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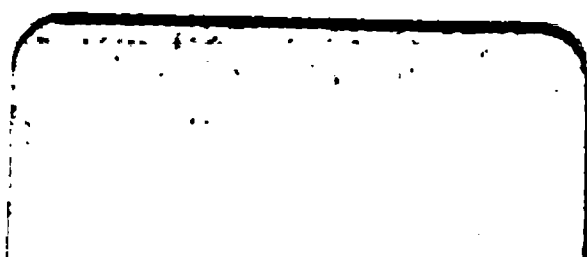
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*Case of Good Hope. Supreme Court.*  
a.w. Bead  
"CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1906

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

S. H. ROWSON, B.A., LL.B.,

ADVOCATE OF THE SUPREME COURT.

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**BUCHANAN, HON. SIR E. J., Knt. (Senior Puisne Judge). Absent from  
October 4th.**

**MAASDORP, HON. C. J. (Second Puisne Judge).**

**HOPLEY, HON. W. M. (Third Puisne Judge).**

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# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

#### REVIEW CASES.

REX V. BRIL. { 1906.  
Jan. 12th.

Act 18 of 1873, Sec. 7—Apprentice.

*Sec. 7 of Act 18 of 1873 applies only to servants who are not under 16 years of age.*

Hopley, J.: This case comes in review from the Resident Magistrate of Fraserburg. The accused, a juvenile apprentice, aged 13, was charged with contravening clause 2 of section 7 of Act 18, 1873, in that, without lawful cause, he absented himself from his master's premises, and from the performance of his work. He pleaded guilty, was convicted, and sentenced. These proceedings must be quashed, as the section under which they were instituted applies only to servants who are not younger than sixteen years of age.

REX V. TALJAARD, ALIAS FOURIE.

Whipping—Juvenile offender.

*A Magistrate has no power to sentence a juvenile offender over the age of 14 to whipping for a first offence.*

Hopley, J.: This case comes in review from the Assistant Resident Magistrate of Cape Town. The ac-

B

cused, aged 16, was charged with stealing a bicycle, of which crime he was properly convicted. The Magistrate, however, not wishing to send so young a lad to gaol for a term of imprisonment, sentenced him to receive a caning. In a note, he states that he knew that this was not a competent sentence, as the accused was over the age of fourteen, and could not therefore be dealt with as a juvenile offender, and so be sentenced to a whipping for a first offence. He, however, thought that it was the best way to treat the matter. The Magistrate may be quite right as to the desirability in this case of inflicting such a punishment, instead of relegating the accused to gaol for a term of imprisonment, but as the law stands, it is entirely beyond his powers to order such a punishment, and it is likewise beyond the power of the judges of this court to sanction such a proceeding. The conviction in this case is perfectly legal and correct, but the sentence must be quashed. Owing to the fact that the accused was tried just after the conclusion of last term, he has been kept in suspense as to his fate for nearly a month, and while remitting him to the Assistant Resident Magistrate for imposition of a legal sentence, I should suggest that the ends of justice will now be met by a discharge with an admonition and warning.

REX V. MULLER.

Hopley, J.: This case came before me for review from the Resident Magistrate of Uniondale. The facts are that on the night of 5th September, 1905, a room used as a storeroom was broken open, and a bicycle and tools, the property of one Henry Marx, were stolen. There was no spoor left, and no trace of the missing goods was found until the 2nd of October, i.e., nearly four weeks after the theft. On that day John Marx, the brother of

Henry Marx, was using a bicycle hand-pump, on which was an "inflator" or "nozzle," which Henry recognised as his, and which bore the letter "H" on its metal work, that being a mark Henry Marx had placed upon his inflator. This inflator had on the previous day been lent by the accused to John Marx, who lives with his brother Henry. Suspicion being thus aroused, information was given to the police, and the bicycle belonging to the accused, which was at a neighbouring shop, was in his absence investigated, and partly taken to pieces, with the result that Marx recognised, or thought that he recognised, as his, the inner tube on the hind wheel. It had no mark, but apparently there were three patches very close together, and it is by those patches mainly that the identity of this tube is attempted to be established. No other parts of the missing bicycle have been found or traced, though a rigorous search of the premises belonging to the father of the accused, with whom he resides, was made. The crime was committed on a farm which is thickly populated, and the Marxes and the accused live within a quarter of a mile of each other. The father of the accused is a well-to-do landowner, who seems to have bought a bicycle for his son not very long before the time in question, and who states that he would have been quite ready to give him new tyres or tubes if necessary, and that there was no reason why the accused should not ask him to do so, and there seems to be no reason why the accused should steal a bicycle when he already had one of his own. The accused is only 17 years of age, and the whole of his conduct seems to have been open and ingenuous. He lent his bicycle and the inflator to the brother of Harry Marx, and though this may have been because he was in ignorance of the mark on the inflator, it may also have been because he genuinely believed it to be his own. Among such near neighbours, who apparently on occasion lend bicycles and bicycle-tools to each other, it does not seem to me to be by any means unlikely that such small articles as these inflators should get interchanged accidentally (and there is evidence that the accused had purchased inflators for himself); and with regard to the patched inner tube, there seems to me to be a considerable conflict of evidence as to its identity. It is not at all unlikely that two tubes might have been patched in similar manner, and that Henry Marx may have genuinely thought—and also his witnesses—that the three closely contiguous patches proved that the tube was his, and yet they might be mistaken. The accused assisted in the search of his father's house, and persisted in his claim to the disputed ar-

ticles, he also swearing to the tube as his, and pointing to the three patches in proof of his assertion. On the whole, the evidence does not seem to me to be satisfactory and conclusive in so far as it was legal and proper evidence. Some evidence of a different and objectionable nature was, however, admitted, which does not seem to me to carry the case any further against the accused; but which may have nevertheless affected the Magistrate's decision. It appears that when the accused's home was being searched, his father, when he found out the object of the search, made a proposal to pay for the missing bicycle. This proposal was made in the absence of the accused, and seems to have been due to a sudden panic on the part of the father; but it is clear that those present looked upon it as a highly suspicious circumstance, of which the Magistrate admitted evidence from more than one witness. It is true that the father subsequently explained that he made the offer, not from any guilty knowledge, but in the excitement of the moment, and to save his son from the ignominy of a prosecution, and it is also true that before remitting the case to the Magistrate the Attorney-General pointed out that such evidence had been improperly admitted. But in a doubtful case like the present, it is impossible to say how deep an impression such evidence had made on the mind of the Magistrate. Though the evidence was illegal and improper, he had heard it, and if the case was a proper one to be remitted at all, it would have been well to remit it to some other Magistrate. The evidence still stands on the record as part of the case against the accused, and affords an additional ground for quashing the proceedings. I further think that even if the evidence had been satisfactory and conclusive, the sentence of six months' hard labour would have been excessive, considering the nature of the theft and that the accused was a boy of only 17 charged with a first offence. Though I could not, if everything had been in order have interfered with such a sentence, I am not sorry that there are good grounds for quashing the conviction.

#### ADMISSIONS.

{ 1906.  
{ Jan. 12th.

Dr. Greer moved for the admission of Matthys Johannes de Wet de Kock as an attorney and notary.

Application granted and oaths administered.

Mr. Bailey moved for the admission of Johannes Albertus Louw as an attorney and notary.

Application granted, oaths to be taken before the A.R.M., Somerset West.



Mr. J. E. R. de Villiers moved for the admission of Henry T. Wickens Tromp as an attorney and notary.

Application granted and oaths administered.

Mr. De Waal moved for the admission of Lawrence Naude as an attorney and notary.

Application granted, oaths to be taken before the R.M., Somerset East.

## PROVISIONAL ROLL.

DC PLESSIS V. MAHOMED. { 1906.  
Jan. 12th.

Mr. Lewis moved for confirmation of a writ of arrest and for judgment under Rule 329d for £103 15s., purchase price of sheep. The ground of the original application was that the defendant was about to leave the country. Plaintiff was a stock dealer residing at the Paarl and defendant had been carrying on business as a butcher, Clifton-street, Cape Town.

Dr. Greer opposed the application as to the writ of arrest. He read an affidavit sworn by the defendant, who denied that he had had any intention of leaving the Colony, and declared that he had been wrongfully placed under arrest. Counsel also read a supporting affidavit.

Mr. Lewis read replying affidavits.

The matter was ordered to stand over till Monday morning, in order that fuller information might be placed before the Court.

*Postea.* (January 15).

Counsel having been heard in argument,

Hopley, J., said if plaintiff formulated any scheme for leaving the country, it was improbable he would at once go and talk to another man about it. The information that he was selling the sheep was also denied. If a plaintiff acted on such information, he did so at his own peril, and the writ would be discharged, with costs, the writ to stand as the summons, in case the plaintiff decided to go into the principal action.

## WATSON AND CO. V. THOMPSON:

Mr. Pyemont moved for confirmation of a writ of arrest, and, if defendant confessed, for judgment for £56 19s. 6d., due by virtue of a bill of exchange, and for £70 7s. 2d., due on a note and account for goods sold and delivered.

Defendant said that he had been arrested when he was about to proceed Home, where his signature was required in connection with certain property. He had intended to return to this country.

He admitted that he owed the debt. Certain bills had been lying in the bank at Kimberley, which had since been sent down for his creditors.

Final judgment was granted as prayed.

## HAWORTH AND CO. V. GRAHAM.

Civil imprisonment—Act 20 of 1856, Sec. 13.

*A Magistrate in district A. had issued a writ of execution against the movables of G. These movables were all in district B. The Magistrate of district B. indorsed the writ, and on a return of nulla bona having been made, issued a warrant for civil imprisonment.*

*Held, that a Magistrate cannot grant a decree of civil imprisonment on the judgment of any other R.M. Court.*

Mr. P. S. T. Jones moved for a decree of civil imprisonment upon an unsatisfied judgment of the R.M.'s Court at Wynberg for £15 12s. and £6 3s. 10d. costs. The matter was brought into this court because the defendant had removed to another district.

Defendant denied that he had removed from the jurisdiction of the Magistrate's court. He admitted that he owed the money, but said that he was without property or means. He was totally unable to make any offer; he was an insurance agent, broker, and commission agent, but at present was doing no business.

Cross-examined: The debt was for provisions supplied to him when he was living at Lakeside. He was now canvassing for life and accident insurance. He was living in lodgings at Wynberg, and his average earnings had been about £10 or £12 during the past 12 months. The house where he was living belonged to his wife, and was bought about five months ago. The house was entirely under mortgage. His wife had furniture, but it was on the hire-purchase system.

Counsel having been heard on the question of whether the correct procedure had been adopted in bringing the case to this Court,

Hopley, J.: In this case the amount involved is somewhat small but a somewhat important principle has been raised, and, personally, I should have been glad to have seen a case of this paltry nature settled in one of the minor Courts with-

out incurring the costs of coming to the Supreme Court. Here there are difficulties in the way of doing what I should have liked to have seen done. In view of the fact that the plaintiff is apparently residing at Kalk Bay, which is in the Simon's Town district, he originally took out a summons against his debtor, who was then living apparently in the Simon's Town district at a place called Lakeside, and obtained judgment in the Simon's Town Magistrate's Court, on which judgment a writ of execution was taken out in the Simon's Town Magistrate's Court. By that time the debtor had removed to Wynberg, and outside the jurisdiction of the Simon's Town Court, and the proper step for the parties then to take was taken, i.e., the writ was endorsed as laid down in the 13th section of the Act 20, 1856. It does not seem to me that section 13 goes any further than this, that is to say, if the Magistrate in district "a" has issued a writ, and there are effects in district "b," the Magistrate in district "b" must endorse such writ, and then anything that is found in district "b" may be executed upon, but it does not go so far in my opinion as to make the judgment of the first Magistrate a judgment of the second Magistrate. Therefore, when you come to further steps, such as civil imprisonment, it may well be that the Magistrate in the first district may say, "I personally cannot grant a decree of civil imprisonment upon a judgment which is not my own, although there is a writ endorsed by me upon that judgment for the purpose of execution within my district." I have also considered the 16th section, but as far as I can see there is nothing in the Act which authorises the Magistrate of a second Court to grant a decree of civil imprisonment upon a judgment of another Court. It seems to me that in this case the judgment remained the judgment of the Magistrate of Simon's Town, that the defendant has chosen to remove beyond the jurisdiction without satisfying the debt incurred in that jurisdiction, and that, therefore, the plaintiff is entitled to come to the Supreme Court for his remedy. That being my opinion in the matter, the plaintiff must have judgment as prayed, but, as to the application for a decree of civil imprisonment against the defendant, it seems to me, as defendant has no power at the present moment to make any payment, and as imprisonment without some sort of arrangement is not prayed for, he should be discharged. Of course, if he should come into anything like an income the plaintiff may renew his application. Judgment as prayed, with costs; no order as to civil imprisonment for the present.

[Applicant's Attorneys: Dold and Van Breda. Respondent: In person.]

#### LOTRIET V. BOONZAIER.

Mr. De Waal moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £50 1s. 1d., and costs, £8 17s. 11d.

Mr. Upington read an affidavit by defendant, who resides at Carnarvon. Dependent said that, in consequence of losses through the Anglo-Boer war and the drought, he had been ruined, and he saw no prospect of being able to make any payment for the next two years. He had a wife and eight children to support. Counsel also read a corroborative affidavit.

Mr. De Waal read an answering affidavit by applicant, who said that he had offered to assist the defendant so as to enable him to pay the balance of the debt, but the latter had rejected any proposals made to him. He added that he believed defendant had wilfully and vexatiously tried to evade payment of the debt. Mr. De Waal also read an affidavit by a man who had acted as applicant's agent.

The matter was ordered to stand over until Monday for information as to the salary earned by the defendant as manager of the farm.

*Postea* (January 15).

Mr. De Waal said it was difficult to obtain the information, as the plaintiff was at present in the Orange River Colony. There was a telegram, however, stating that the plaintiff was in a good position. Mr. Upington read a couple of telegrams, which set out that the plaintiff virtually received no remuneration. There was an agreement with the plaintiff's wife. The plaintiff had a home and food for his family in return for his work on the farm.

Decree of civil imprisonment granted, to be suspended on payment of £1 per month, with leave to the applicant to move for a larger amount as soon as he thought he could show that the defendant could afford it.

#### DOLD V. GOUS.

Mr. Roux moved for provisional sentence for £14 15s. 9d., on a Magistrate's Court judgment, and £2 9s. 8d. and 9s. 10d., costs; and that certain rights in the joint estate should be declared executable.

Order granted.

#### BENNETT V. ESTATE CAMPBELL.

Mr. P. S. T. Jones was for the plaintiff, and Mr. J. E. R. de Villiers for the defendant.

Mr. Jones moved for provisional sentence against the defendant for £28 14s. 7d., in her capacity as executrix



in the estate of her late husband, with interest at 8 per cent. from December, 1900. Mr. J. E. R. de Villiers read the affidavit of the defendant, which set out that there were no assets in the estate. There was a life policy of £460 12s. 1d., which the creditors could not claim. The executrix merely wanted to put her position before the Court.

Provisional sentence as prayed, with costs.

**COLONIAL GOVERNMENT V. VAN ROOIJEN.**

Mr. Howel Jones moved for provisional sentence for £330 on a mortgage bond, with interest, and that the property be declared executable.

Order granted.

**VAN NIEKERK V. GRACE.**

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £80 10s., with interest at 7 per cent. from 1901, and that the property specially hypothecated be declared executable.

Order granted.

**MARAIS V VAN DER BYL.**

Mr. Sutton moved for provisional sentence on three mortgage bonds for £720, £630, and £1,400, with interest, less £20 paid on account, and that the property be declared executable.

Order granted.

**TREGIDGA V. WALLACE.**

Mr. Long moved for provisional sentence on a mortgage bond for £400, with interest, and that the property specially hypothecated be declared executable, and that the rents receivable may be attached.

Order granted.

**BLACKBURN V. BROWN.**

Mr. W. P. Buchanan moved for provisional sentence on mortgage bonds for £2,000, £600, and £400, and £1 8s. insurance premium, that the properties specially hypothecated be declared executable, and that the rents might be attached.

Order granted.

**ESTATE FRASER V. ESTATE CARR.**

Mr. Swift moved for provisional sentence on a mortgage bond for £2,600, with interest, and that the property specially hypothecated be declared executable.

Order granted, subject to the production of proof that the defendant is the executor in the estate.

**GUTHRIE V. UYS.**

Mr. P. S. T. Jones moved for judgment for £1,500 on a mortgage bond, with interest, and that the property specially hypothecated be declared executable.

Order granted.

**BAILEY V. DOBSON.**

Dr. Rainsford moved that a provisional order of sequestration be made absolute.

Order granted.

**LOWRY V. KOEWORT.**

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**MACLEOD V. MULLER.**

Mr. Struben, on behalf of the plaintiff, moved to have a provisional order of sequestration of the defendant's estate discharged.

Order granted.

**LE GRANGE V. SMALIBERGER.**

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**HUDSON AND CO. V. RENSBURG.**

Mr. De Waal moved for the final order of sequestration of the defendant's estate.

Order granted.

**GASNER V. WALLIS.**

Mr. Gutsche moved for the discharge of an order of sequestration against the defendant's estate.

Order granted.

**MALHERBE V. ESTATE WRIGHT.**

Mr. P. S. T. Jones moved for provisional sentence against the executor on a mortgage bond for £200, less £25 paid on account, and that the property specially hypothecated be declared executable.

Order granted.

FLEMING V. SLABBER. { 1906.  
{ Jan. 12th.

Mr. De Waal moved for provisional sentence on a mortgage bond for £150, with interest, and that the property specially hypothecated be declared executable.

Order granted.

VOS V. SLABBER.

Mr. De Waal moved for provisional sentence on a mortgage bond for £300, with costs, and that the property specially hypothecated be declared executable.

Order granted.

FULLER V. WEBB.

Mr. M. Bisset moved for provisional sentence for £125, with interest, and that the property be declared executable, and for costs in attaching the property to found jurisdiction.

Order granted.

ELSKE V. REYNOLDS.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £350, with interest from March, 1905, and that the property specially hypothecated be declared executable, with costs.

Order granted

STANDARD COLD STORAGE CO. V. PANELL.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LEWIS V. HARRIS.

Mr. Close moved for the final adjudication of the defendant's estate.

Order granted.

FEBRUARY V. JOHNSTONE.

Mr. Gardiner moved for the final adjudication of the defendant's estate.

Order granted.

FRANCK V. HANSLMAIR.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

The defendant appeared, and asked by his lordship if he had any objection, he replied: "Absolutely no; I want to be free."

Order granted

GEISTER V. WENTZEL AND ANOTHER.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Granted.

SACHS V. JACOBSON.

Mr. Wright moved for provisional sentence on two cheques for £74 and £93. Both cheques were dishonoured.

Order granted.

CAPE TIMES, LTD. V. STAINER.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £40, for value received, with interest and costs.

Order granted.

WITEL V. SINCLAIR.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £1,000, with interest, less £10 paid on account, and that the property specially hypothecated be declared executable.

Order granted.

INGLESBY V. HASTIE.

Mr. Douglas Buchanan moved for provisional sentence for £170, balance of a mortgage bond, with interest, and that the property be declared executable.

Order granted.

THE MASTER V. ESTATE DU TOIT.

Mr. Howel Jones moved for an order on the defendant executor in the estate calling upon him to file an account within a month.

Order granted.

DILLEY V. OLDFIELD.

Mr. Douglas Buchanan moved for provisional sentence for £325 upon a certain agreement of sale of property at West London, plaintiff tendering transfer against purchase price.

Mr. P. S. T. Jones read an affidavit by defendant, who said that under the agreement plaintiff undertook to do certain guttering and painting, which she had failed to do. He was willing to take transfer provided plaintiff carried out the conditions of the agreement.

Mr. Buchanan read an answering affidavit by plaintiff and others, the effect of which was that the down pipes were serviceable, and that the defects complained of by defendant were of a paltry nature.

Counsel having been heard in argument on the facts.

The matter was ordered to stand over until Monday, His Lordship suggesting that the case should be settled out of Court.

### ILLIQUID ROLL.

GOEDHALS V. STEGMANN. { 1906.  
Jan. 12th.

Mr. De Waal moved for judgment, under Rule 328d, for £129 15s. 11d., in respect of cancellation of sale of certain property in Cape Town, with interest *a tempore morae* and costs. Defendant had failed to pay the sum due, after making repeated promises.

Hopley, J., commented on the bad wording of the claim, as set out in the summons, and refused to make an order on the present application. He suggested that the claim should be re-drafted, so as to be intelligible.

### CLARKE AND CO. V. THOMAS.

Mr. Lewis moved for judgment under Rule 319.

Mr. W. Porter Buchanan, on behalf of defendant, applied for leave to purge default and file plea. Defendant had filed an affidavit of merits, in which he said that he had a good defence to the claim. Plaintiff had supplied certain goods to defendant, and there was a dispute between the parties as to whether the order had been properly carried out by plaintiffs.

Mr. Lewis said that the position of the plaintiffs was that the delay was due solely to the defendant, and that there could be no defence to the claim. The plaintiffs originally claimed a sum of over £30, but the goods were returned by defendant to them, and the plaintiffs had reduced their claim, on certain conditions agreed upon, to £8 7s. 6d.

The matter was allowed to stand over until Monday, His Lordship suggesting that the parties should come to an agreement.

### WAR DEPARTMENT V. DUFFUS AND CO.

Mr. Schreiner, K.C., moved, under Rule 319 for judgment in terms of declaration for £334 2s. 6d., with interest and costs.

Mr. M. Bisset (for defendant) applied for leave to purge default and file plea.

Mr. Schreiner (in answer to the Court) said that the action was for recovery of a certain sum of money which was received by defendant carrying on business as an auctioneer in Cape Town, from sales held for and on behalf of the War

Department. He had in hand funds which he claimed to retain upon a contention that he was entitled to 2½ per cent. commission, while the agreement, the plaintiffs said, was that he should have one per cent. commission.

Affidavits having been read on both sides in respect of the application for leave to purge default, from which it appeared that the defendant had been paying a visit to South America,

Mr. Bisset submitted that it was clear there was a *bona fide* defence to the claim. It was anticipated that the defendant would have returned to Cape Town by the 19th inst. His attorneys had been delayed, because they required his confirmation on certain points as to the plea.

Mr. Schreiner contended that no cause had been shown for further indulgence to be extended to the defendant, who had been granted indulgence again and again.

Leave granted to purge default upon payment by defendant of all wasted costs, and on condition that he should file his plea on or before the 25th January; no order was made as to costs of the application.

### NENGEBAUER AND CO. V. SIGNAL HILL QUARRY.

Mr. Watermeyer moved for judgment, under Rule 319, for judgment, in default of a plea for sums of £20 and £48 6s. 4d.

Judgment as prayed.

### VORSTER V. VORSTER.

Mr. Benjamin moved for judgment in terms of a consent paper for a judicial separation on certain terms.

Judgment as prayed.

### CILLIERS V. TITUS.

Mr. Bailey moved for judgment under Rule 329d for £100, with interest, on a mortgage bond.

Judgment as prayed.

### ZEEDERBERG V. STONE.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £30 on a deed of suretyship signed by the defendant.

Judgment as prayed.

### ZEEDERBERG V. GROENEWALD.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £16 9s. 10d., with interest and costs.

Judgment as prayed.

**POTGIETER V. WIGGETT.**

Mr. M. Bisset moved for judgment under Rule 329d for £215, money paid to the defendant, which should have been paid by the defendant into the bank in settlement of a promissory note, and for the re-delivery of a bill for £150.

Judgment as prayed.

**WIGGETT V. WIGGETT.**

Mr. M. Bisset moved for judgment under Rule 329d for £800, money lent, with interest and costs.

Judgment as prayed.

**COLONIAL GOVERNMENT V. CONRADIE.**

Mr. Nightingale moved for judgment under Rule 329d for £63 10s. 1d., quit-rent and stamp duty due by the defendant.

Judgment as prayed.

**CAPE TOWN TOWN COUNCIL V. KAHN.**

Mr. Gutsche moved for judgment under Rule 329d for £15 12s. 10d. and £16 5s., rates for 1904-1905, and on two amounts for water supplied.

Judgment as prayed.

**CAPE TOWN TOWN COUNCIL V. LEVY.**

Mr. Gutsche moved for judgment under Rule 329d for £34 17s. 10d., for rates, and £9 12s. 6d., for water supplied.

Judgment as prayed.

**CAPE TOWN TOWN COUNCIL V. ROLLINCK.**

Mr. Gutsche moved for judgment under Rule 329d for £83 0s. 4d., for rates, and £20 5s., for water supplied.

Judgment as prayed.

**CAPE TOWN TOWN COUNCIL V. COSAY.**

Mr. Gutsche moved for judgment under Rule 329d for £480 9s. 3d., for rates, and £11 5s., for water supplied. Since issue of summons £444 19s. had been paid, and now Council asked for judgment for £46 15s. 3d.

Judgment as prayed.

**CAPE TOWN TOWN COUNCIL V. KAISER.**

Mr. Gutsche moved for judgment under Rule 329d for £49 6s. 7d. and £51 14s. 8d., rates for 1904-05, and two sums of £15 15s. for water supplied.

Judgment as prayed.

**LIBERMAN V. SWIRSKY.**

Mr. Lewis moved for judgment under Rule 329d for costs in this case, goods sold and delivered. The defendant appeared in court and said he wanted to pay a certain sum per month.

Hopley, J., said the defendant could arrange that later on. Judgment would have to be given as prayed.

**LE GRANGE V. TRUTER.**

Mr. De Waal moved for judgment under Rule 329d for costs in the case, the capital having been paid.

Judgment as prayed.

**LIBERMAN V. LATEGAN.**

Mr. Lewis moved for judgment under Rule 329d for £24 6s. 6d., goods sold and delivered, less £10 paid on account.

Judgment as prayed.

**STEWART AND ANOTHER V. INHAMBANE OIL CO.**

Mr. Swift moved for judgment under Rule 329 for £418 6s. 8d., balance of account for goods sold and delivered, with interest and costs.

Judgment as prayed.

**JORDAAN V. KRYNAUW.**

Mr. W. P. Buchanan moved for judgment under Rule 319, in default of plea, for transfer of certain property and costs.

Judgment as prayed, transfer to be given forthwith.

**BENJAMIN V. RAUBENHEIMER.**

Mr. P. S. T. Jones moved for judgment under Rule 329d for £191 2s. 3d., balance of account for goods, less £115 6s. 1d. paid since the issue of summons, with interest and costs.

Judgment as prayed.

**SUPREME COURT**

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* VAN STADEN AND } 1906.  
ANOTHER. (Jan. 15th.

This was an application brought by Philippus Theunis van Staden and Gert

Christoffel Jacobs, calling upon the Attorney-General to show cause why an order should not be granted restraining him from granting or executing a warrant for the extradition of the applicants to German South-west Africa, which warrant was sought for on the ground of an act of spoliation alleged to have been committed by the applicants, who are British subjects, in the territory of German South-west Africa, such offence being an extradition crime under the treaties governing the extradition relations between Great Britain, together with its dependencies, and Germany, together with its dependencies.

The applicants' affidavit stated that they were confined in the Kenhardt Gaol, charged with stealing cattle in German South-west Africa. They had been, up to September, in the employ of the German Government as wagon drivers and conductors. Their wages for the first four months were to be £7 10s. per month, and afterwards £22 10s. The total balance due to each of the prisoners was £57 10s., no wages having been paid to them for three months. In consequence, they, with three others, drove 35 head of cattle, the property of the German Government, over the border into the Colonial territory, and were subsequently arrested. Deponents said that they did not take the cattle with any criminal intention, but *bona fide* believing that they were justified in doing so, as they could not obtain the money due to them. They were British subjects, and as such were anxious to be tried by a Colonial Court of Justice. They sincerely regretted the wrong they had done, and were willing to be tried before a Colonial Court, but they feared that, under the German authorities, they would be tried by court-martial, and that any mitigating circumstances which might exist in their favour would be lost sight of.

Mr. Nightingale read an answering affidavit by Mr. P. K. Albertyn de Vos, acting chief clerk, Attorney-General's Department, who said it appeared, from papers received from the Resident Magistrate of Kenhardt, that the applicants were arrested by certain officers of the Cape Mounted Police, on or about the 24th September, 1905, on a complaint made by an officer of the German troops, that the said prisoners had stolen certain cattle and horses, the property of the German Government. When arrested, they were found in possession of 65 oxen and two horses, which were claimed by the German officer and restored to him. Prisoners were brought before the Resident Magistrate of Kenhardt on the 30th September, and remanded, pending arrangements to be made for their surrender to the German authorities under the Extradition Act. On the 4th November, 1905, the Acting

Consul-General for Cape Town, applied to His Excellency the Governor to have the applicants kept under arrest. On the 18th of the said month he sent a requisition for the surrender of the said prisoners on the charge of theft of about 104 oxen. On the 28th November, 1905, the Governor issued an order under terms of section 7, Imperial Extradition Act, 1870, signifying to the Resident Magistrate of Kenhardt that a requisition had been made for the surrender of the said applicants, and requiring him to issue his warrant for their apprehension in terms of section 8 of the Extradition Act, provided the conditions of the said Act had, in his judgment, been complied with. On the 9th December the said prisoners were duly committed to Kenhardt Gaol, pending their surrender to the Government of German South-west Africa, when they signified their intention to apply for a writ of *habeas corpus*. One P. A. Gouws was originally arrested, together with Van Staden and Jacobs, but the Acting Consul-General for Germany intimated to His Excellency the Governor that it was not intended to make a requisition for his surrender, and instructions were thereupon given for his liberation.

Dr. Greer was for the applicants; Mr. Nightingale was for the Crown.

Dr. Greer submitted that no warrant should issue to extradite the appellants, who were charged with what was not an extradition offence as contemplated by the treaties of Great Britain and its dependencies and Germany and its dependencies. After referring to the British Acts of Parliament and treaties dealing with extradition, counsel went on to submit that before extradition was allowed the evidence must be clear that the crime with which the accused were charged was a crime coming under the provisions recognised by the Acts and treaties as extradition crimes. In reference to the particular circumstances of this case, he submitted that no extraditable crime had been committed. The facts were not disputed on the affidavits.

[Hopley, J.: Do you admit that theft would be an extradition crime?]

Dr. Greer: Yes.

[Hopley, J.: You say on the affidavits that no theft has been committed?]

Mr. Greer said his contention was that the circumstances of the removal of the cattle by the applicants were such as to take it out of the category of crime. The applicants admitted spoliation, and for that the German Government had a remedy against them in the courts of this colony. The applicants had not been paid the wages due to them.

[Hopley, J.: We are dealing, not with barbarians, but with a civilised State, and we must suppose there was a valid reason for not paying these men.]



Dr. Greer: But we have the fact—and it is not denied—that the money was owing to these men.

[Hopley, J.: I suppose the German authorities do not think it worth while denying it.]

Dr. Greer pointed out that German South-west Africa was in a state of turmoil, and that the Civil Courts might at the present juncture not be so unhampered as they otherwise would be.

[Hopley, J.: During our own turmoil, the Civil Courts were sitting and doing justice to the best of their ability, and their decrees were being carried out. His Lordship added that it seemed to him that the applicants took about £700 worth of goods to satisfy their alleged claim of £150, whether it were bogus or not. It was almost insulting to the German Government or to the civil establishment in that country to suggest that the applicants would get anything but a fair trial.]

Dr. Greer rejoined that he did not say the applicants would not get a fair trial, but he did say that in a country which was swept by the ravages of war, as that country was now, there must exist confusion and turmoil, and that the chances of their getting an absolutely fair trial might be prejudiced by the existing state of things there.

Mr. Nightingale submitted that it was perfectly clear that even apart from their defence, there was a *prima facie* case of theft against the applicants.

Hopley, J.: It is admitted in this case that we have an extradition treaty which applies to the German possessions in South-west Africa; it is admitted that theft, certainly theft of the nature disclosed in the present case, is one of the extradition offences for which criminals can be extradited, and it appears that the applicants, who are British subjects, took service under the Government of German South-west Africa, entered into some contract, and there seems to be some sort of civil dispute between them and the German Government as to whether or not there are moneys due to the applicants by the German Government in those parts. They say in their application that they have not been able to get satisfaction for their pecuniary claims from the German Government, and that, therefore, they proceeded to help themselves to the property of the German Government, so as to recoup themselves, though it seems to me that they took property in excess of the amount alleged to be owing to them. They seized either 65 or 104 head of cattle and two horses, and took them across the border, where they were arrested, on the application of the German authorities, by our own police,

and the property in their possession was handed over to the lawful owners. They now say that they had no intention to commit theft, with which they are charged, but that it was a case of spoliation. *Prima facie*, it seems to me, this was a case of theft. If they can show that it was merely spoliation, they will have an opportunity of doing so when they are brought to their trial. The question I have before me is that they took away other people's property, and converted it to their own use. That would be theft, and it seems to me that this is *prima facie* a case of theft. Looking upon it, therefore, as far as I can see, as a case of theft, is there anything which would justify me, as a Court sitting here, in restraining the extradition of these people to German South-west Africa to await their trial? It was originally alleged that they would be tried by court-martial, and that they would not have a fair trial. That has been disposed of by the German Consulate, which says that this is a civil offence, and has nothing to do with martial law, and that they would be tried before a civil court. Then we have been told that there is an objection on the part of the authorities of this country to hand over British subjects to the German Government. That may be, but, on the other hand, it is clearly implied that they have the power of doing so if they choose, and in this case the Governor, acting by the advice of his Executive, has decided to hand over these men for their proper trial in German South-west Africa. I see no reason whatever for interfering with this decision. I think it is a perfectly just and proper one, and they should go and stand their trial. The application will be dismissed.

[Applicants' Attorneys: Dempers and Van Ryneveld.]

## PROVISIONAL ROLL.

VAN RYNEVELD V. GOLD- ( 1906.  
SMIDT. (Jan. 16th.

Mr. De Waal said this matter was ordered to stand over for information as to the service. An affidavit was now put in from Mr. Van Ryneveld stating that the defendant was keeping out of the way to evade personal service. The summons had been served at the defendant's own property in Napier-street. Counsel moved for provisional sentence for £200, on a mortgage bond, with interest and costs, and that the property specially hypothecated be declared executable.

Order granted.

## ILLIQUID ROLL.

STRAUS V. JACOBSON. } 1906.  
 { Jan. 15th.

Mr. Bailey said this matter was ordered to stand over from Friday, as sufficient time had not elapsed from the date of summons, and he now moved for judgment for £64 13s., an allowance due to the plaintiff as a witness in an action brought by the defendant against Johannes Schultz, with interest and costs.

Judgment as prayed.

## REHABILITATIONS.

Mr. De Waal moved on behalf of Johannes Gideon van Zyl for the discharge of the applicant from insolvency. The estate was voluntarily surrendered in 1897. The liabilities, according to the schedules, amounted to £820 13s., and the assets £324 11s. 1d., leaving a deficiency of £486 2s. 6d. There was nothing unfavourable in the trustee's report. The insolvent ascribed his insolvency to bad times at Malmesbury.

Application granted.

Mr. Swift moved for the discharge from insolvency of Johannes Albertus Walters. The creditors consented.

[Hopley, J.: Have you any further information as to the estate?]

Mr. Swift: No, my lord.

[Hopley, J.: You seem to have a blank sheet marked a guinea on the outside, and your attorneys ask you to move. You ought to be told a little more than that. I don't know what the creditors represent. You can make your application at a later date, when we know more about the matter, and there will be no order at present.]

Mr. Swift again mentioned the application later, and said that he was instructed that the Master's certificate was amongst the papers, and that the Master was satisfied that the necessary consent of the creditors had been obtained.

Hopley, J., said it was very inconvenient that counsel had not been properly briefed with the requisite documents. It was most important that counsel should be able to present the necessary documents. The application might be quite in order, but it was not clear to him that that was the case, and the matter should therefore stand over, with leave to mention it later.

*Ex parte FERREIRA.*

Mr. Bailey moved for the discharge from insolvency of Ignatius Leopoldus

Ferreira, M. son. The insolvency took place in September, 1887. There was nothing unfavourable in the trustee's report, and notice had been duly given. The dividends amounted to £48 9s. 6d., the deficiency being £421 1s. 3d.

Application granted.

*Ex parte ROSSOUW.*

Mr. Sutton moved, under section 14 of the Act of 1884, for the discharge from insolvency of Johannes Jacobus Petrus Rossouw. The creditors had all been paid in full. The trustee had recommended that the insolvent be prosecuted for fraudulent insolvency, but that was not done. Subsequently the creditors were paid 20s. in the £, and the trustee now said he had no intention of opposing the application.

Application granted.

*Ex parte PHILLIPS.*

Mr. Sutton moved for the discharge from insolvency of Henry Augustus Phillips, trading as H. Phillips and Co.. The estate was surrendered in October, 1904. There was a deficiency of £900. The preferent creditors were paid in full, and the concurrent creditors received 2s. in the £. The creditors had given the necessary consent, and there was nothing unfavourable in the trustee's report.

Application granted.

*Ex parte PFUHL.*

Mr. Bailey moved for the release from sequestration of Johan Frederick Pfuhl. The estate was sequestrated on the 30th October. At the first and second meetings no creditors appeared, and no trustee was present. Notice had appeared in the "Gazette," and there was an affidavit of full and fair surrender. There had been a compromise effected with the creditors.

Application granted.

## GENERAL MOTIONS.

VOGEL V. VOGEL. } 1906.  
 { Jan. 15th.

Mr. P. S. T. Jones moved for a decree of divorce by reason of the non-return of the defendant, in accordance with an order of Court. The defendant was ordered to restore conjugal rights to his wife, but failed to do so.

Decree of divorce granted, with costs.

*Ex parte* STRUWIG.

Mr. Sutton moved to make absolute a rule *nisi*, granted under the Derelict Lands Act, and for costs out of the estate, of an application that had been wrongly made. The previous application had been made in open court.

Rule made absolute, and costs to come out of the estate.

*Ex parte* JONES.

Mr. Lewis moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

*Ex parte* VARKEVISSER.

Mr. Douglas Buchanan moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

## SMITH AND OTHERS V. SMITH.

Mr. P. S. T. Jones was for the applicants (heirs in the estate) and Mr. Gardiner appeared for the co-executor (Henry Furtman).

The application was made on behalf of several of the heirs of the late John Smith to have one of the co-executors, Stephen Smith, removed, for failing to do his duty, and for the appointment of a substitute in his place. The co-executors under the will were Stephen Reginald Smith, son of the testator, and Henry Furtman. The representatives of three branches of the family were anxious to have a co-executor with Mr. Furtman. The position the heirs took up was that they would like someone appointed with Furtman. There was no allegation whatever against Mr. Furtman.

It was ordered that Stephen Reginald Sidney Smith be removed from the office of co-executor, but his Lordship could see no necessity to appoint a co-executor with Mr. Furtman. Costs to come out of the estate.

*Ex parte* NAUDE AND OTHERS.

Mr. Schreiner, K.C., moved, on the petition of Hester Petronella Susanna Naude and others, for leave to confirm a family arrangement entered into between the various members regarding the division of certain farms in the district of Worcester between the estates of Petrus Chas. Naude and Jan Abram Naude. The agreement had been unanimously entered into by those concerned in order to save the land from being sold in execution.

Hopley, J.: I see no reason to think that the parties have come to other than a wise family arrangement in this matter. All the parties who are concerned, it seems to me, have made up their minds that this arrangement they have come to is better than the somewhat complicated, cumbrous, and perhaps ruinous terms of the will under which they are at present existing, which may possibly, if strictly adhered to, end by ruining or going far towards ruining this family, who might, on the other hand, be kept on foot, and in a good position for some years. It seems to me that, in sanctioning the agreement come to between the parties, as the Court hereby does, it perhaps sweeps away the terms of the will, and puts the family into a new position, and the probability is that the meaning and true intention of the testator is best perhaps expressed by the present arrangement or better expressed at all events than under the terms of the will. The co-testator is still alive, and is one of the consenting parties. It appears that the surviving old people and the young people have come to a very sensible arrangement. This application is granted as prayed, and in granting it I may, if it is necessary to state the opinion of the Court, say that as to prayer (c), the parties will have leave to mortgage the property as prayed, notwithstanding anything in the will.

MINTO AND OTHERS V. TRUSTEES,  
MALAY MOSQUE.

This was an application brought by Hadje Minto, Hadje Mahomet, and Abdulla Boran, upon notice of motion, calling upon Hadje Imaum Rakiep and Imaum Abdullah to show cause why an interdict should not be granted restraining the High Sheriff from paying over to the said respondents balance of proceeds of sale in execution of the Malay Mosque in Buitengracht-street, Cape Town, of which respondents are trustees.

Mr. Gardiner was for the petitioners, Mr. Upington was for the respondents.

From the affidavits of the petitioners, it appeared that the Malay Mosque, in Buitengracht-street, had recently been sold in execution, and that there was a sum of about £543 remaining in the hands of the High Sheriff after satisfying the debt. He had given notice that, unless an order of Court were obtained, restraining him from paying over the money to the respondents, as trustees of the said Mosque, he should proceed to hand it over. Petitioners said that they had been members of the Mosque for some years, although for a considerable time past they had not attended the Mosque, having left the Church because they could not agree with the Imaum. They desired to re-construct the congregation, and said that the Church had



fallen into its present position, owing to the ill-administration and want of care of the congregation shown by the respondents. According to the Mohammedan religion and the Koran, moneys which had been raised for church purposes could not be used other than for church purposes.

[Hopley, J.: I do not think that the Mohammedan religion and the Koran are different from the common law in that respect.]

The affidavit of Hadje Imaum Rakiep said that none of the petitioners had been members of the congregation for many years past, and none of them had been inside the building to his knowledge for upwards of 30 years, nor had any of them contributed to its upkeep. Deponent had been Imaum of the congregation for about 40 years. The trustees were prepared, and it was their intention to use the money received from the sale of the building towards either re-purchasing the property, or obtaining other suitable premises for a Mosque, so that the intention of the original grantee of the property might be carried out. The petitioners had given no reason, nor did he (deponent) know of any reason for alleging that he and his co-trustee would not use the money to be paid out to them for church purposes. Deponent referred to an old dispute, which he had had with the father of the first-named petitioner in the '70's.

Answering affidavits were read, in which several of the statements of the Imaum were called in question, and it was stated that the petitioners, although they had not, for some years past, attended the church, had remained members of the congregation, and had supported the Mosque by labour and money. The first-named petitioner said he was informed that the Imaum intended to use the money for other than church purposes, and generally alleged that he was not a fit person to have the money entrusted to his custody.

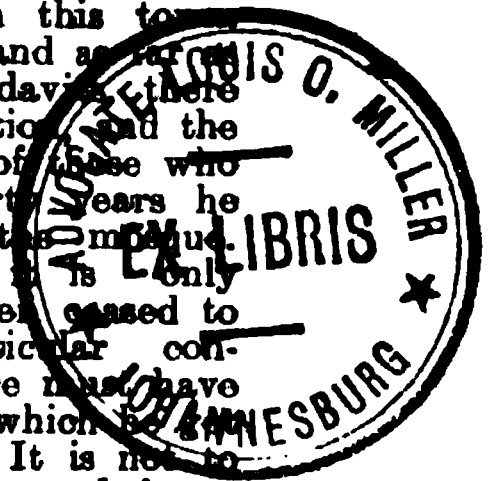
Hopley, J., suggested that the money might be placed in a fund, such as the Guardians' Fund, pending further directions as to how it should be disposed of.

Mr. Upington said that, on behalf of his client, he could not consent to such a course. His client was the trustee, and until he had been removed from the trusteeship he was entitled to the custody of this balance, at any rate, until some good reason to the contrary had been shown.

Hopley, J.: This seems to be a matter of long standing between these parties. It is simply a continuation of an old feud in the Malay congregation of this town. Some 30 years ago the main applicant tried to dispossess the father of the present respondent or the present respondent himself from his office as minister of

the Malay congregation in this town. He was unsuccessful then, and as far as I can gather from the affidavits, there was a split in the congregation, and the present applicant was one of those who seceded, and for over thirty years he has never appeared in the mosque. Under the circumstances, it is only common sense that he then ceased to be a member of that particular congregation. I suppose there must have been some sort of place in which he found his religious consolation. It is not to be supposed that he never attended any place of worship. The presumption would be that during these thirty years he belonged to some other congregation, and the other two people who join him seem to be much in the same position. As far as the present respondent knows, they have never been inside his church. Now, after all these years, as soon as there is a little money in the matter, they suddenly discover they still are members of the congregation. The first question is: have the applicants shown any sort of *locus standi*? Are they more interested in the disposal of this money than any member of the Mohammedan faith? The mere fact that one is a Mohammedan does not seem to give him a *locus standi* to interfere in a matter like this, which concerns the guardianship of certain moneys in which the applicants have long ceased to have any special interest. We must remember that the respondents are the duly-elected trustees. They were unanimously appointed by the congregation, and their election was confirmed by the Supreme Court ten years ago. The chief respondent (Rakiep) has been priest-in-charge of this congregation, and he still is so. Now, in his old age, creditors have pressed him. The property was sold, and there was a sum of £500 left in the hands of the Master after the creditors were paid. There is no reason to suppose this old priest will not be able to set up his congregation somewhere or other. If there was anything to show that the respondent was likely to squander the money, the Court would restrain him from receiving it. Mr. Gardiner had to admit that the allegations are extremely vague. The money will be jointly paid out, and I hope the money will be deposited in such a way that neither trustee will be able to act without the signature of the other. At all events, they are jointly responsible, and the Master might call Abdullah's attention to the fact that he is equally responsible with Rakiep, and advise them to operate only on their joint signatures. I feel there is no good ground for restraining this payment, and the application must be refused, with costs.

[Applicants' Attorney: R. J. McLeod. Respondents': Faure, Van Eyk and Moore.]



*Ex parte* BRAND.

Mr. Buchanan moved to have a rule *nisi* made absolute for the cancellation of a certain bond, which was lost.

The rule made absolute.

*Ex parte* JONAS.

Mr. Douglas Buchanan moved for leave to sue by edictal citation to have a deed of transfer set aside. The petitioner duly received transfer of a certain erf at Beaufort West, on which she erected certain property. The deed of transfer was in possession of one D. H. Blythe, whose business was afterwards taken over by Reece and De Villiers, but they were unable to trace the deed. Ultimately it was discovered in the Deeds Office, with a mark of transfer to relatives of the petitioner. The petitioner was able to write her name, and denied that she made the mark in question.

Leave granted to sue petitioner's son-in-law, one Herman, and her son Joseph Isaacs, by edictal citation, the property to be attached to found jurisdiction. The citation and notice to be served simultaneously and personally, and the process returnable by March 1, costs to be costs in the cause.

*Ex parte* THE COLONIAL GOVERNMENT.

Mr. Nightingale said this was the return day of a rule calling on the respondent, one Le Roux, to show cause why certain mineral leases should not be cancelled. The leases contained a stipulation that they should be cancelled on non-payment of rent. No rent had been paid, and no work done since 1898. There had been due publication. The original lessee could not be traced.

Rule made absolute.

COLONIAL GOVERNMENT V. CONCORDIA  
COPPER MINING SYNDICATE.

Mr. Nightingale said this was a similar application to the last over 12 mineral leases, in Namaqualand. The Government had no knowledge of the respondents, and there had been due publication.

Rule made absolute.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REHABILITATION. { 1906.  
Jan. 16th.

Mr. Swift again mentioned the application of Johannes Albertus Walters for discharge from insolvency. Counsel now presented the information required by the Court.

Order granted as prayed.

## GENERAL MOTIONS.

## SANDERS V. CAPE TOWN TRAMWAYS CO.

Sir H. Juta, K.C. (for respondents), mentioned this matter, which was an application for leave to sue *in forma pauperis*. He said that the matter had originally been before Mr. Justice Maasdorp, and he should like an expression of opinion from the Bench as to whether it was thought the further hearing should be before his lordship. The application was opposed by the Tramways Co. on more than one ground.

Hopley, J., said that he would confer with his brother Maasdorp, and ascertain whether it would not be possible for his lordship to sit in that court and deal with this and other matters which might be brought before him, while he (Mr. Justice Hopley) took the Criminal Sessions. It might be possible to arrange for an exchange of courts to-morrow (Wednesday).

The matter was again mentioned later in the day, when Mr. Watermeyer (for petitioner) said that the application was urgent.

It was directed that the matter be again mentioned to-morrow morning.

*Postea* (January 17th).

Mr. Watermeyer now informed his lordship that the matter was urgent, the applicant having met with an accident on the 1st August last, having being under treatment at the hospital, and exposed to great expense in doctors' bills.

His Lordship thought that under all the circumstances it was desirable that the hearing should be before Mr. Justice Maasdorp, before whom the original matter came.

Ordered to stand over until the 1st day of term, or earlier, that the application might be heard before Mr. Justice Maasdorp.

*Ex parte* THE INSOLVENT ESTATE  
WENTZEL AND SCHLESWIG.

Mr. Bailey moved as a matter of urgency for the appointment of Mr. J.

C. A. Leister and Mr. G. W. Steytler as provisional trustees in the estate of Richard Horn and Wm. Young, trading as Wentzel and Schleswig, chemists and druggists, Cape Town, pending the election of permanent trustees. It was stated that there were preferent claims against the estate of £13,812.

Order granted as prayed.

*Ex parte* BREUSING.

Mr. Benjamin moved for leave to assume the death of Robert Gustaf Breusing, generally known as Paul Breusing, late of Three Anchor Bay, brother of the petitioner, who resides at Worcester. The petitioner said that his brother, who had been in practice as an architect, had disappeared from Cape Town on or about the 3rd October, 1905, and had not since been seen or heard of. Further affidavits were read to the effect that a man believed to be the deceased was seen on the date named to walk into the surf at Three Anchor Bay. He floated away, and the body had not been recovered. The assets of the deceased included a sum of £252 10s. 6d., standing to his credit in the Post Office Savings Bank, certain lots of ground at Sea Point, and certain shares. A photograph of the deceased was identified by one of the deponents as that of the man whom he saw walking into the sea. The Master declined to take the usual steps without an order of Court.

Hopley, J., observed that it was surprising that the clothes of the deceased, which were ostensibly left on the shore, were not utilised to establish his identity.

Mr. Benjamin said that, no doubt, a search was made by the police, but no explanation as to what had become of the clothing was forthcoming.

Leave was granted to presume death, the Master to be authorised to take the necessary steps to appoint an executor.

*Ex parte* XABANISA.

Mr. Watermeyer moved for an order authorising the amendment of the name of the petitioner in certain deeds as Patrick Xabanisa.

Order granted as prayed.

*Ex parte* THE ESTATE ENGELBRECHT AND OTHERS.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to cancel certain deeds.

Order granted.

*Ex parte* THE ESTATE ROODT.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to pass transfer of certain immovable property in the estate of the petitioner's late husband. The distribution account had been filed with the Master in 1897, and he considered it a good account and as fair valuation. The Registrar of Deeds objected to pass transfer on the ground that the valuation was not a fair one compared with the present one.

Hopley, J., ordered the matter to be referred to Mr. Norton, a sworn appraiser of the Court, for an affidavit as to the true selling values of the farms in June, 1897, with leave to the petitioner to amend the accounts in accordance with such valuation, and to obtain transfer on the basis established if so advised, or otherwise to apply again.

COLONIAL GOVERNMENT V. DE VILLIERS.

Mr. J. E. R. de Villiers moved to have an award of the arbitrators made a rule of Court. There was a consent paper filed by the respondent.

Order granted.

*Ex parte* ESTATE VAN ZYL.

Mr. J. E. R. de Villiers moved on behalf of the petitioner, executor in the estate, for an order authorising the Registrar of Deeds to pass transfer of certain property in the estate of her late husband, Gideon van Zyl. The original lessor of the farm could not be found.

A rule *nisi* was granted calling on all persons professing to have an interest to show cause why transfer should not be passed, one publication in a local paper and one in the "Gazette."

*Ex parte* MASSEY.

Mr. De Waal moved for an order declaring certain property derelict on which the petitioner had paid quitrent for a number of years. The owners of the land had abandoned it some 12 years ago, and the petitioner wished to obtain transfer.

Hopley, J., said he saw no way of helping the applicant. As far as he could see, there had been no final abandonment of the land, as the owners might eventually return, and it was impossible to say they did not intend to do so. Of course, if they stayed away thirty years, the applicant would probably acquire a prescriptive title. He did not see that he could make any order.

*Ex parte* GOLDSTEIN.

Mr. Benjamin moved for an order authorising the amendment of a certain birth certificate by altering the names of the petitioner and his wife to "Abraham" and "Bertram Rebecca" respectively.

Order as prayed.

*Ex parte* ESTATE SNYMAN.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to cancel a certain bond.

A rule *nisi* was granted calling on all concerned to show cause why the bond should not be cancelled, one publication in a Uitenhage paper and the "Gazette," returnable 28th February.

*Ex parte* ESTATE VISSER.

Mr. McGregor moved for an order confirming the disposition of a certain farm, and authorising the Registrar of Deeds to register the transfer.

Hopley, J., ordered the matter to stand over *sine die*, as he had doubts whether the matter, as the circumstances disclosed, could be decided on motion.

*Postea* (January 19th).

Hopley, J., said that he wished to make an intimation in reference to this matter, which had come before him the other day. He had since thought over the matter and had also laid it before the only judge whom he had been able to meet on the point, namely, the Chief Justice. They thought that there should be notice, at all events to Kruger, both individually and in his capacity as guardian of the minor children. Then if he raised no objection, it was possible that the order might be made, but if he did object then the matter would have to take another development altogether. The order of the Court would be that notice of the application be served upon Jacob Casper Kruger in his individual capacity and also as guardian of his minor children.

At a later stage Mr. McGregor (for petitioner) read a telegram which stated that all the children were majors in 1904.

His Lordship then ordered that notice of the application be served upon Jacob Casper Kruger and his major children; upon the former both in his individual capacity and as guardian of the minor children (if any).

*Ex parte* LOOTS.

Mr. W. Porter Buchanan moved, on behalf of the executor testamentary in the joint estate of Loots, for an order authorising certain transfers of property

in the Britstown division. The matter had already been before Mr. Justice Maasdorp, and had been referred to the Master for report.

Hopley, J., said that in ordering that the prayer be granted, one must protect the interests of the children, who were probably minors, and who had some contingent interest directly in the lands, so that these lands might not be sold at all events during their grandfather's lifetime, and they should not be prejudiced by their immediate parents. It was not likely that such things would be done, but they might be done. It was, therefore, ordered that the petition be granted, in terms of the prayer, and according to the areas therein set forth, the division of the farms Eerstegeeluk and Tweedegeeluk, to be made along the line "d," "g." and "x," as shown in the plan put in amongst the papers in the proceedings, and that transfer be allowed to be given to the various heirs according to the arrangement made by them and the executor, subject to the terms of the will as to the rights of the children.

*Ex parte* THE ESTATE DE BEER.

Mr. W. Porter Buchanan moved on the petition of the executor dative for leave to sell certain land in the division of Bedford.

Ordered to stand over for production of a further affidavit as to the value of the ground in question.

*Ex parte* THE ESTATE ROBERTSON.

Mr. Douglas Buchanan moved on the petition of the executors testamentary for leave to raise on mortgage a sum not exceeding £3,000 upon certain landed property in the Claremont Municipality, so as to discharge certain debts due to one of the petitioners (Mr. Fraser), the balance, about £1,500, to be divided among the six heirs, all majors. The object of the application was to avoid a sale of the property in the present depressed state of the market.

Order granted authorising a mortgage not exceeding £3,000 to be raised, and to be applied as stated in the petition, and authorising the Registrar of Deeds to register such bond.

*Ex parte* CARTER.

Mr. Lewis moved on the petition of Frederick James Carter, of Ceres, for leave to sue his late employers, Kirsch and Co., who are storekeepers at Ceres, *in forma pauperis* for £300 damages for personal injuries alleged to have been sustained through the negligence of a fellow servant, acting in common

employment. Petitioner said that his right arm was fractured, and his body was paralysed as a result of the accident. He had been an out-patient of the New Somerset Hospital. Counsel said he was prepared to certify in favour of the application.

Rule nisi granted, calling upon the respondents to show cause on the first day of next term why leave should not be granted as prayed.

#### BURSLEM V. BURSLEM.

Dr. Greer moved, on the petition of Nellie Alberta Burslem, for leave to sue her husband, George James Burslem, by edictal citation for divorce, by reason of the defendant's adultery. The petition stated that petitioner was married to George James Burslem at Orange, New South Wales, in January, 1885. Petitioner and her husband came to this city and resided here for a number of years, but dissensions and differences arose, and on the 24th October, 1903, they entered into a notarial deed of separation. On the 12th December of the same year an order was granted by the Supreme Court, by consent, in terms of the said deed. Since that time the petitioner and her husband had lived apart. Petitioner's husband continued to live in Cape Town for some time after the application. On the 28th May, 1904, he left Cape Town, under the assumed name of Lieut. George, by S.S. Kaikoura, trading to New Zealand. On the 15th of the same month, one Jeanie Angeline Mary Kelly left likewise for New Zealand under the name of Mrs. Brown. Petitioner knew that her husband and the said Kelly had been on very friendly terms while residing in Cape Town, and from information she had received she went to Christchurch, New Zealand, and from further information she there received she left for Sydney, New South Wales, and proceeded to the defendant's house, situated in Gordon-street, Paddington, and found that her husband and Kelly were living together as man and wife. Petitioner was living in Cape Town.

[Hopley, J. (to Dr. Greer): Why did she not sue him there and then, seeing that they were in their original country?]

Apparently she has settled down in this country. There was some considerable property in this country, and that property was divided by the decree of separation between the parties. I think I am correct in stating that all the property belonging to the estate was situate in this country.

[Hopley, J.: Has the Court any jurisdiction over this man Burslem now?]

Well, my lord, his property is in this country, and he does not appear here to object to the domicile.

[Hopley, J.: Of course, he does not appear to object, because he knows nothing of these proceedings. I do not know what he will do when he receives your citation.]

The question of domicile might then be raised. Counsel submitted that there was sufficient before the Court to show *prima facie* that the respondent's domicile was in this Colony.

[Hopley, J.: Petitioner does not even say when they came to this Colony.]

I believe there was property amounting to several thousands of pounds when they were judicially separated. If, afterwards, the question of domicile is raised it could then be threshed out.

[Hopley, J.: What strikes me is that this man came out here from Australia, and that he afterwards returned to his original country. Is this his proper forum? She went there to track them. Why did she not proceed to move for her divorce in New South Wales? Why should we be bothered with this New South Wales intrigue?]

Dr. Greer said that the respondent had already accepted the jurisdiction of this Court in regard to the order made upon the notarial deed. Respondent had had livery stables in Cape Town.

Hopley, J.: It seems to me rather a pity that when she caught them living together she did not proceed against the respondent for divorce. Of course, there may have been practical reasons why she should not have proceeded in Australia. I can quite understand that she is domiciled here, but the question is whether her husband is domiciled here. I should like to know more as to the property, how it stands, whether he parted with his share before he went away, and whether he seems to have finally severed his ties with this country. You may mention the matter again, and I will grant relief to the petitioner if I can possibly do so.

*Postea* (January 18th).

Dr. Greer said that he had a further affidavit in reference to this matter, which was an application for leave to sue the husband for divorce by reason of his alleged adultery. The ground of the application was that the defendant was believed to be residing beyond the jurisdiction, presumably, in New South Wales. Counsel said that since the matter was brought before the Court on Tuesday, an affidavit had been sworn by George T. Hopgood, of the C.I.D., to the effect that he saw the defendant, who was accompanied by a young woman, between Rondebosch and Westerford, between the 14th of December and early in the present year. Hopgood had volunteered this information after seeing the reports of the matter in the papers.

His Lordship said that the whole complexion of the affair was now changed. If further inquiries were made, it might



be possible to serve a summons on the defendant. There would be no order at the present stage on the original application, but leave would be given to renew the application if, hereafter, it were found necessary.

[Applicant's Attorneys: Friedlander and Du Toit. Respondent: In default.]

#### *Ex parte* BETHLEHEM.

Mr. Benjamin moved, on the petition of Elias Bethlehem, a merchant carrying on business at Humansdorp, and his wife, Paula, for leave to register an ante-nuptial contract, excluding community of property, as if the same had been executed before marriage. The parties were married during a visit by the petitioner to England in November last, the ceremony taking place at the Duke-street Synagogue, London. The first petitioner was a naturalised British subject.

After hearing the petition,

Hopley, J., said that there appeared to have been a genuine error on the part of the petitioners. Leave would be granted to enter into a contract, to have the effect of an ante-nuptial contract, saving the rights of creditors, and all parties interested up to date of registration of contract.

#### *Ex parte* HILLIARD.

Mr. Benjamin moved as a matter of urgency, for an order authorising the attachment of a certain sum of money, which may be found to be due to one Hendrik Gerstner, who was indebted to the petitioner in the sum of £83 9s. 4d.

Rule *nisi* granted, authorising the attachment of £60, returnable on the 1st February, rule to operate as an interim interdict.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

WHEELER V. LOGAN. { 1906.  
Jan. 17th.

Forum—R.M. Court—Costs—Act  
20 of 1856, Sec. 35.

*The plaintiff (domiciled in Cape Town) wishing to sue defendant, who was domiciled*

*within the Magisterial District of W., for services as an expert witness in an arbitration case, asked him to accept service of summons in Cape Town. On defendant's refusal to do this, plaintiff summoned him in the Supreme Court and recovered less than £20. He now applied for specially qualifying costs in addition to the ordinary costs allowed by the Rules of Court.*

*Held, that as the cause of action had arisen within the district of W., plaintiff by Sec. 35 of Act 20 of 1856 was only entitled to costs on the R.M. Court scale.*

This was an application upon notice calling upon James D. Logan to show cause why judgment in the action recently heard between the parties should not be entered for the plaintiff, with costs. Mr. Benjamin was for applicant; Sir H. Juta, K.C. (with him Mr. Close), was for respondent.

Mr. Benjamin said that the matter arose out of an action brought by plaintiff against defendant to recover a certain amount in respect of his services as a witness in reference to an arbitration. His lordship found for plaintiff for a less sum than £20, the exact amount being £9. The question of costs was allowed to stand over.

[Hopley, J.: I remember; there was a dispute between counsel as to whether or not Logan objected to service in this town, or whether he should have been served in this town.]

Affidavits having been read on both sides,

Sir H. Juta submitted that it was quite clear from Act No. 20, 1856 (section 35) that the applicant was not entitled to his costs. It was found in the judgment given by his lordship that the contract on which Wheeler succeeded was entered into at Matjesfontein, in the district of Worcester. The Act made it perfectly clear that the plaintiff had not an election to proceed in the Supreme Court, and thus get costs on the higher scale. The whole of the cause of action arose at Matjesfontein—that was where the defendant resided—and there was, therefore, no election to the applicant. Again, if Mr. Logan resided at Cape Town, the plaintiff resided at Maitland, and thus in the same district, so that again plaintiff would have had no election.

Mr. Benjamin said that his learned friend had omitted to mention section 34 of the Act. There was a question

of law concerned in this case that had never previously been decided in the Court—i.e., as to whether a witness was entitled to special qualifying costs beyond the scale of costs awarded according to the rules of Court. For the first time in the recorded history of this Court appeared a decision that a witness was entitled to such costs.

[Hopley, J.: Why could not that have been settled in the Magistrate's Court?]

Mr. Benjamin: If it had been raised in the Magistrate's Court, there certainly would have been an appeal to this Court.

[Hopley, J.: There is always an appeal if the Magistrate had decided wrongly.]

That is so, but I would submit that when questions of law, especially doubtful points of law, are involved, the Court would always hold that the plaintiff was entitled to come into this Court and have the matter decided once for all. Counsel went on to quote English cases, and pointed out that it was to the advantage of the whole country to have had a decision on this point.

Sir H. Juta, in his reply, said that all this that was now raised by his learned friend was raised, as the Chinese said, to "save his face."

Mr. Benjamin: It was raised at the trial.

Hopley, J.: In this matter I was of opinion at the trial, as has been pointed out, that the case should not have been brought into the Higher Court, and it was a matter in which, if possible, a Magistrate's decision should have been obtained, followed, of course, by a judgment, as I suppose the Magistrate would probably have come to the same conclusion as I did, that there was a sum of £9 due to the plaintiff, which would have carried Magistrate's Court costs. I went so far as to give judgment at that time for that amount, with Magistrate's Court costs, until, at the request of Mr. Benjamin, I reserved that particular point, because, he said, it had not been possible for his client to sue in the Magistrate's Court, his client residing in Cape Town, and Logan having refused to accept service in Cape Town, and it having become necessary to serve him in the district of Worcester. On that point, there was a dispute, and the matter was deferred for further information, and the question of costs was allowed to stand over. Now, it would appear that, whether by his instructions or not, Logan's agent in Cape Town did say that Logan could not accept service here, so that service had to be given in the Worcester district at considerable expense. If the matter rested on that point alone, I should give judgment for costs on the higher scale, but I am bound by the terms of the Act, which seem to be very strong—and, in fact, Mr. Benjamin has not tried to

controvert it—and the Act clearly lays down not only that the parties must reside in different districts, but that no part of the cause of action should have arisen in defendant's district before the plaintiff has the option of coming to the Higher Court for his remedy. It would appear from the reading of the 35th section that if the defendant resides in the district in which the cause of action arose, although it be the district in which the plaintiff may not reside, still the plaintiff must follow him into his own (defendant's) district for his remedy. That being so, it seems to me that the plaintiff chose the wrong Court. In this case the cause of action arose at Matjesfontein, and the action ought to have been brought in the district of Worcester. That being the case, it seems to me that I have no option but to confine the costs to Magistrate's Court scale. It is said that an important point of law was involved in this case, and that I should therefore exercise the discretion that is in the Court, and give plaintiff costs on the higher scale. I do not myself think that the point of law was such a one as the Magistrate was incompetent to deal with, or which would justify the plaintiff in risking an adverse decision on the question of costs in coming to the Higher Court. Costs must be allowed only on the Magistrate's Court scale.

Sir H. Juta mentioned the question of costs of the present application.

[Hopley, J.: Costs of the present application must be against the applicant.]

[Applicant's Attorneys: Moore and Son. Respondent's: Van Zyl and Bussinne.]

WALKER V. CORDEAUX AND ( 1906.  
FARROW. } Jan. 17th.

Interdict—Contract in restraint of trade.

*F. had contracted with W. and C. (then in partnership) that he would not, "within five years, after the date on which he shall leave Messrs. C. and W.'s employ without Messrs. C. and W.'s previous consent in writing, practice as an architect, &c., in East London or the Eastern Provinces of the Cape Colony, &c." F. left the employ of C. and W. with their written consent, and subsequently C. and W. dissolved partnership and C. secured F.'s services. W. now applied for an interdict restraining C. from employing F., and F.*

*from practising as an architect, &c.*

*Held, that in view of the doubtful and uncertain terms of the contract, of doubts as to its reasonableness: and of W.'s failure to show that he had sustained damage: the interdict must be refused.*

This was an application brought by Leonard Kendle Walker, architect, East London, against his late partner, Herbert John C. Cordeaux, for an interdict restraining him from engaging or employing one Wilford Farrow as clerk, assistant, agent, etc., at East London, King William's Town, or any portion of the Eastern Provinces, for a term of five years. An interdict was also sought against the said Farrow restraining him from accepting employment in any of the capacities named with any surveyor or architect in the area named or from practising as an architect or surveyor.

The facts were briefly that Messrs. Walker and Cordeaux had been in partnership, and during the continuation of the partnership they entered into a contract for the services of Mr. Farrow. According to that contract, he agreed that he was not within five years of the date when he should leave Messrs. Cordeaux and Walker's employ, without Messrs. Cordeaux and Walker's consent in writing, to practise as an architect and surveyor in East London, or in the Eastern Province, nor be engaged as clerk, assistant, and so forth in such business. That contract was entered into in February, 1903, and it was extended for another year in November, 1903. Mr. Farrow's term of service with Messrs. Cordeaux and Walker expired on the 31st December, 1905, so that from the 1st January, 1906, Mr. Farrow bound himself not to practise nor be interested in the business of an architect in the Eastern Province. In August last year the partnership of Messrs. Cordeaux and Walker expired by effluxion of time. Mr. Farrow received the amount of his salary to the end of December, 1905. He had now been engaged by Mr. Cordeaux, and this the applicant said was a breach of the agreement which Mr. Farrow had entered into.

From the affidavits it appeared that the second respondent had been employed at a salary of £25 a month, and that, according to Mr. Cordeaux, he was only qualified to act as a building and quantity surveyor. Applicant said that Farrow had been sent to manage Mr. Cordeaux's branch at King William's Town, while Mr. Cordeaux, on the other hand, said that he did not propose to injure any business of Mr.

Walker, and that he had merely tried to befriend Mr. Farrow by retaining his services. There had been no collusion between himself (Cordeaux) and Farrow, and if the latter could better himself elsewhere, he should be only too glad to help him.

The replying affidavit of the applicant said Farrow was qualified to practise as an architect, as Cordeaux well knew when he took him into partnership. The statement was untrue that Farrow was only qualified to practise as a building and quantity surveyor.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.) for applicant. Mr. McGregor for respondents.

Counsel said Farrow's agreement terminated on the 31st December, 1905, he received his salary in full up to that date, and there was no moral obligation on Mr. Cordeaux. The whole objects of these contracts was to prevent competition on the part of the gentleman who was brought from England. Counsel cited the case of *Palmer v. Mallet* (36 Chan. Div., p. 411), in which an injunction was granted after the partnership had been dissolved by the effluxion of time, and *Smith and Hawthorne* (76 "Law Times"), to show how far the Court would go to enforce these contracts.

Mr. McGregor said that the present instrument was one between Farrow and Cordeaux and Walker. In the case of *Patterson's Executors v. Webster, Steel and Co.* (1 Juta, p. 350, the Chief Justice laid it down as a general principle that the Court could only recognise the members of which the firm consisted, and any change destroyed the identity of the firm. The only goodwill in an architect's business could be the value of the connection. So soon as the partnership dissolved, there was no one to give Farrow leave to practise, nor was there anyone who could stop him. Supposing the Court held that the agreement was one governing the man, still there came the question as to whether or not the agreement was reasonable. Could it be reasonable that such an extensive agreement, covering the Eastern Province, should be upheld? Of course, the facts of each case would have to be taken into consideration. Taking Chartreuse, for instance, counsel did not doubt for a moment that a man knowing the secret of Chartreuse, in which the whole world was interested—could be restrained on a contract anywhere.

Sir H. Juta, in reply, contended that it was contemplated that the restraint upon Farrow should exist not merely during the life of the partnership, but after the termination of the partnership. Upon this agreement, it was all important that they should look at the intention of the parties. Counsel relied strongly on the fact



that the agreement was for a period longer than the term of the original partnership.

Hopley, J., called attention to clause 6 of the agreement, and said that it appeared from that clause that the restraint was against Farrow in case he left without the consent in writing of Cordeaux and Walker.

Sir H. Juta: Neither of the parties has read the agreement in that way. That is not the idea of the agreement. The point has never previously been raised.

Hopley, J.: In this case the Court is asked for the extraordinary remedy of an interdict to restrain a person, who is at present earning his living by acting as an architect's assistant in the town of King William's Town, from doing so, on the ground that he contracted himself out of the right to carry on his particular calling in any portion of the Eastern Provinces of the Cape of Good Hope. The first point that I feel about this matter is that it seems on the wording of the sixth clause of the agreement between this person, who is sought to be so restrained, and the firm of which at that time the present applicant was one of the partners, extremely doubtful whether there has been any breach whatsoever on the part of respondent. The clause reads as follows: "Wilford Farrow agrees that he will not, within five years after the date on which he shall leave Messrs. Cordeaux and Walker's employ without Messrs. Cordeaux and Walker's previous consent in writing, practise as an architect or surveyor in East London, or the Eastern Provinces of the Cape Colony, nor be concerned, engaged or interested either as principal partner, assistant, clerk, or agent in any such business in East London, or the Eastern Provinces of the Cape Colony." Now that is capable of two readings. Grammatically speaking, the comma being where it is, after "writing," I should say that the first meaning of it is that he shall not within five years after he leaves the employ of the firm without their consent in writing do certain things, but, of course, it has been argued that no one has read it in that way, that it has not been taken up in that way, and that they all consider that the contract means that he shall not, within five years, leave the firm's employment to practise as a surveyor or architect in East London or in the Eastern Provinces of the Cape Colony without Messrs. Cordeaux and Walker's previous consent in writing. It is capable of that reading certainly. I think the more simple one, the more grammatical one, is the one I first dealt with, and, if that is the case, the respondent Farrow has never broken this agreement at all, for he did not leave their employment without their consent in writing. Then there are other doubtful and arguable points, which arise in this mat-

ter, and I am not entirely satisfied by the case of *Palmer v. Mallett*, that it is absolutely good law that either of these parties, after the dissolution of the partnership, without its being expressly stated in the agreement, should come and sue, individually, for the breach alleged to have taken place in an agreement made with the firm of which they were at the time of the agreement members. As to the case of *Palmer v. Mallett*, and the other cases, I quite see the force and strength and logic of the judgments of the Lord Justices of Appeal, but I am not absolutely satisfied, on the wording of the present agreement, that those judgments can be applied to this case. The next point that occurs to me is, should this agreement be enforced or should it be held to be void as being wide and in restraint of trade and in restraint of the ordinary right that any man has to earn his living and his livelihood in any portion of His Majesty's dominions? Of course, a man can contract himself out of that right, but at the same time the contract must be reasonable, and it must be shown that there are parties so interested that it is a vital matter to them that a person should be so deprived of his common law rights. Now here is a person, without any particular distinguished position, merely, as far as I can see, a humble architect's assistant, who comes to this country at a salary which is not a large one—£25 a month—and yet it is in this contract sought to restrain him from earning that sort of livelihood as an architect's assistant, or in any sort of line which is at all connected with the architect's profession in the whole of the Eastern Provinces of the Cape Colony. What that exactly means I am not prepared at this moment to state. It may just mean the Eastern Province proper, as it was, it may include the whole of British Kaffraria, and it may also include the great Transkeian territories. It seems to me that there is a great deal to be said on the point as to whether or not this contract is not void, or it should not be held to be void for vagueness, and because it is too wide and too much in restraint of the ordinary common law right that this man Farrow has of earning his living practically in the only line of profession that he knows. I do not say that the present applicant could not succeed, but there are these doubtful points which occur to me, and they all seem to me to be quite sufficient, certainly taken cumulatively, to make me refuse this extraordinary remedy which I take it should only be granted when the right is perfectly clear, and I do not think it is clear in this particular case. There is another reason that occurs to me. I do not know how, on the circumstances

disclosed on the affidavits, it would be possible for Mr. Walker (the present applicant) to prove that he is being in any way damaged. It is said that he has a large interest in seeing that this contract is enforced, so that Cordeaux shall not have the services of Farrow. If that is so, he will probably be able to show how he is damnified in an action. If he is not damaged at all, it does not seem to me that he should have this extraordinary remedy. At any rate, I think that so far as the present proceedings are concerned the interdict asked for should be refused. As regards costs they had best abide the result of the action to be brought, if an action be brought. The order of the Court is that the application be refused, costs to abide the result of an action to be forthwith instituted, failing which applicant to pay costs.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller. Respondent's: Walker and Jacobsohn.]

#### DRUMMOND V. LEZARD.

Mr. Gardiner moved on behalf of the applicant (defendant in the action) for the removal of the trial to Kimberley before the High Court of Griqualand. The defendant had taken exception to the declaration on the ground that it disclosed no cause of action. The hearing of the trial and the exception were set down for February 2, and counsel pointed out if the exception was upheld the defendant would be put to unnecessary expense in bringing his witnesses from Kimberley. The action was for £1,500 damages for an alleged breach of trust on the part of the defendant, who, the plaintiff alleged, handed over a document contrary to his instructions, with the result that he was arrested, and after being tried for forgery, was found not guilty.

The applicant, Hildyard Home Drummond, read his affidavit, in which he set out that owing to the professional negligence of the defendant, he was detained for three months on a charge of forgery. The witnesses, he said, could only give evidence in mitigation of damages.

Hopley, J., ordered the exception to be heard on February 2, and the case to be set down for trial on February 23. After the exception was heard, the defendant could renew his application for removal, costs to be costs in the cause.

#### ESTATE DARROLL V. INSOLVENT ESTATE HUMPHRIES AND TURKINGTON.

Mr. Benjamin moved for an order authorising the trustee in the insolvent estate of Humphries and Turkington, to pay over a certain dividend due by one

Duggan to the applicant, to whom Duggan owed money for rent. Duggan's whereabouts were unknown.

Hopley, J., granted a *rule nisi*, to operate as an interim interdict, to be served on the trustee, Mr. W. A. Currie, restraining him from paying over the money. Rule returnable February 1. A copy to be sent to P.O. Box 1,367, and one publication in the "Cape Times."

#### *Ex parte* THE KALK BAY MUNICIPALITY.

Mr. Douglas Buchanan moved for an order restraining James Colley, the contractor to the drainage works, from removing any of the material which was against the express terms of the contract.

A rule nisi, returnable on the first day of term, was granted, restraining the contractor, or his agent, or servants, from removing any of the materials in the meantime, and, further, calling on him to show cause why he should not return any materials he has taken from the works.

#### *Ex parte* MADER.

Mr. Van Zyl moved on behalf of the applicant (defendant in the action) for an order, calling on the respondent to pay over £50 to enable her to defend proceedings against her for a decree of divorce.

Dr. Greer appeared for the respondent, and put in an affidavit by the respondent's attorney.

Hopley, J., ordered the respondent to pay to the applicant £35, the question of costs to stand over.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLY.]

SPRINGFIELD PUBLIC SCHOOL { 1906.  
V. BAUMGARTEN AND { Jan. 18th.  
OTHERS.

Public school—Committee—Irrregular election.

*In 1886 the Government granted a certain piece of land as a site for a school and cemetery for the use of certain German immigrants. These people,*

*with the help of a few friends, built the school, and subsequently a German church adjoining. Government provided an annual grant towards the teacher's salary. In August, 1905, practically all the German immigrants in the neighbourhood met and decided to abandon the Government grant from January 1st, 1906, and to sever their connection with the Education Department, and they gave the Department notice of their intention. Thereafter some 9 persons who disapproved of this resolution met together and elected a new school committee without having given public notice of their intention to do so. The new committee now applied for an order of Court, calling upon the original committee to hand over to the applicants all books, papers, &c., &c., belonging to the said school.*

*Held, that as the applicants had not been legally elected as a committee, the application must be refused with costs.*

This was an application upon notice calling upon the respondents, the Rev. Heinrich Baumgarten and others, to show cause why an order should not issue from this Court compelling them to hand over to applicants, as constituting the committee of the Springfield Public School, and recognised as such by the Department of Education, all books, papers, documents, and moneys belonging to the said school.

Mr. Howell Jones was for applicants; Dr. Greer was for respondents.

Dr. Greer: Who first mentioned the matter, said that it was one of considerable urgency, involving a declaration as to whether this was a public or private school. The school should open on Monday next, and both parties, he understood, had engaged teachers who were ready to go on with the work of the school.

[Hopley, J.: Is it a matter that can be settled on motion?]

Dr. Greer: I don't know that it can be settled altogether on motion, but at any rate some sort of order should be given.

Hopley, J., intimated that the case should be called.

Mr. Jones said that the application was by certain gentlemen who had been

elected as the committee of the Springfield Public School, situated on the Cape Flats, and who were recognised by the Government, for an order upon respondents, who had also been elected at another meeting, as the applicants said without proper notice, and who had not been recognised by the Government, requiring the respondents to deliver up the movables at the school.

From the affidavits it appeared that the allegation was that the school had, since July, 1884, been carried on as an undenominational school, under the Department of Education. Applicants (Carl H. A. Horstmann and others) said that, hearing in the latter part of 1905 that it was the intention of the existing committee to make the school a private German school, and as they (applicants) desired to preserve the school as a public school, they held a meeting, at which they elected a committee. Subsequently, a meeting was held by the old committee, at which another committee was elected.

The Rev. Heinrich Baumgarten, in his affidavit, said that he had been chairman of the committee of the Springfield Public School, and that he was pastor of the community of German immigrants on the Cape Flats. The buildings in which the school was held were erected, and paid for by the German immigrants, many of them contributing labour when they could not contribute funds. It had been resolved by an overwhelming majority at a meeting of those interested, that the school should be converted into a German private school. The applicants represented non-German, and insignificant elements, and included the rural constable, who had been appointed a member of the new Board. Mr. Baumgarten submitted that the applicants had no locus standi so far as the school was concerned.

From an affidavit by the Acting Superintendent-General of Education, it seemed that the department recognised the committee appointed by the meeting convened by applicants, not only on the ground that the meeting convened by respondents was irregular, but because of the desire of a considerable portion of the inhabitants that the school should continue as a State-aided public school, the absence of any sound reason why the continuity of the function exercised by the previous committee should not be preserved, and on other grounds.

Mr. Jones said that notice had been given by the respondents of an application for an order requiring the applicants to vacate the premises. This notice, however, was irregular.

Dr. Greer said that it was to the interest of both sides that the respondents' application should be heard.

Hopley, J., said that if the notice was irregular, the respondents' applica-

tion could not be heard at the present stage.

Dr. Greer said that the applicant committee had taken possession of the building. The site, by a Government grant, was given to certain trustees. Those trustees, two of them at any rate, were opposed to the action taken by the irregularly-convened meeting. The ground was originally granted to the Civil Commissioner, the pastor for the time being of the German immigrants on the Cape Flats, and a trustee from time to time to be selected by the said immigrants on the condition that the ground should be used for the purposes of a school, and burial ground, in connection with the German immigrants on the Cape Flats.

[Hopley, J.: But that means a Government school. It is granted by the Government as a Government school, and amongst other things they put a Government nominee on the Board in the sate of the Civil Commissioner.]

Dr. Greer: As a matter of fact, the grant is made generally for the advancement of the German immigrants for burial ground and school purposes. On the ground there has also been erected a church as well as a school. There is no limitation in the Act as to what the school shall be.

Mr. Jones said that the sole object of the respondents at the present time was to convert this public school into a private school, and to appropriate all the movable assets thereof, which had been contributed from time to time, not only by the Government, but all other persons, who did not say for a moment that they had contributed these funds and this furniture on the strength of its being a private German school. The funds had been contributed, not to a German private school, but to a public undenominational school. Really, the object was to exclude in this way the operation of the School Board Act. The position taken by respondents was, he submitted, quite an untenable one. Clearly, the applicants were the committee duly elected, according to the School Board regulations.

Hopley, J., remarked that it seemed to him to be extraordinary that any one in the position of Horstmann should have convened a meeting to elect a committee.

Mr. Jones submitted that the school had been carried on hitherto as a public undenominational school.

[Hopley, J.: It is a pity there is this split.]

I quite agree, but the people who are at the wrong end of the split are the respondents. They have no *locus standi*. Counsel (continuing) submitted it was already one of those schools which were referred to in the Act as a public undenominational school. Private schools were not aided by the Govern-

ment. It was the duty of the committee on the expiration of their office to hand over the assets to the School Board Committee.

Dr. Greer said it was evident there was an attempt being made to carry an issue against the wishes of the majority of the beneficiaries. It was quite clear that this action was taken by a disappointed minority, who were endeavouring to assert their opinions as against the decision of the majority. The land was granted for the purposes of a school, and burying ground to the German immigrants. It was given for the purpose of inducing the German immigrants to settle there, and the German immigrants or their friends had built the school. The Education Department had never granted a penny towards the building. It was true that the Government gave assistance by providing some furniture, but that furniture had long since gone, and the present furniture was supplied by the German people or their friends, and the sole grant of the Government was for work and labour done. Surely, it was not to be said that the Government had acquired a right not only to the building, but to the whole of the money subscribed to that school? The contention in itself was manifestly absurd. There was a precedent in the case of St. Martin's School, Long-street, the committee of which, after receiving the grant, gave notice of their intention to relinquish it in favour of a private school, and the Education Department acquiesced in their decision. The real test in the matter, counsel submitted, was the wishes of the majority of the beneficiaries.

Mr. Jones having been heard in reply,

Hopley, J., said it was to be regretted, in a small and flourishing community, there should be any squabbling over the important matter of education. What he had to consider was whether the applicants had shown a clear right to have it declared that certain property must be handed over to them, and that they must be entrusted with the management of a school which had been erected at Springfield, on the Wynberg Flats, by the German community. Apparently the school was built together with the church and the teacher's house upon a piece of land granted in 1886 by the late General Torrens, when he was Administrator here, to the German immigrants, for the purposes of a school and burying ground, and leave afterwards was added to erect a church. The Germans seemed to have contributed money by labour, and collected money from their friends in other lands and people in South Africa to put up these buildings.



It was clear that the object of the grant was to encourage these German immigrants on the ground, and to give them the solace of their own religious ritual and the power to keep on the language of their Fatherland. In the building erected by them the Government paid for a certain amount of furniture, but the original furniture had worn out, and what was in the school at present had been contributed by the school itself, and direct Government aid had not been obtained. The school seemed up to quite recently to have been managed as an undenominational public school, the Government merely contributing towards the salary of the teachers for every school term. Within the past year a new School Board Act was passed, and it might be in consideration of the terms of that Act, or it might be that they were actuated by other matters of policy, such as keeping the school entirely a white man's school, but whatever their reasons were these people met on the 21st August, and the affidavit of Mr. Baumgarten set out that the meeting called by him was attended by practically all the German immigrants or their descendants, when it was decided from the 1st January, 1906, to change the school to a private German school. He took it to mean that they wished to have the absolute control of their own school, and they gave the Government notice of their intention. Of the fifty voters who were present, it was stated that the resolution was carried by 41 to 9. Among the 9 dissentients was Mr. Horstmann. Had these people any *locus standi* to come to Court to claim that they were properly appointed as a committee? It was evidently in the minds of these people that as they were to have a private school at the end of the year, it would not be necessary to elect a School Board Committee. The notices which appeared in the "Cape Times" and "South African News" did not say that it was proposed to elect a new committee, and Mr. Baumgarten had said that the English language in which the notices appeared was not generally read, and it did not put before them clearly the main issue which would be the election of a new Board of Management. It was perfectly clear there should be some notice to the guarantors as to who were the members to be elected. If the applicants wished to insist upon a regulation as showing Mr. Baumgarten's meeting to be illegal, surely they must abide by the other regulations laid down, none of which they seem to have kept. He could not find that the applicants had acquired such a right, such a clear *locus standi* as to justify the Court in granting them the order. It might be that other points would arise hereafter. They might be able to show they were properly elected, but it had not been

shown that the applicants had any right to the order they asked for, and the application must be refused, with costs.

[Applicants' Attorneys: Reid and Nephew. Respondents: Friedlander and Du Toit.]

## GENERAL MOTIONS.

*Ex parte* ESTATE YATES. } 1906.  
Jan. 18th.

Mr. Douglas Buchanan moved, on behalf of the creditors, in the estate, who represented almost the entire liabilities for the appointment of a provisional trustee to carry on the business of an hotel at Swellendam.

Application granted, Mr. F. Simpson Reid appointed as provisional trustee.

### *Ex parte* GESWINT.

Mr. Douglas Buchanan moved for leave to the petitioner to exchange certain property in the interests of the estate of his father, to whom he was duly appointed as curator.

Order as prayed.

### *Ex parte* ISMAIL AND OTHERS.

Mr. P. S. T. Jones moved for leave to sell the shares of two minors in certain property, and for the appointment of their mother as guardian to act on their behalf, and to pass transfer. There were certain arrears due in respect of a mortgage, and the bond-holder threatened an action. A portion of the building fell in during the severe weather last winter.

Order granted as prayed, any surplus belonging to the minors to be paid into the Guardians' Fund.

### *Ex parte* RUBBI AND WIFE.

Mr. Benjamin moved on the petition of Rubbi and wife for leave to register an ante-nuptial contract in terms of draft deed, annexed to petition, and for an amendment of his name, as registered in certain bonds. The first-named petitioner, who belonged to Italy, came to this country some years ago, and commenced business in Cape Town. During October last, he was married to the second petitioner in Padua, Italy.

Order granted as prayed, saving the rights of any creditors up to date of registration.

### *Ex parte* BOYCE.

Dr. Greer moved on the petition of J. W. Boyce, acting on behalf of his minor

daughter, for leave to raise a mortgage of £270 upon certain property in Stirling-street, Cape Town. The petitioner offered as collateral security a second bond on his property at Milnerton.

Order granted as prayed.

*Ex parte KOHNE*

Mr. Gutsche moved, on the petition of C. H. H. Kohne, acting on behalf of his minor children, for leave to pass a mortgage bond of £150 upon certain property, situate off Kent-road, Wynberg. The money was required to effect repairs. Counsel stated that the Master, in his report, seemed to have confused the property referred to in the present application with another property, which had previously formed the subject of an application by petitioner.

Order granted, authorising the bond to be raised.

*Ex parte CONGO.*

Mr. J. E. R. de Villiers moved, on the petition of Theophilus Congo, as the eldest son of Nathaniel Congo, a native, who had died intestate, for an order authorising the Registrar of Deeds in Cape Town to pass transfer. The petition was accompanied by an affidavit by the Resident Magistrate of Umzimkulu, stating that petitioner was, according to native law and custom, the sole heir of his father, and to the best of his knowledge and belief entitled to the land. The matter had been ordered to stand over for more definite information, and an affidavit was now read from Mr. Moore, attorney, stating that Congo had been appointed executor dative.

Hopley, J., said that he could scarcely see how the application was necessary under the circumstances.

Mr. De Villiers said that the Master desired an order of Court authorising him to act.

Ordered to stand over. Subsequently,

Hopley, J., remarked that he did not see any necessity for the application. If the Master could not see his way to do the necessary things without an order, then the matter should be mentioned again. He was not prepared to make what seemed to him at present to be an unnecessary order.

*Postea* (January 22nd).

Mr. J. E. R. de Villiers again mentioned this matter, which was an application by a native, as the eldest son and heir, according to native law and custom, of his father, for an order on the Registrar of Deeds to pass transfer of certain property in his father's estate. The matter had been ordered to stand over for further inquiries.

Rule nisi granted calling upon all

persons concerned to show cause on the last day of next term, rule to be published once in a Kokstad paper and once in "Imvo."

HODGSON V. MCKAY AND CO.

Contempt of Court—Interdict—  
Personal attachment.

This was an application upon notice calling upon the partners in McKay and Co., music dealers, Cape Town, to show cause why a writ of personal attachment should not issue against them by reason of their contempt of Court, in that, after being interdicted from removing any of their goods from certain premises, 6 and 8, Church-street, they persisted in so doing, and why the Sheriff should not be authorised to place a man in possession of their premises to prevent respondents from removing further goods while the interdict continues.

Mr. Close was for applicant; Dr. Greer was for respondents.

Mr. Close read an affidavit by the applicant, which set out that the interdict was granted on the failure of the respondents to pay arrears of rent amounting to £365. The Court had declined to entertain an application on behalf of the respondent to remove the interdict, and the respondents continued to occupy the premises and dispose of their goods, against which the interdict was granted. They were selling off their stock as if no interdict was in force, and in defiance of the order of the Court. To the original debt of £365 for rent there was a further £120 due for rent in November and December.

Dr. Greer put in a replying affidavit from John P. Bishop, partner in the firm, which set out that it was arranged the firm should pay the arrear rent at the rate of £10 per month, and the combined sums had been regularly paid. He denied that the Court declined to entertain an application to remove the attachment, as it was ordered that it should be set aside if £400 was paid into court, or security for that amount found. It was submitted that it was never the intention of the Court to close the business. The interdict was interpreted by both parties to mean that the respondent could not remove the goods in bulk.

Mr. Close put in a replying affidavit, in which the applicant denied the arrangement to pay off the arrears of rent at the rate of £10 per month.

Mr. Close made a proposal that the respondents should pay £120 within a few days and instalments of £60 per month afterwards, pending the action.

Hopley, J., said that on the application of the landlord the

Court granted an order interdicting the removal of the goods from respondent's premises pending an action, which he then and there instituted, for the payment of arrear rent. That was an absolute order, and it was not left to the parties to construe it to mean anything else than that what the order said. The respondents did not approach the applicant, and they did not come to the Court for an explanation. They went on, in spite of the order of Court, selling as many goods as they could, and apparently doing as they chose with the funds which came into their hands from those sales. That was not a compliance with the order of Court. The only thing that could be said for the respondents was that they might have thought the Court did not mean to close up the business as a going concern. The respondents treated the applicant's remonstrances with contempt, and they simply went on selling. After that the respondents came to Court, and asked to be allowed to remove the goods on the ground, as they said, that they were being damaged by remaining in the shop. Another Judge of the Court then gave them leave to remove the goods if they paid £400 into court or furnished security for that amount. That they never did, and the result was that they were still in the same premises. Yet, in spite of these two orders of Court, they (respondents) went on selling the goods piecemeal, though they now said that they were replacing the goods. The only difficulty was the exact remedy to apply. Of course, the Court could at once order the attachment of the managing partner, the person who authorised these sales in spite of the order of Court, but the applicant did not pray for that, and there was perhaps a reason for not doing so, in that, as respondents said, they construed the Court's order to mean that they might continue the business as a going concern. He did not, under those circumstances, and without being pressed for it, wish to make an order of personal attachment, but he wished to call respondents' attention to the fact that there was a resort that the law had for those who treated the Court's orders with contempt. The order of the Court would be as follows: That the Sheriff do take charge of the said premises to prevent further removal of goods, this order to be suspended in any case until Monday, and, thereafter, if on Monday £120 be paid or deposited with the Registrar, or security for that amount be found, to be further suspended until the 31st of the month, on which date, if £60 be paid or deposited with the Registrar aforesaid, or security be found, the order to be suspended until the hearing of the action; during all times of the suspension of the order, the respondents to have leave to carry on the business

as a going concern. Respondents to pay the costs of this application. His lordship added that he did not see why some sort of arrangement could not be come to between the parties.

[Applicant's Attorney: T. J. O'Reilly. Respondent's: Friedlander and Du Toit.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

JOLLIFFE V. VAN ZYL. { 1906.  
Jan. 19th.

Mr. Van Zyl moved for judgment in terms of the referee's report and for costs. Mr. Upington was for respondent. The case, it appeared, originally came before his lordship at the Colesberg Circuit Court, and was referred to Mr. Wilfred Murray, Government land surveyor, Colesberg, to take evidence and report his findings on certain points. The plaintiff's claim was composed of the following items:—(a) £540 for building a cottage; (b) £260 for building an additional wing to the cottage; (c) £395 for building shed and stables; (d) £85 19s. 6d. for extras; (e) £2 10s. for a stable door, making a total of £1,283 9s. 6d. By instalments the defendant had paid to plaintiff a sum of £975. The plaintiff had also agreed to reduce his claim by £37 5s., thus leaving a balance, according to plaintiff's claim, of £271 4s. 6d. The claim was entirely repudiated by defendant. He admitted having entered into the contracts, but said that the work was so badly executed by the plaintiff that no money was due to him. He claimed in re-convention a sum of £150 for damages, and also said that as to the sum of £975 it was not paid as part of the contract price but merely by way of loan to the plaintiff.

Hopley, J., said that when he directed the referee the sum of £975 was practically admitted by counsel to have been paid on account of the contract.

Mr. Van Zyl said that the referee had allowed £36 as damages for delay in the completion of the cottage, being six months' rent of the cottage at £6 per month.

[Hopley, J.: That is pretty much what I should have arrived at though in a different way by allowing say 8 per cent.]

Mr. Van Zyl read the report of the referee, who said that the plans and specifications were drawn in a very rough manner, though that seemed to be the practice in Colesberg. As to the cottage, the workmanship in some particulars was very bad, but at the same time the vagueness of the contract should not be lost sight of. As to the additional wing, he reduced the claim of the plaintiff to £230. In regard to the claim for extras, he reduced the amount to £52. He allowed the defendant a sum of £37 5s. agreed to by plaintiff, and further allowed him £50, the amount estimated to be required to put the cottage in a fair state of finish. In regard to the shed, he found that £15 would be required to put that part of the building in a fair state of finish. He found also that the time limit of nine months for the completion of the building was a reasonable one and allowed defendant £36, being rent of the cottage for six months during which he should have had possession. As to the shed, he did not find that defendant had suffered any damages by reason of delay on the contractor's part. Briefly summarised, the referee's findings were: For plaintiff £540 contract for erection of cottage, £230 for additional wing, £395 for shed, and £52 for extras, making a total of £1,217. For defendant: £975 cash paid, £37 5s. allowed under the claim "b," £50 allowed for completing cottage, £15 allowed for completing shed, and £36 damages for delay in completion of cottage, making a total of £1,113 5s. This showed a balance of £103 15s. in favour of the plaintiff, as compared with a claim of £271 1s.

Mr. Van Zyl submitted that, the plaintiff having substantially succeeded in his claim, judgment should be given for the balance in his favour as found by the referee with costs.

Mr. Upington was proceeding to argue, from the minutes of evidence sent up by the referee, that certain of his findings were not in accordance with the evidence, when

Hopley, J., interposed, and remarked that in sending the matter to the referee it had not been his intention to be furnished with the record of evidence. The referee seemed to have sat an extraordinary number of days in order to hear the case, and in a communication that he had sent he pointed out that the parties would persist in leading additional evidence, and thus prolonging the hearing.

Mr. Upington said the plaintiff was really in default when he came into Court. He had not completed his contract, and he was not entitled to a penny until the contract was completed. The plaintiff in his summons based his claim on the completion of the contract, and one of the questions submitted to the referee was to find out whether the

contract was completed, and he found that it was not, and that the work was far short of requirements.

Hopley, J., said it was necessary in this case to appoint a referee, and for the time he had been engaged in the proceedings the referee's fee would be fixed at sixty guineas, and that would form part of the costs. If the referee had found that the contract had been completed in a workmanlike manner, the applicant's case would have been exceedingly strong, but the referee found that the contract had not been completed, and certain repairs were necessary. However, he could not find, taking all the circumstances into consideration, that either party was devoid of blame in protracting the proceedings. There would be judgment for the applicant in the sum of £103 15s., each party to pay his own costs, the costs of the referee to be borne equally by each party, and the plaintiff's share to be paid out of the £103 15s.

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## SUPREME COURT

[Before the Hon Sir JOHN BUCHANAN.]

REX V. CORNELIUS. { 1906.  
Jan. 22nd.

Master and Servants Act—Act 18  
of 1873, Secs. 4 and 7—Child  
under 16.

Buchanan, J.: A case has come in review from the Special Justice of the Peace of Victoria West. A lad aged 13 years had been convicted of contravening section 4, sub-section 6, Act 18, 1873 (Master and Servants Act). The sentence was only half-a-crown or three days, and the imprisonment has, no doubt, been undergone, but for the guidance of the Special Justice of the Peace, I mention this case and quash the conviction, as, if the Justice had looked at section 7 of the Act he would see that it is expressly enacted that these sections are not to apply to servants under sixteen years of age.

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HARRIS V. DOYLE.

Mr. Upington moved for leave to take the evidence of the defendant (Denis Doyle) on commission in Bloemfontein,



O.R.C. The applicant said that, with a view of saving expense and avoiding loss of business which would result from his absence from Bloemfontein, it was of advantage that his evidence should be taken on commission.

Dr. Greer (for respondent and plaintiff in the suit) read an affidavit by Harris's attorney, who denied that there would be any loss or inconvenience if the defendant came to the Court to give his evidence. On the ground of saving expense, he opposed the application. It was important, deponent urged, in order to judge of the veracity of the parties, that they should appear before the Court.

Application granted, evidence to be taken before Mr. Advocate Hill, failing him the R.M. of Bloemfontein, costs to be costs in the cause.

Buchanan, J., observed that he did not think it would be to the disadvantage of plaintiff if defendant gave his evidence on commission.

#### HOLMES AND CO. V. FRYER.

This was an application for the removal of trial to the R.M.'s Court at Upington. Dr. Greer was for applicant (Fryer); Mr. Benjamin was for respondents.

The matter arose out of a dispute as to certain promissory notes. Provisional sentence had been given. The judgment of the Court had not been satisfied. Applicant said that he was unfit to make the long journey to Cape Town.

Buchanan, J., pointed out that security had already been given by Fryer.

Mr. Benjamin said he was not aware of that.

[Buchanan, J.: You ought to have taken out your execution at once.]

Counsel having been heard in argument on the facts.

Buchanan, J.: The present applicant and defendant gave a promissory note to the respondents and plaintiffs on July 1, 1905. This note, on maturity, was not paid. The amount was £178 13s. The holder of the note sued the applicant in the Magistrate's Court of his district on this promissory note, whereupon the defendant took exception under the Act of 1876, and claimed the right to have the case removed to the Supreme Court. The case was removed to the Supreme Court, and provisional sentence was given in November last. The defendant has done nothing since then; he has not satisfied the judgment, he has not entered appearance, and he has done nothing at all. The plaintiffs, fortunately for defendant, have not taken out a writ of execution yet, or provisional sentence would have become final within a month of granting the order. The defendant is

not entitled to play fast and loose with the jurisdiction of the different Courts in this way. He was sued in the Magistrate's Court at the beginning, he objected to that jurisdiction, and he forced the plaintiffs to come to this Court. Now he wants the case to be sent back to the Magistrate's Court. The case is not one in which the Court will make an order. Whether the Court can order a case which has been brought into the Supreme Court to be removed to a Magistrate's Court for trial is a question which I do not wish to settle at the present time. All I can say is that it is not one of those cases which are contemplated by the Charter of Justice. The application will be refused, with costs.

#### ROSENBERG V. FOURIE.

##### Motion—Judgment.

*It is not the practice of the Court to grant judgment on motion in defended cases.*

This was an application brought by Moritz Rosenberg, general dealer and farmer, of Oudtshoorn, upon notice of motion calling upon Jacobus Andries Fourie to show cause why he should not be ordered to restore to applicant, and put him in lawful possession of, certain nine mules, buck wagon, and gear, the property of the applicant.

Applicant's affidavit stated that the applicant let the property to the respondent on lease, which was renewed from time to time. Payments were made by respondent as they became due. The lease finally expired on the 10th April last, and the applicant said that after that date he allowed the respondent to continue in possession on the same terms as were embodied in the lease. The applicant said there were other transactions that he had with the respondent, in respect of which the latter gave him a promissory note for £250 2s. 2d. This note was paid by cheque drawn by the father of the respondent. The respondent said that the promissory note was given in respect of the purchase price of the property in dispute, and, although requested by the applicant to deliver up possession of the mules, etc., he declined to do so.

Mr. Bisset for applicant; respondent in default.

[Buchanan, J. (to counsel): Why did you not institute an action in this case? Why did you proceed by motion?]

Mr. Bisset: I suppose ultimately it would come to that. It would appear from the affidavits that the respondent is not in a substantial position. What one would suggest is that the respondent be ordered to deliver the mules to

the applicant, with leave to the respondent to institute his action.

[Buchanan, J.: It would be introducing a new practice in the Court—obtaining judgment on motion. I will give you an interdict attaching this property pending an action to be brought in the Circuit Court. You need only then issue a summons.]

Mr. Bisset acquiesced in this proposal, and

An order was granted attaching the property, pending an action to be instituted in the Circuit Court by the applicant for recovery of the property, costs to be costs in the cause.

#### ALLEN V. COLONIAL GOVERNMENT.

Sir H. Juta, K.C., was for the applicant, Joseph G. S. Allen, a hotel proprietor, of the Paarl, and Mr. Howel Jones appeared for the Government. Mr. Jones, at the outset, said he might explain that the Government had not had time to file any replying affidavits, as the applicant's affidavits were only served that morning. He would ask the Court to postpone the hearing of the application.

Sir H. Juta said if the interdict was not granted, he would ask for access to and from the premises. His client had bought some erven close to the Railway Station, where the Government proposed to erect a fence along an old road, and so prevent the applicant having access to his premises. The Railway Department stated that the road was their land. Counsel thought the whole matter might stand over until the action was decided, but if they insisted on fencing he thought the Government should not fence in front of the two hotels.

Buchanan, J. (after hearing Mr. Jones on the facts) said he would take it as an *ex-parte* application, and he granted a rule *nisi*, returnable on February 1, to operate as an interim interdict, calling on the Government to show cause why an interdict should not be granted pending an action to be instituted by applicant forthwith, restraining the erection by the respondents of any fence between the points marked "e" and "f" on the plan attached to the application, costs to be costs in the cause. His Lordship suggested that there should be no delay in taking the action.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.O.M.G., LL.D.).]

ADMISSIONS { 1906.  
Feb. 1st.

Mr. M. Bisset moved for the admission of Robert Rhodes Reed Barrett Howes as an advocate.

Application granted and oath administered.

Mr. Van Zyl moved for the admission of Thomas Norman Palk Palmer as an advocate.

Application granted, and oath administered.

Mr. Howel Jones moved for the admission of Charles William Henry Lansdown as an advocate.

Application granted, and oath administered.

Mr. W. P. Buchanan moved for the admission of Josias Jacobus Malherbe as an attorney and notary.

Application granted and oaths administered.

*Ex parte* LOW.

Attorney—Admission.

*The Court admitted an articled clerk who, during the absence of his principal, had discharged purely nominal duties without salary, as acting secretary to a Divisional Council for a period of three months.*

Mr. W. P. Buchanan moved for the admission of Stirling Graham Low as an attorney and notary.

Mr. Searle, K.C., opposed, on behalf of the Law Society. The opposition was based on the ground that the applicant for a period during the time he was articled had acted as secretary to the Divisional Council. The affidavit of the applicant set out that the books of the Council were kept in the office of the attorney with whom he served. In the temporary absence of the secretary, Jacobus Viljoen, the applicant had acted as secretary for three months. He drew no salary for the work done.

De Villiers, C.J., said he quite agreed with the contention of Mr. Searle that the practice of taking additional duties was not to be commended, as it was a practice which was liable to abuse. In

the present case, however, there was not such an abuse. The additional duties performed by the applicant were merely nominal, and they certainly did not interfere with the due performance by him of his duties as articled clerk. The application would be granted, but there would be no order as to costs, as the Law Society were quite justified in coming into court.

On the application of Mr. Buchanan, the oaths were ordered to be taken before the R.M. of Prince Albert.

### PROVISIONAL ROLL.

MACCALLUM AND OTHERS { 1906.  
v. STEVENS. { Feb. 1st.

Writ of arrest—Removal from the Colony.

*Writ of arrest confirmed, although the defendant alleged that he did not intend to leave the Colony unless he could first settle with all his creditors: it being clear that he had made all the necessary preparations for removing from the Colony.*

Mr. Schreiner, K.C., appeared for the first plaintiff, Mr. P. S. T. Jones for the "Cape Times" and John Garlick, Mr. Lewis for F. B. Andrews, and Mr. W. P. Buchanan for the defendant. Mr. Schreiner moved to make absolute the final order of sequestration of the defendant's estate, and that the rule nisi to attach 55,000 shares in Sacco, Limited, and £150 in the hands of the Deputy Sheriff be made absolute.

Mr. Buchanan said that the defendant would not now raise any objection to the sequestration of his estate. It was admitted that certain money was owing by the defendant, but he denied that he owed the first plaintiff as much as was claimed.

Charles Henry Stevens, the defendant, went into the box, and denied that on the 17th January he attempted to leave the country. Witness never had a bill of costs from the first applicant.

By Mr. Schreiner: The costs were mainly in respect of his recent prosecution. Witness had asked Mr. MacCallum for a bill of costs. He was going away on the 17th January, provided he could fix up his affairs. On the previous Saturday he wrote to Mr. MacCallum stating that he intended to leave on the Wednesday, and asking for an account of his indebtedness. He denied

that he had taken a ticket, or that he approached the shipping company. Other people were not making arrangements for his departure.

[De Villiers, C.J.: What is Sacco, Limited?—It is a cure for consumption, my lord.

Continuing, under cross-examination, the witness denied that he intended to leave without making provision for his debts. His lawful debts amounted to about £350. The defence in the criminal case amounted to £243 16s. 3d., according to the statement of the applicant. Witness thought he owed Mr. MacCallum about £60. His arrest prevented him from paying his creditors.

By De Villiers, C.J.: He had been in Cape Town about four years. Formerly he was a cycle agent.

Mr. Jones was about to cross-examine the witness, when De Villiers, C.J., intimated that there was no occasion for further cross-examination.

Mr. Buchanan was then heard in argument on the facts.

Without calling upon counsel for the plaintiffs,

De Villiers, C.J.: Whatever doubts may exist in this case, upon other points there seems to me to be no doubt whatever upon this point: that the defendant is insolvent, and that the sequestration must now be finally adjudged. A ground upon which the application for sequestration was applied for and granted was, *inter alia*, that the defendant was about to leave the Colony. The defendant now consents to the sequestration of his estate, and I take it that that consent involves that the ground upon which the application was made was a good one. But, even if it was not, I consider that there is sufficient evidence in this case to show that the defendant was making preparations to leave the Colony. It would be easy for a debtor under such circumstances to say that his intention was to leave, only providing he could satisfy his creditors, but all his preparations were made, and I think that was a sufficient ground for the application to the Court for the arrest of the defendant under the 8th Rule of Court. The Court will therefore confirm the arrest, with costs. Then, upon the application for sequestration of the estate, the Court will make an order that the sequestration be adjudged, and this order will also involve the release of the defendant. Then, in regard to the rule nisi, I consider that at this stage the Court should not decide the question, but should wait until trustees are appointed. I am not sure within what time trustees can be appointed; I suppose within a month. The Court will continue the rule, which is to be served on the trustee of Stevens's insolvent estate on his appointment, and which will be returnable on the last day of February.

**O'REILLY V. WASSEBZUG.**

Mr. Jones moved for provisional sentence on a taxed bill of costs for £31 10s. 9d.

Granted.

**AFRICAN HOMES TRUST V. SCHROEDER.**

Mr. Benjamin moved for provisional sentence for £50 on a certain guarantee of fidelity.

Mr. P. S. T. Jones appeared for the defendant.

The guarantee was given in writing, by which the defendant undertook conditionally upon the plaintiffs appointing a certain individual as their agent, to be responsible for payment, in certain circumstances, of a sum not exceeding £50.

Mr. Benjamin said he could not maintain that this was a liquid claim.

De Villiers, C.J., said the principal case would have to be gone into.

Mr. Benjamin said that he would ask that the summons in the present case should be allowed to stand as summons in the principal case.

Mr. Jones said his client had been brought into court on a wrong procedure, and he submitted he should have his costs.

De Villiers, C.J., said it appeared to him that this was a matter in which the plaintiff should go into the principal case to prove the loss for which he sued the surety. An order would be made accordingly, costs to be costs in the cause.

**KOCH V. CRAIG.**

Mr. Bisset moved for the final adjudication of the defendant's estate.

Granted.

**VAN DER SPUY V. GRAY AND ANOTHER (TRADING AS GRAY AND SON).**

Mr. W. P. Buchanan moved for the discharge of a provisional order of sequestration.

Granted.

**DU TOIT V. AJAM.****Insolvency—Act 38 of 1884—  
Interests of creditors.**

*A provisional order of sequestration having been made upon a petition, stating that the defendant was insolvent and that it would "be in the interest of" the creditors that the estate should be sequestrated.*

*Held, that the use in the petition of the words: "in the*

*interest," instead of "for the benefit" of the creditors, was not fatal to the order.*

Mr. Russell moved for the final adjudication of the defendant's estate.

Mr. D. Buchanan appeared to oppose on behalf of one Omar Crabier, a creditor.

The petition set forth that the petitioners, Jacobus du Toit and Fatima du Toit, were creditors of the respondent to the amount of £265. It was to the advantage of the creditors to have the estate sequestrated.

In the replying affidavit Crabier said that the petitioners were Ajam's brother-in-law and sister. Ajam had previously applied to surrender the estate voluntarily, and the Court had refused to accept the surrender. He believed that there was a collusive arrangement between Ajam and the petitioners, and that there was no real debt owing by Ajam to petitioner. If the application were granted there would be much additional expense, and assets wherewith to satisfy deponent's claim would be considerably lessened. The object of the other parties was to cause him as much loss and inconvenience as possible. Crabier, on a judgment, attached sufficient property to satisfy his claim six months ago.

It appeared from further affidavits that Crabier's claim was in respect of the purchase price of property bought by Ajam from him. Ajam stated, in an affidavit, that Mrs. Du Toit had lent money to Ajam and it was in respect of this that Du Toit and his wife claimed. Petitioners stated it would be to the interest of the creditors that the estate should be finally sequestrated.

Mr. Buchanan having been heard in argument on the facts.

De Villiers, C.J.: On the whole, I am of opinion that this is a case in which sequestration should be adjudged, because that course would do least injustice to all concerned. It is quite possible that the plaintiffs may be able to prove, in case of sequestration, that they are *bona fide* creditors, and in that case it would be very hard upon them that their rights should be swamped entirely by a creditor who has taken out execution. It is true, as counsel has stated, that the Court favours a vigilant creditor, but it does not do so at the expense of other creditors, who have equally good claims, but who have not put forward their claims because, as in the present case, they believed that the debtor would obtain sequestration voluntarily. It is only after the debtor failed herself to obtain sequestration that the petitioners came forward and took action. If it should turn out that the plaintiffs are not *bona fide* creditors the trustee will protect the

estate, and at all events there will, as I judge from the evidence, be sufficient to pay the amount claimed by Crabier. But then it is said that the words used in the petition are "in the interests" instead of "for the benefit" of creditors. Well, it seems to me that there is very little difference between the two; if it is for the benefit of creditors that the estate should be sequestrated it is in their interest and *vice versa*. It is also said that there are only two creditors, but at all events the plaintiffs are in a majority, and therefore it is to the benefit of the creditors, that is, the majority of the creditors, that sequestration should be adjudged. As to the costs, I consider it would be well to let the costs be costs of sequestration, more especially by reason of the fact that, when voluntary sequestration was applied for, the Court refused to grant it. It is quite possible the plaintiffs may not be able to establish their claim as creditors, when the trustee goes into the whole matter, and therefore the matter ought to be left over for further consideration by the trustee, and as to the costs of both sides, I consider they should form part of the costs of sequestration. The Court will, therefore, make an order that sequestration be adjudged, and that the costs of both parties form part of the costs of sequestration.

**SCHUTJE AND CO. V. GOTTLIEB.**

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.  
Granted.

**KEEP BROS. V. BRANDON.**

Mr. Van Zyl moved for final adjudication of the defendant's estate as insolvent.  
Granted.

**REIDERBERG AND DUNCAN V. GOLDING.**

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.  
Granted.

**HIDDINGH V. ABDURAGHIEN.**

Mr. Benjamin moved for provisional sentence on a mortgage bond, and that the property specially hypothecated be declared executable.  
Granted.

**WILSON V. BOYCE.**

Mr. W. P. Buchanan moved for provisional sentence for £132 on a mortgage bond with interest at 10 per

cent. from 1st July, 1905, and that the property specially hypothecated be declared executable.

Granted.

**SILBERBAUER V. LEBNER.**

Mr. Roux moved for provisional sentence on a mortgage bond for £530, with interest at 6 per cent., and that the property specially hypothecated be declared executable.

Granted.

**TBOLLIP V. BOYCE.**

Mr. Gutsche moved for provisional sentence on a mortgage bond for £100, with interest at 6 per cent. from 1st January, 1904, and that the property specially hypothecated be declared executable.

Granted.

**MOSES V. HALL**

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £750, with interest from July 1, 1905, and that the property be declared executable.

Granted.

**BLERSCH V. LUCAS.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £700, less £400 paid on account, with interest and costs, and that the property specially hypothecated be declared executable.

Granted.

**ESTATE LITHMAN V. DAVIDS.**

Mr. Swift moved for provisional sentence on four mortgage bonds.

Granted.

**NATIONAL BANK V. HARRIS.**

Mr. Watermeyer moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court. Judgment was given on August 1 for £600 on a promissory note. The defendant appeared in Court and said he had no money. Formerly he was a bookmaker, but since bookmakers were abolished he had no employment.

Cross-examined by Mr. Watermeyer: He was a foundation member of Tattersall's Club, and paid £23, which had not yet been returned to him. He was suffering from rheumatic gout and could not do any work. Tattersall's Club was closed down pending an application to Parliament to alter the law.



De Villiers, C.J., said if the £23 deposited was available an application might be made to attach it, but there would be no order at present, as there was nothing to show that the defendant had any means.

#### DUSSEAU AND CO. V. HARTMAN.

Mr. Douglas Buchanan moved for a decree of civil imprisonment against the defendant.  
Granted.

#### ROOTH V. FISCHER.

Mr. Gutsche moved for provisional sentence on an unsatisfied judgment of the Court of the R.M. of Prince Albert.  
Granted.

#### BRUYNS V. WILSON.

Mr. Roux moved for provisional sentence on four promissory notes for £21, £21 8s. 6d., £55, and £25.  
Granted.

#### WESTERN W. AND S. CO. V. SMUTS.

Mr. Roux moved for provisional sentence on a promissory note for £161 17s., less £75 paid on account, with interest.  
Granted.

#### MACLEOD V. WERTH.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.  
Granted.

#### STEWARTS AND LLOYDS V. TOUCHER.

Mr. W. P. Buchanan moved for the final order of sequestration against the defendant's estate.  
Granted.

#### BARNETT AND FOSTER V. ADELAIN BROTHERS.

Mr. D. Buchanan moved for the final adjudication of the defendants' estate as insolvent.  
Granted.

#### LOUWITZ V. SACKS.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.  
Granted.

#### ILLIQUID ROLL.

VAGGERS V. HOPKINS. { 1906.  
Feb. 1st.

Mr. Gutsche moved for judgment under Rule 329d for £187 10s., for work done and material supplied.  
Granted.

#### PARKER AND SONS V. FRANJSEN.

Mr. D. Buchanan moved for judgment under Rule 329d for £68 1s. 11d., balance and proceeds of a timber sale.  
Granted.

#### COLONIAL GOVERNMENT V. ROSENBERG.

Mr. Howel Jones moved for judgment under Rule 329d for £220, less £60 paid on account, an amount due for income tax.  
Granted.

#### BANK OF AFRICA V. CUNNINGHAM.

Dr. Rainsford moved for judgment under Rule 329d for £5,074 17s., the amount of an overdraft and cash advanced, with interest and costs.  
Granted.

#### GOURLAY AND CO. V. CUNNINGHAM AND DE JONGH.

Mr. M. Bisset moved for judgment, under Rule 329d, for £144 7s. 11d., being an amount of goods sold, and for £500, less £437, paid on account, money lent, with costs.  
Granted.

#### FEDERAL SUPPLY CO. V. TESKE.

Mr. Bailey moved for judgment, under Rule 329d, for £64 2s. 8d., with interest and costs.  
Granted.

#### CAPE TOWN TOWN COUNCIL V. CUNNINGHAM.

Mr. Gutsche moved for judgment, under Rule 329d, for £120 6s. 2d., and £6 15s., for rates and water supplied. Since summons, £66 15s. had been paid, leaving a balance of £60 6s. 2d.  
Granted.

#### DE VILLIERS AND CO. V. FRAMES

Mr. De Waal moved for judgment, under Rule 329d, for an amount of cash lent, with interest and costs.  
Granted.

**Granted.**

**Granted.**

**Granted.**

## Granted.

**Granted.**

**Granted.**

{ 1906.  
Feb. 1st.

**Granted.**

**Granted.**

**Rule made absolute.**

**Rule made absolute.**

**Granted.**

## Granted.

Rule made absolute, Mr. Lewis to act as counsel.

**Granted.**

**Granted.**

## Granted.

A rule was granted, calling on all persons concerned to show cause, on May 11 next, why an order should not be granted as prayed, the rule to be published once in the "Melbourne Argus" and once in three Cape Town dailies.



*In re* THE ROYAL HOTEL COMPANY.

Mr. Roux moved for confirmation of the second report of the liquidation of the Royal Hotel Co., Ltd.

The report was ordered to lie for inspection.

## OXENDALE AND CO. V. WOOD.

Mr. Benjamin moved for the appointment of a Commission to take evidence in England of defendant and other witnesses.

Dr. Greer for the plaintiff (Wood) consented.

The application was granted, and the case removed from February 20 to next term.

## WENTZEL V. GREEFF AND WALTER.

Mr. J. E. R. de Villiers moved for an order to sign judgment against defendants.

Granted.

## VAN DER VYVER V. VAN DER VYVER.

Mr. Le Roux moved for an order declaring Johanna Christina van der Vyver to be mentally incapable of managing her own affairs, and for the appointment of a curator. The curator (Mr. Reitz) appointed to report on the respondent's condition stated that she was an imbecile. She was in the care of her brother and sister, and was quite happy and contented with them.

Order granted, Mr. H. C. H. Hauptfleisch being appointed curator.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

## GENERAL MOTIONS.

SANDERS V. CAPE TOWN ( 1906.  
TRAMWAY CO. ( Feb. 2nd.

Mr. Watermeyer moved, on behalf of William King Sanders, for a rule nisi calling on the respondent to show cause

why he should not be allowed to sue the defendants *in forma pauperis*.

The affidavit of the applicant was to the effect that he was a coachbuilder by trade, and that whilst driving along the Sir Lowry-road, owing to the condition of the road, caused by the Tramway Company in relaying the tram-line, the horse bolted, and threw the occupants of the cart out. Sanders received such injuries that he was confined in hospital for seven weeks. He considered he had sustained damages to the extent of £400, and as he was not possessed of property to the value of £10, he moved for leave to sue *in forma pauperis*.

Sir H. Juta said that this case had been before Mr. Justice Maasdorp when certain affidavits were filed for the respondent, but the matter was postponed to enable the applicant to amend his petition on the grounds that the petition disclosed no grounds for the action. Sir H. Juta read replying affidavits, which set out that every care was taken in relaying the blocks.

The applicant did not even suggest in what respect the company was acting unlawfully, nor did he give any details of the accident, or as to how or where it occurred. The applicant should reasonably give some details of the accident. The superintendent of the Tramway Company saw the cart after the accident, and he stated that the shaft was in a rotten state, and might have broken at any time. In submitting a claim, one of the applicant's attorneys stated there was a collection of rails on the road, but the superintendent was in a position to state that there was no such heap of rails. A witness of the action, in an affidavit, said the driver had a large picture in front, which seemed to hamper him in the control of the horse.

De Villiers, C. J., said he thought it was rather unusual to go into the merits of the case at that stage.

Sir H. Juta said the applicant should show a *prima facie* case. There was absolutely nothing in the petition to show that the defendants were responsible.

De Villiers, C.J., said he thought it would be advisable to have the additional affidavits read.

Mr. Watermeyer read the affidavit of the applicant, in which he stated that he had read the affidavit of Donald McDonald. As alleged in the petition on the 1st August he was proceeding along Sir Lowry-road in a cart, which was in perfectly sound condition. The respondent company were relaying the tram-line, and, owing to carelessness, the relayed rails were from nine to twelve inches above the level of the road. At the spot where the accident occurred the rails were taken up. So as to avoid a collision with an approaching tram, the applicant had to drive

on to the portion of the road ripped up, with the result that the shaft of the cart was broken, and the horse bolted, throwing the occupants out.

[De Villiers, C.J.: I do not think the Court can go into the merits of the case. Doesn't the petition show a *prima facie* case?]

Sir H. Juta: I do not think so my lord.

Sir H. Juta contended that there was a broad road over which the applicant could have driven without turning into the right side.

[De Villiers, C.J.: But isn't there a board put up?]

No, as it prevented the public getting on the trams.

[De Villiers, C.J.: That may be very good evidence, but it cannot be gone into now. If a person travelling on the road meets with an accident through the carelessness of the Tramway Company, he is entitled to take proceedings to recover damages.]

He must travel on the road, and not on the tram-line.

De Villiers, C.J., it was not denied by the defendants that the plaintiff was entitled to sue *in forma pauperis*. But certain requirements were necessary before the Court could grant applications. The main requirement was that there should be a certificate of counsel appointed by the Court for the purpose of ascertaining the question as to whether plaintiff had a probable cause of action. Such a certificate was forthcoming in the present case. The defendants contended that the petition did not disclose any cause for action. It was quite true that it was somewhat vague in its wording, but when the matter first came before the Court, the Court authorised the petition to be supplemented by further affidavits to state what the real cause of action was. Such affidavits were now forthcoming, and he thought that if the petition was read by the light of the affidavit now forthcoming, there certainly appeared to be a *prima facie* case. It was quite true that the defendants might be able to prove everything stated in the counter affidavits, but it was not at that stage that the merits of a case were to be tried. The only question was, was there a probable cause of action? He (his lordship) thought there was a *prima facie* cause of action. The travelling public had a right to the use of the roadway which had to some extent been appropriated by the Tramway Company. If the Tramway Company, during their work, temporarily endangered the public, they should take steps to minimise the danger. In his opinion, there was sufficient cause shown to make the rule absolute. There would be no order as to the costs of the application at that stage, but the plaintiff would be at liberty to move

when the final judgment was given, for the costs to be costs of cause.

Messrs. Fairbridge, Arderne and Lawton were appointed attorneys, and Mr. Watermeyer counsel in the case.

COATES AND COTTRELL v. { 1906.  
S. JOHN'S BENEFIT SOCIETY. { Feb. 2nd.

Benefit Society—Constitution—  
*Ultra Vires*.

*A majority of members of a benefit society which had received its charter from the Grand Lodge of Free Gardeners in Scotland resolved to return the charter and apply for a fresh charter from the Grand Lodge in England.*

*Held, that the applicants, who had received a certificate of membership in connection with the Grand Lodge of Scotland and who had voted in the minority, were entitled to an order declaring the resolution to be null and void, and interdicting the payment of any of the funds of the society for the purpose of obtaining the charter from the English lodge, in the absence of any rules authorizing such a fundamental alteration of the constitution.*

Mr. W. P. Buchanan moved on behalf of the applicants, Joseph John Coates and Lewis Cottrell, for an order restricting the defendants, the secretary of the St. John's Benefit Society, in connection with the Grand Lodge of Scotland of the Ancient Order of Free Gardeners from paying out of the funds of the society any money for purposes contemplated by a certain resolution passed at a meeting of the society on the 26th September last, pending an action to be instituted, and also to declare null and void a resolution to the effect that the St. John's Society in future work under the charter of England.

When the case was before the Court in December last, after the different affidavits had been read, the case was adjourned to see if it was not possible for the parties concerned to settle their differences, and if possible thus save an action.

The application was opposed by Mr. De Villiers.

The applicant's petition stated that they were members of the society, which had for its object the raising of funds

by entrance fees, subscriptions, fees, fines, etc., for various benefit purposes. At a meeting of the members of the society in December last, it was resolved by the majority of members (several remaining neutral), that the charter of the Lodge of Scotland should be returned to Scotland, and that the society in the meantime work under the Free Gardeners' Rules locally as the St. John's Benefit Society, pending a final decision, a minority of eight voted against it, amongst whom were the petitioners. At a subsequent meeting held in September last, it was agreed by a majority of members that the society in future work under the charter of England, and that the sum of £10 be paid out of the funds of the society for the purpose of paying the expenses of initiating 12 of the members into the British Order of Free Gardeners. Petitioners lodged an objection to the diversion and misappropriation of the sum from the funds of the society for an object not contemplated by the rules or by members who had originally contributed to the society; wherefore petitioners prayed that the Court would grant an order declaring the resolution void, and grant an interdict as prayed.

Mr. De Villiers said that this was the second time the application came before the Court. On the previous occasion it was adjourned to enable the applicants to show the difference between the British order and the Scottish one.

[De Villiers, C.J.: If I had known that at first I would have ordered the case to stand over for Mr. Justice Maasdorp.]

Mr. De Villiers said the applicants had had ample opportunity of proving the difference between the two societies, but had not yet done so. Unless the applicants could show that working under a new charter changed the character of the society, they should fail in their application.

De Villiers, C.J., said that as far as he could gather the society was formed on a charter from the Scottish Lodge.

They have acted without a charter for the past twelve months.

[De Villiers, C.J.: But hasn't the Grand Lodge of Scotland some authority over them?]

We would like to know that.

Mr. Buchanan said he presumed the parent institution would have some control over its children. That there was some supervision was apparent.

De Villiers, C.J., said it seemed clear from the affidavits that for the purpose of establishing the society in connection with the Grand Lodge of Scotland, it was necessary for the local society to obtain a charter from the Grand Lodge of Scotland for the establishment of the local society. The rules of the local society were headed: "Rules of the St. John's Benefit Society in connection with the Grand

Lodge of Scotland," and the certificates given to the members were given from the St. John's Benefit Society in connection with the Grand Lodge of Scotland. A meeting was called by the ruling authorities of the local society for the purpose of considering whether there should not be a change of charter and whether the society should not be in connection with the British Lodge, instead of the Scottish. Now, if this had been a voluntary act on the part of all the members, the Court would not have intervened, but eight of the members voted against the change, and notwithstanding their objection, a fresh charter was obtained from the British Lodge. That seemed to him such a fundamental alteration in the constitution of the society as altogether to exceed the power of a majority of the members. The rules of the society confer no such power on them, and on principle no such authority can be held to vest in them. The contract with the members was that they were to be members of a society in connection with the Grand Lodge of Scotland, and the local society had no right to alter the contract of any members of the society if any of the members objected. That seemed perfectly clear, and even if the rules of the Grand Lodge of Scotland did not differ from the rules of the British Lodge, his ruling would be the same, because if a person wished to remain affiliated on sentimental or national grounds, the other members of the society had no authority to substitute any other Grand Lodge for the parent lodge. For those reasons the Court was of opinion that the applicants were entitled to have it declared that the resolution was void, and that there would be an interdict to restrain the secretary from using the funds of the society for the purpose of obtaining a fresh charter. The application had been made against the trustees of the society, and he thought that the costs of the application should come out of the funds of the society.

Mr. De Villiers: What is the ruling with regard to the five guineas already paid for the charter?

[De Villiers, C.J.: That will have to be replaced by those who paid it out.]

#### KALK BAY MUNICIPAL COUNCIL V. COLLIE.

#### Contract—Removal of materials—Interdict.

*One of the conditions of a contract entered into by the respondent with the applicant Council, was that all the materials brought by the contractor on the works should be*

*deemed to be the property of the Council and should not be removed during the progress of the works without the written order of the Municipal engineer. Before the completion of the work, the respondent, without the consent of the engineer, removed a pulsometer from waste land of the Council to a shed some distance off, and kept the key of the shed in his own possession.*

*Held, that there had been a breach of the condition.*

This was an application to make absolute a rule nisi restraining the respondent or his agents from removing any further materials or implements from the drainage works in connection with the Kalk Bay Municipality.

The affidavit of W. T. Olive (Acting Engineer of the drainage works), stated that the respondent was the contractor for the drainage works, and that he entered into the contract on September 15, 1904. In terms of the contract all materials, timber, tools, etc., brought by the contractor on to the works were deemed the property of the Council for the time being, and were not to be removed during the progress of the works without the written orders of the Engineer, and in case of the suspension of the work by the Engineer for any act or default of the contractor, or of the work being taken out of the hands of the contractor, the materials should be subject to be used in the completion of the work. About December 23 last the respondent caused to be removed from the works a pulsometer, against the protest of the Engineer, and although requested to return it had failed to do so. Since that date he had removed certain timber and other articles from the works, in contravention of the section, and against the Engineer's express instructions.

The replying affidavit of the respondent stated that since the granting of the rule nisi the applicants had taken the work out of his hands, and had taken possession of all his plant, machinery, etc., used in connection with the work. He submitted that there never was the slightest necessity for the application, inasmuch as he never intended removing any portion of the plant from the works during the progress of same. With regard to the allegation that he removed the pulsometer, he admitted having hired a store in which to keep it when it required shelter. Before ceasing work for the Christmas holidays he gave his staff orders to remove all plant and tools not actually required, so as

not to impede the traffic on the road, and they, as far as possible, placed under shelter such plant as was too bulky to be removed into the store. In doing so he was actuated solely by the desire to leave the road as free as possible during the holidays, and also to preserve the plant, etc., from injury. With regard to the other allegations with reference to the timber, the affidavit stated that Olive complained to respondent that there was an unnecessary amount of timber projecting out of certain excavations at St. James. This quantity of timber had been used when it was impossible to say how deep the timber would have to be sunk, and at the time the complaint was made it was evident that owing to the rock having been found comparatively near the surface, and that so great a quantity was not required, respondent therefore ordered its removal. It was this timber, and certain other timber used in shoring excavations which had been completed and were being filled, that was removed from the public road, and stacked on some waste ground adjoining which had been utilised for the work ever since the drainage had been started, and the timber remained there ready for use in connection with future excavations. Respondent was always ready to continue his contract.

Mr. W. P. Buchanan for applicants; Sir H. Juta, K.C., for respondents.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said that the respondent entered into this contract with his eyes open, and he must be presumed to have known the terms of the contract, and he was bound by those terms and conditions, however stringent they might be. The 18th section of those conditions was certainly as stringent as any employer could, under any circumstances, insist on. Under the heading, "Materials brought on the ground," it was stipulated that all materials, implements, engines, tackle, timber for shoring, tools, etc., brought by the contractor on the works should be deemed the property of the Council for the time being, and should not be removed during the progress without the written order of the Engineer, etc. It was stated that in the present case the pulsometer was taken down from certain waste land and placed in a shed belonging to the respondent, and by him placed under lock and key. Not only was there no written consent, but there was an actual protest against the removal, and notwithstanding this the pulsometer was placed in the shed, and there was no tender by the respondent to the Council, or the Engineer, of the key to allow the Council to retain control over them. Under those circumstances the Court cannot hold that there was not a removal, and that

thus there was a breach of the 18th section of the conditions, and that the rule granted was a proper one. It might be that since the rule was granted the necessity for an interdict had fallen to the ground, but on the question of costs he did not see why the respondent should not pay the costs, as he did what he was not justified in doing. As to the timber the case was not so strong against the respondent. The terms of the contract were very wide, and the respondent should not have entered into it if he intended to repudiate it in the way he had.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN  
and the Hon. Mr. Justice HOPLEY.]

THE CAPE TIMES, LTD. V. THE ( 1906.  
SOUTH AFRICAN NEWS, LTD. ( Feb. 2nd.

Libel — Newspaper — Trading  
Company — Damages — Prac-  
tice.

*The S.A.N. (a newspaper published in Cape Town) accused the C.T. (another Cape Town paper) of suppressing a report of a certain informal meeting of a quasi private character, in the course of which meeting certain strictures were made by one of the directors of the C.T.: and the S.A.N., in a published article, suggested that the said report was suppressed from interested motives. The C.T. now sued the S.A.N. for damages for libel, but special damage was not pleaded. The defendants applied for absolution from the instance.*

*Held, that as the C.T. had not claimed to have been injured in its business, absolution from the instance must be granted.*

*Semle: If a defendant intends to apply for absolution from the instance on the ground that the declaration discloses no cause of action; exception should be taken to the declaration.*

This was an action in which the Cape Times Limited sued the South African

Newspaper Co., Ltd., for £5,000 as damages for alleged libel.

It appeared that the action arose out of circumstances connected with the interim election for the Cape Town Council, which took place last September. The plaintiffs' declaration was in the following terms:

1. The plaintiff is the Cape Times Ltd., a company duly registered in Cape Town, owning, printing, and publishing a newspaper circulating in Cape Town, and elsewhere in South Africa, styled the "Cape Times."

2. The defendant is the South African Newspaper Co., Ltd., a company duly registered, and having its head office in Cape Town, being the proprietor and publisher of the "South African News," a newspaper published and circulating in Cape Town, and elsewhere in South Africa.

3. On or about the 11th September, 1905, an election took place to fill certain vacancies in the Town Council of Cape Town. After the declaration of the poll, the candidates and certain other persons were invited to meet the Mayor in the official parlour of the Mayor at the Town Hall, and on the said occasion one Richard Stuttford, one of the successful candidates, and also a director of the plaintiff company, made a speech relative to municipal affairs and the recent election.

4. Thereafter, in the issue of the "South African News," of date September 12, 1905, the defendant company published what purported to be a report of the said speech, and thereafter the said Richard Stuttford wrote to the plaintiff company for publication a letter, which appeared in the "Cape Times" of date September 13, 1905; the plaintiff company craves leave to refer to the said letter when produced at the trial, and to the editorial comments published at the foot thereof.

5. Thereafter, in commenting upon the above, the defendant company printed, published, and circulated in the issue of the "South African News," of date September 15, 1905, in a leading article styled "Disgraceful Allegations," the following false, malicious, and defamatory words of and concerning the plaintiff company, and the management and conduct of its newspaper, to wit:

"Apparently what happened was that the 'Cape Times' thought it well to suppress this interesting expression of opinion by one of its directors, and accordingly decided to suppress the whole report of the proceedings in the Mayor's parlour, which its representative had industriously compiled. After this it invented and communicated to Mr. Stuttford, the ingenious theory that the pro-



ceedings were private, a theory which is not supported by men who have a longer acquaintance with municipal affairs than Mr. Stuttaford. We can only add an expression of our regret that Mr. Stuttaford should have disclaimed his speech, as in our opinion what he said about Mr. Liberman especially did him credit as a young Councillor. However, these events not unnaturally distressed the rebuked 'Cape Times,' and that journal decided to execute vengeance, of all people in the world, on us, and vented its rage in an article which will do much to deepen in the minds of many honest and gentlemanly Progressives the sentiments so frankly expressed by Mr. Stuttaford on Monday night."

6. The said words were intended to mean, and did mean, that the plaintiff company had acted in a dishonest and dishonourable manner in the conduct of its business as proprietor of the "Cape Times" newspaper, and in its dealings with the said Richard Stuttaford; that it had wilfully and deliberately suppressed its own shorthand writers report of the proceedings aforesaid in the Mayor's parlour, because the said Richard Stuttaford had during the course of the said proceedings commented adversely on the attitude taken up by the "Cape Times" newspaper with regard to the said election; and that subsequently, in order to deceive the said Richard Stuttaford, and to prevent publication of his speech aforesaid, had falsely pretended to the said Richard Stuttaford that the said proceedings were private, well knowing that they were not.

7. By the aforesaid false, malicious, and defamatory statements, the plaintiff company has been greatly injured in its fair name, fame, and reputation, and has sustained damages amounting to the sum of £5,000.

Wherefore the plaintiff company claims: (a) The sum of £5,000 as damages; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. The defendant company admits paragraphs 1, 2, and 3 of the plaintiff's declaration.

2 It also admits paragraph 4 thereof, and says that the report therein referred to was a substantially correct report of the said speech.

3. The defendant admits the publication complained of in paragraph 5, and that it referred to the plaintiff, but denies the rest of the said paragraph.

4. As to paragraph 6, it admits that the words complained of meant that the plaintiff company had wilfully suppressed

the report of the speech made by the said Stuttaford for the reason specified in the said paragraph, and the defendant company says that the said statement is true, and that it was in the public interest that it was published. Otherwise it denies the innuendoes set forth in the said paragraph.

5. It says further that the words complained of were published *bona fide*, without malice, and that they constituted a fair criticism or comment upon the conduct of the "Cape Times" with respect to a matter of public interest and importance.

6. The defendant denies paragraph 7 of the declaration.

The replication was general.

Mr. Searle, K.C. (with him Mr. Bisset), for plaintiffs; Mr. Molteno (with him Mr. Burton) for defendants.

Buchanan, J., observed that these newspaper amenities were very common, and were regarded by the public in a Pickwickian sense. He thought it a pity that it should come into court.

Mr. Searle said he would submit that it was a very serious imputation to make. The seriousness of it lay in the fact that Mr. Stuttaford was a director of the "Cape Times," and it was suggested in this article that a certain report of proceedings was wilfully suppressed because Mr. Stuttaford, one of the directors, had spoken against the "Cape Times," that there was an invention of the theory that these proceedings were private, and that that was why the report was not published. He (counsel) submitted that these were allegations which, if true, showed a very wrong, dishonourable, and dishonest method of carrying on a newspaper if a newspaper suppressed proceedings of that kind, and then endeavoured to cover it up by saying the proceedings, after all, were private, and that for that reason they were not reported. When he came to argue the case he could quote authorities to show the libellous character of the statement. The matter was one of importance to the "Cape Times," and it was likely to injure the company in its business.

[Buchanan, J.: What one newspaper says of another is likely to advertise it, and to do it good, but as to injuring it that is quite another question. I can only judge it for myself. I can only say that if I considered it, I would not think it harmful.]

Maitland Hall Park said he was the editor of the "Cape Times," and had occupied the position since September, 1902. He remembered the occurrence in connection with the election last November. He saw the article in the "South African News," headed "Disgraceful Allegations."

Counsel proceeded to read the article.

Buchanan, J., said it appeared that after the election certain people were invited to the Mayor's parlour.

Mr. Searle: Yes, and certain speeches were made there which I shall try to show were not intended to be reported.

[Buchanan, J.: One should hope so, or it would be introducing a new horror into life.]

I shall endeavour to show they were so regarded.

[Hopley, J.: What were the reporters doing there?]

It will be explained, my lord, how the reporters got there.

[Buchanan, J.: I suppose they, too, were invited to share the hospitality of the Mayor.]

Probably; sometimes they do that. The reporter went there apparently to seek the Town Clerk to get information about the polling.

Buchanan, J., said he believed that in the case of the *King* against *Palmer* he gave a direction to the jury as to the law on the point of libelling a Corporation.

Mr. Searle said it had been settled in England that a corporation had a reputation to be protected. Of course, there were cases where it had been held that, where matter is published concerning a non-trading corporation it must be matter affecting certain individual members. A distinction was drawn, at all events, in the English law, between a trading company and a non-trading company. In a case where the Mayor and Corporation sued a paper for libel, it was held that it was an individual matter for them.

[Buchanan, J.: Do you allege that this corporation has been injured in its business?]

[Hopley, J.: You don't specially say the business has fallen off to any extent?]

I do not think it is necessary to say that. I say candidly I do not think the business has fallen off, but I say that it is sufficient that the words published are likely to injure the business, and I have authority—plenty of authority—on that point.

Mr. Park, continuing, said there was no truth in the allegations that he suppressed the report.

Mr. Searle: Is there any truth in the allegation that, as far as you are concerned, as the editor, you wilfully suppressed the report of these speeches at the Town House?

Witness: No.

[Buchanan, J.: Did you consider the meeting private?]

Witness: I was not even aware of the existence of a report.

Mr. Searle: When did you first hear there had been any report?

It was not until I saw the "South African News" the next day that I was aware that anything had been reported.

Is it matter which in the ordinary course would come before you?—No; news matter in the ordinary course does not come before me.

Just explain what comes before you, and what control you have?—The news reporter goes first of all to the reporters' room, where he transcribes the report from the shorthand note. He then takes it to the sub-editor's (Mr. Dimpleby's) room. In the ordinary case, that is to say, in 99 cases out of 100, I would not see these news reports at all until they appear in the paper, and would know nothing about them, but if any case arises where the sub-editor has any difficulty, he would always naturally come to me.

That is, if he is in difficulty as to whether anything should appear?—Yes; he would then appeal to me. That is to say, he regulates matter in regard to space by his own discretion, but if matter which appears to him to be defamatory or libellous comes to him, he would refer it to me.

As a fact, then, you did not know anything about these proceedings? Were you in the office that evening?—I was in the office that night. The only thing I knew about the Mayor's parlour meeting was when Mr. Dimpleby, who comes in about the last thing in the evening to me to hand over the summaries, came in, and made a remark the exact terms of which I cannot recollect. But the gist of it was that he had heard, or that a reporter had said—I cannot swear whether he mentioned a reporter—that Mr. Stuttaford had made some uncomplimentary remarks. I made no observation at all, I think. I simply said "Oh!" and smiled.

[Buchanan, J.: You often hear that?]

Yes. I am quite used to it, my lord.

In further examination, Mr. Park said there was absolutely no truth in the suggestion that someone invented the theory that the proceedings were private. Mr. Stuttaford came in to see him the following forenoon.

Mr. Searle: Just tell me, shortly, without going into detail, what took place when Mr. Stuttaford came in to see you the next day.

Witness: When Mr. Stuttaford came into the room, I was naturally somewhat annoyed about this, and the first remark he made was that he was very sorry at what had appeared in the "News" that morning. I think the answer I made was: "So well you might." Mr. Stuttaford then said: "If you wait a minute, I will explain, and I think you won't take the same view of it." He then said he had not the remotest idea that any of the remarks he made would ever have appeared, but that he regarded the meeting as entirely private.

Mr. Molteno said he would point out that there was no reference to Mr. Maitland Park by the defendants.

[Buchanan, J.: You plead it is the truth?]

Mr. Molteno: We plead, in regard to the first matter, that it was sup-



pressed, and that there was a reporter there, but we do not bring Mr. Park in, and we make no reference to an interview between Mr. Park and Mr. Stuttaford.

[Buchanan, J. (to Mr. Searle): Isn't it sufficient for Mr. Park to say it is absolutely untrue that there was any suggestion made?]

Mr. Searle: I am leading up to the letter written by Mr. Stuttaford, my lord. (To the witness) This was the only meeting you had with Mr. Stuttaford before he wrote this letter to the paper: "Sir,—I was much surprised to find in your morning contemporary a report of some remarks made by me in the privacy of the Mayoral Parlour last night, and I feel sure that His Worship the Mayor would be the last to allow his hospitality to be taken advantage of for the purpose of making 'newspaper copy.' The only thing I would suggest to the reporter in question is that in any future occasion on which he is invited to the privacy of the Mayor's apartment, if it is too much to ask him to drop his business for the time being, at any rate he should be more thorough, and report the whole proceedings which lead up to any remarks made, and correctly report those remarks.—I am, etc., R. Stuttaford?"

Witness: Yes.

Mr. Searle: You made this comment on the letter: "If His Worship the Mayor gives the entree to persons who abuse the privileges of his hospitable parlour by publishing, and publishing inaccurately, as Mr. Stuttaford asserts, what was never intended for publication, this is the Mayor's own concern. If we took the report as it stands, the proceedings, if they were not to be accepted in a purely Pickwickian and postprandial sense, would certainly be more remarkable for sound than for sense, not to speak of good taste. If Mr. Matthews, or Mr. Stuttaford, or anybody else, thought the views expressed by the "Cape Times" in regard to the issues or the candidates were erroneous, the columns of the paper were open to them to say so before the election took place, and to give their reasons. The public could then form their own conclusions, and some good might result from the discussion. But no possible good can come of bottling up wrath until the elections are over, and then talking about "foul blows," as Mr. Matthews is reported to have done. Here we may say that the 'Cape Times' never stated that Mr. Matthews 'knew nothing about municipal work'; what we did say was, he and Mr. Bartlett had, in our opinion, 'shown no grasp of the larger issues of municipal life,' that 'they had shown no desire to obtain such a grasp,' and that they had 'often put themselves in merely factious opposition.' Naturally Mr. Matthews does not share this opin-

ion, and Mr. Stuttaford and others may think with him rather than with us; but we write what we write according to our judgment, on the available evidence, of what is best for the public interest, and this we shall, of course, continue to do.—Editor, 'Cape Times'?"

Witness: Yes, I wrote that. The letter was sent in afterwards, and I added the footnote.

Did you suggest to him that he should write the letter?—No.

[Hopley, J.: Did he suggest to you that he would write the letter?]

He told me he would write a letter.

I suppose you told him that would be the best course to pursue?—Quite the contrary. All I said to him was that I would have to say something about the matter, now it had been published, and that it would be for him to consider what course he should pursue.

Cross-examined by Mr. Molteno: Mr. Park, you say the editor of a paper doesn't necessarily know what is going to appear in the news portion next day; he doesn't see it?—No; he doesn't see all the news.

Do you know your own reporter was present, and took notes at this very meeting?—Yes; I know now.

That he was present with the "News" reporter taking notes of this meeting?—I know he was present now, but I did not know at the time.

But you knew one of your reporters was present, because you had information from Mr. Dimpleby that Mr. Stuttaford had made this speech?—I have already said I cannot positively state whether Mr. Dimpleby said a reporter had told him, but naturally I would conclude it was one of our reporters; but I did not understand from him that these remarks were reported by the reporter.

Did Mr. Stuttaford tell you that he knew his speech would be reported?—He said, on the contrary, that he was absolutely astonished to see a report in the paper.

A number of people will come here to say that both reporters were seen taking notes, and that it was generally regarded that it would appear in the paper next day?—I cannot say what other people say.

You regarded it as private?—As absolutely private.

Mr. Molteno proceeded to cross-examine the witness in regard to an article written by him, in which the words "disgraceful allegations" appeared and asked him whether the words with which the article complained of was headed were not borrowed from this article written by the witness.

[Buchanan, J.: What has that to do with this case?]

Mr. Molteno: I want to show that the words "disgraceful allegations" are borrowed from that article.

Mr. Molteno (to witness): Were you going to take editorial action on this report?

Witness: I was going to comment upon it.

And do you still contend that the meeting in the Mayor's parlour was a private one?—I think so.

And you, on the following day, had an editorial note, which your counsel has read, charging a certain writer with publishing private, confidential reports?—I did not use the word "confidential." I said this was a private meeting, as I understood it.

And you blamed the "News"?—Certainly.

And you also inferred that the "News" had falsely reported Mr. Stuttaford?—I made no such statement.

Mr. Molteno read the foot-note to Mr. Stuttaford's letter, and asked: "You were a little severe, weren't you?"

Witness: I don't think so.

But you are a little severe sometimes?—Well, I do my best.

And some of us suffer sometimes under the sting of your severity?—I am sorry.

And don't you think, Mr. Park, that editors are sometimes a bit too sensitive, a little tender?—I assure you I do not think, personally, I am at all tender. I have had 20 years of it now.

But this awful libel was too much for you?—I consider it one of the worst libels I have ever seen.

You were so angry at this awful libel that you also summoned this unfortunate newspaper for £5,000 damages?—I did.

Questioned as to why the action was not brought with the present one, the witness said he understood from his counsel that it had been proposed to the other side that the actions should be heard together, and that they declined to agree to the consolidation.

Mr. Molteno: How did you know this meeting was private?

Witness: I say I should regard it as private.

But you weren't there. I will tell you what occurred: that the meeting was not private, that after the declaration of the poll the Mayor turned to those standing around him, and asked them to come up. And do you know that the reporters were invited to be present?—Quite probably.

The reporters are not personal friends of the Councillors?—As a matter of fact anyone who knows anything about functions of that kind knows that reporters are frequently asked into purely private functions after public proceedings.

But you know your reporter was present and took notes?—I know now.

Have you got the reporter's note-book?—No.

Have you asked for it?—No.

Do you know that an order of discovery was served on Mr. St. Leger, and

that this reporter's note-book was not put in?—The notes are not kept; we don't put them in a safe.

Did you never ask to see Mr. Short's report?—I do not think I saw Mr. Short, our reporter, for ten days afterwards.

Do you think it any harm to suppress a report in a paper?—Most distinctly, if I did it because it reflected on me in my editorial capacity. It would be most detrimental and damaging to a newspaper if its editor suppressed anything because of his own personal repute.

You know the value of a report is destroyed by something being left out?—That is a matter of judgment. You may leave out part of a public speech, because you do not think it is an important part of the speech. A paper cannot report everybody verbatim. But the editor does not do that because he is afraid for himself it should appear. But in this case there is a distinct allegation that I suppressed it because a director of the "Cape Times" had made a statement, and it reflected on me personally.

Have you dropped this personal action against the "News"?—No, I have not.

In re-examination, Mr. Park said that there were occasions when it was possible for a paper to cut down reports creditably, and times when it was not possible. A paper could not report everything fully. Matter had to be cut down, and instructions were given to the reporters to cut down unimportant parts, but it would be most discreditable for an editor to instruct a reporter to cut out anything because it reflected on him in his editorial capacity. He considered that an editor who did that would be dishonoured.

[Hopley, J.: Would it not come to this: that you would not put in what every man in the street said about the "Cape Times"?]—The point here is that there is an insinuation that I did this, not because it is unimportant, but because it reflected on myself.

But even that is a very good reason for omitting it?—I consider it is detrimental to the editor, and still more detrimental to the journal, because then the public would then have no assurance that news was not struck out, not for the public interest, but for the editor's interest.

In reply to Sir John Buchanan, the witness said he desired that his action should be amalgamated with the present one.

Buchanan, J., said there was no reason why this should not be done.

Charles Malam Dimpleby, sub-editor of the "Cape Times," said that on the evening of the election, Mr. Short, a member of the reporting staff, returned to the office from the City

Hall. All news which came in after 7 p.m. passed through witness's hands. On this occasion, Mr. Short returned somewhat late. Witness remarked that he was late, and Mr. Short then said there had been a little function in the Mayor's parlour, which was informal and private. Witness replied, "Just so," and asked him to let him have his copy quickly, and some time afterwards Mr. Short brought the copy, which witness read over, and sent into the printers. Mr. Short told him afterwards that Mr. Stuttaford and Mr. Matthews had made uncomplimentary remarks with reference to the "Cape Times."

Mr. Searle: Did Mr. Short supply you with a report, and did you suppress it?

Witness: Oh, no.

Did you know as a fact he had taken any notes?—No.

[Hopley, J.: If he did as a fact take notes, he suppressed them to you?—Exactly, my lord.]

In reply to further questions, the witness said he had been twenty-five years in Cape Town, and for sixteen years had been sub-editor on daily papers—the "Cape Argus" and the "Cape Times." He had been at several functions in the Mayor's parlour.

Mr. Searle: As far as you know, are they regarded as private?—I have never known proceedings in a Mayor's parlour after a declaration of poll to be published.

They are always regarded as private?—Yes, so much so, that if there had been a report brought in, I should have questioned the reporter particularly as to what he was doing reporting proceedings of that kind.

[Hopley, J.: I have seen things that were much more private published.]

[Buchanan, J.: The more private it is, the more some papers like to get hold of it.]

Cross-examined by Mr. Molteno: Witness did not think that Mr. Short told him that a "News" reporter was there reporting.

By the Court: Witness did not ask Short if he had taken notes; he did not suppose that a reporter would have taken notes of such proceedings.

Lennox Short, reporter on the staff of the "Cape Times," said he was deputed to report the proceedings in connection with the declaration of the poll, which took place at the entrance to the City Hall in Corporation-street. After the declaration the successful candidates and unsuccessful candidates made speeches, of which witness took a report. Witness wished to verify the figures, which had been read out by the Town Clerk, and on inquiring for that official he was given to understand he was in the Mayor's parlour. Witness thereupon went there. There were about twenty or thirty people present.

The Town Clerk was not there. Witness went and sat down on a couch, intending to wait for the Town Clerk. The door was then shut, and refreshments served, and some speeches of an informal character were made. About a dozen persons spoke, among whom were some of the candidates. Mr. Seabrook, of the "News," sat next to witness. At about the middle of the first speech, Mr. Seabrook asked witness if he intended to give anything, and witness replied in the negative, saying they would take some notes "for fun." Mr. Stuttaford spoke twice during the proceedings. Witness took disjointed notes of three or four speeches. He became personally interested in the proceedings as they developed, and discontinued writing and listened to what was being said. The Town Clerk did not return, and witness saw the figures posted up, and verified them. He took the notes on some loose sheets of paper, which he tore up the same night. He did not tell Mr. Dimbleby he had taken any notes. He did not take notes of Mr. Stuttaford's speech at all, and only a few words of Mr. Matthews' speech. Witness told Mr. Dimbleby that Mr. Matthews and Mr. Stuttaford had been "slanging" the "Cape Times." Witness produced the transcript of his report. He did not transcribe any of the notes he took in the Mayor's parlour. He regarded the proceedings as private.

The witness, under cross-examination, said he found himself in the Mayor's parlour quite by accident.

By Hopley, J.: He could not have got out without inconveniencing other people.

Continuing under cross-examination, witness said he was anxious to have his notes in for the paper as quickly as possible. He only left off taking notes when Mr. Matthews came to the subject of the "Cape Times." He said nothing to Mr. Seabrook.

[Hopley, J.: When you said you were taking notes for fun, what did you mean?]

It is not unusual to take a note for practice.

Mr. Molteno: Did you not think that the fact of your taking notes would lead the gentlemen who were speaking to infer their speeches would appear in the paper?—I was behind a lot of people. Proceeding, the witness said he destroyed his notes taken in the Mayor's parlour.

You told Mr. Dimbleby what had taken place in the chamber?—Yes.

Did you tell him what Mr. Stuttaford said?—Nothing beyond a casual remark.

Was he not interested to know what was said about the paper?—I don't think so.

Did you not tell Mr. Seabrook that you were taking notes for publication?—No.

Counsel said that Mr. Seabrook would state that the witness had asked him how much he was going to make of the report. The witness further stated that he left the Town House along with Mr. Seabrook. Witness had taken no note of what Mr. Stuttaford had said.

You did not think much of the new member? No answer.

[Hopley, J.: Did you know he was one of your directors?—I did not know then.

Re-examined by Mr. Searle: Have you ever had instructions given to you not to take notes of anything said against the "Cape Times"?—Not at all. On the contrary, it is the practice to take anything said against the paper.

You were not taking this report for the paper?—No, I never had any intention of publishing it.

Richard Stuttaford stated in September last he was elected as a member of the Town Council. He was a director, but had never been chairman of the "Cape Times." He was present at the Town House at the declaration of the poll. The Mayor invited him to the parlour to join in a refreshment. When he got to the parlour the room was fairly full. When he entered, Mr. Matthews was speaking about his defeat, explaining that he was not treated quite fairly. The health of the Mayor and other candidates was proposed. Witness then made the remark attributed to him in the "S.A. News."

Mr. Searle: Did you regard the meeting as public or private? Absolutely private. When a man asks you to go to his room to have a drink I certainly regard it as a private meeting.

Had you any idea that there were reporters present taking notes?—No.

Witness further stated that he was at a meeting of a number of the Town Councillors in the "Cape Times" Building. The meeting had nothing to do with the "Times." When the meeting was over he thought he might see Mr. Park, as he did not want the editor of the "Times" to think he would run away from anything he had said. No one had ever communicated to him the theory that the proceedings were private. He explained to Mr. Park that he might make a remark more or less in private, or to Mr. Park himself if he were present, but that he might put it in a different way if for publication. His objection to the report was not so much on the question of what he had said about the "Times," as what he had said about the Mayor. The report led one to suppose that he had said that the Mayor was practically the only possible Councillor who could be Mayor for the ensuing year. Mr. Park took up the position that as the thing had been made public he had the right to comment upon it, and witness took up the position, at any rate, that a letter should be inserted from him. In his letter he

could not go into the details of a private meeting. If reporters were going to report everything that took place in a private room, he thought at any rate it should be a correct report.

Cross-examined by Mr. Molteno: The meeting which had taken place between Mr. Park and himself was not what he would call pleasant. Mr. Park seemed to feel annoyed, as one might if it was said of him that he was wrong. Witness would say many things to a man himself which he would not say if he knew that they were to be published.

Do you say absolutely that you did not see reporters present?—The room was fairly full of men, and from what the reporter now says, he was sitting at the farthest point he could have sat, and there must have been men around him.

You see, Mr. Stuttaford, several members of the Council who were present will be called, and will say that they expected to have the proceedings reported?—I cannot help what other people say.

Witness (proceeding) said that he did not know Mr. Seabrook, but he knew the person now indicated to him by sight. He did not see Mr. Seabrook in the Mayor's Parlour on the evening in question. Mr. Seabrook might have wished witness good-night on the termination of the proceedings in the Mayor's Parlour. With regard to Mr. Seabrook's statement that he (Mr. Seabrook) had congratulated witness on his election as he was leaving the Mayor's Parlour, and that witness, in acknowledging the congratulations, said to Mr. Seabrook, "You will give us a good report, won't you?" witness did not remember a word of it.

Sir William Thorne stated that he was Deputy-Mayor of Cape Town. He had been a member of the City Council for a number of years, and had been Mayor of the City for three years. He was not present in the Mayor's Parlour on the occasion in question, because he had not been invited. He was outside on the evening of the election, and had made a speech outside after the election was over.

Mr. Searle: These functions in the Mayor's Parlour, what do you regard them—public or private?—Private, as a rule.

You regard them as private?—On these occasions, Councillors, candidates, and their friends generally were invited in the old Town House into the Mayor's Parlour. If they made any speeches, and there were reporters present there, those present were appealed to, whether they wished to have their speeches reported.

The practice has been that these functions are considered private?—Yes. I do not know if speeches on these



occasions have been reported. If so, it was only on one occasion.

The Mayor's Parlour is private?—People are not admitted to the Mayor's Parlour unless Councillors or their friends, or by invitation.

By Mr. Molteno: The practice in the old Town House was to ask the consent of the speakers if their speeches could be reported. Witness did not know anything about other persons having seen reporters in the Mayor's Parlour on the evening in question.

Mr. Searle called Mr. Ball.

[Buchanan, J.: What has all this evidence to do with the case?]

Mr. Searle: It is really on a side issue. I do not think that it has anything to do with it. In view of what your lordship says, I will not take the witness's evidence. It is only to show the privacy of the proceedings.

[Buchanan, J.: Is that your case?]

Mr. Searle: I had other evidence to call as to the privacy of the proceedings, but I will not take it now. That is my case.

Mr. Molteno: I am going to make a motion—

[Buchanan, J.: You have a plea on record. Are you going to support it?]

Mr. Molteno: I do not think that the plea affects it.

[Buchanan, J.: Are you going to lead evidence in support of your plea or not?]

Mr. Molteno said that he had a lot of evidence to lead as to what had taken place on the occasion in question; but he would move at that stage for absolution from the instance. He would submit that, after hearing the evidence for the plaintiff, there was no case. He would submit that, on the declaration, there was no evidence in support of defamation. In what did the alleged libel consist? The "South African News" was trying to find an explanation for the fact that, although a reporter of the "Cape Times" was present in the Mayor's parlour, and had taken notes, yet no report had appeared in the "Cape Times," and had said merely by way of explanation of these facts, "Apparently what happened was that the 'Cape Times' thought it well to suppress this interesting expression of opinion by one of its directors, and accordingly decided to suppress the whole report of the proceedings in the Mayor's parlour, which its representative had industriously compiled." Now, even supposing that all this was not true, and supposing that no notes had been taken at all, there was no defamation in the words complained of.

[Buchanan, J.: They why on earth did you not except to their declaration?]

Mr. Molteno: Because of the innuendo contained in the latter part of the declaration. Paragraph 6 of the declaration says: "The said words

were intended to mean, and did mean, that the plaintiff company had acted in a dishonest and dishonourable manner in the conduct of its business as proprietor of the 'Cape Times' newspaper, and in its dealings with the said Richard Stuttford; that it had wilfully and deliberately suppressed its own shorthand writer's report of the proceedings aforesaid in the Mayor's parlour, because the said Richard Stuttford had during the course of the said proceedings commented adversely on the attitude taken up by the 'Cape Times' newspaper with regard to the said election, and, subsequently, in order to deceive the said Richard Stuttford, and to prevent the publication of his speech aforesaid, had falsely pretended to the said Richard Stuttford that the said proceedings were private, well knowing that they were not."

[Hopley, J.: But in argument on exception you could have brought that up.]

Mr. Molteno: Rogers deals with cases of this sort, with regard to the position taken up in refusing to submit a case to a jury. He deals with it under the head of "Words incapable of defamatory meaning."

Mr. Searle, in reply, said that if there was any ground for dismissing the action at the present stage, it could only be that the words complained of were incapable of a defamatory meaning. It was clearly laid down in English law that the assertion that a person conducted a business in a dishonest way was libellous. If it were shown that certain words were capable of injuring a person's or company's business, they constituted libel, even without showing any special damages. It was a question in the present case whether it was a proper way in which to carry on a newspaper business, to suppress what had been said by a director of the newspaper for the special reason alleged in the article in question. Mr. Searle quoted from Mr. Melius de Villiers' Commentaries on Roman-Dutch Law, from the section commencing on Voet (47-10-10), as to what constituted the grounds for an action for libel. He went on to quote from the case of the *South Heathon Coal Company v. The North-Eastern News Association, Limited*, reported in volume 1, 1904, Queen's Bench Division reports, 133. In that case the alleged libel had reference to the insanitary condition of the Coal Company's premises, and judgment was given for the plaintiff. In giving judgment, the Lord Chief Justice, who had tried the case, had said that any statement calculated to bring into contempt, hatred, or ridicule a person or company was libellous, and, further, that a company had a ground for action where the management of its affairs was attacked, and that without alleging or proving special damages. It was held that the plaintiff

company was injured in its credit and reputation. It was only common-sense that in such a matter a company must be treated in the same way as an individual where an assertion was made that was calculated to bring the company in its business into ridicule. If there was no law on the point, a company would be at the mercy of anyone to slander as he wished. Then there was the case of *The Mayor of Manchester v. Williams* (1 Q.B., 1891, p. 54), where it was held that the Mayor could not sue in respect of an article accusing some of the municipal departments with corruption, because the corporation was not a trading company. In the case of the *Metropolitan Omnibus Company v. Harkins*, in which the defendant maliciously published a letter imputing to the company insolvency and mismanagement, it was clearly laid down that the reputation of a corporation should be protected to carry on its business. In *Williams v. Beaumont* (10 Bingham, 269), where the defendant had said that an insurance company had practically defrauded a man's heirs out of a life policy by taking a certain technical exception, which they were entitled to take, Tindall (C. J.) held the action was maintainable, as it was a libel on the partnership by attacking the mode in which that business was conducted. It was not necessary, counsel submitted, to allege or to prove any special damages. Here was a newspaper, and he took it to be ordinary and proper management to supply the public with such news as was likely to interest the public in a fair and proper manner. Now, it was alleged it sent a reporter to report on certain proceedings, and, after he compiled his report in an industrious manner, and when it was found that one of the directors of the company had said something against the policy of the paper, that the editor of the paper deliberately suppressed the report, and then the editor invented and communicated to the person, who had made the speech, the ingenious theory that the proceedings were private.

[Hopley, J.: All that is "apparently." It is not stated as a fact.]

Mr. Searle said it was very seldom the case that libels were stated as facts; suggestions were usually thrown out. The smallest investigation would have shown the untruth of the statement, and surely a person could not escape by the word apparently. If the company had done such a thing it could not be carrying on its business in an honest and fair manner.

Hopley, J., said he could not see how the public could expect the "Cape Times" to put in anything like that. The "Cape Times" was not up for election; it was not running for Mayor even.

Mr. Searle said the defendants stated

it was of public interest and was suppressed

[Hopley, J.: What did it matter to the public whether the "Cape Times" was disparagingly spoken of at that time?]

Mr. Searle: The whole gist of the article is that it was a matter of public interest.

[Hopley, J.: I do not see anything discreditable in the "Cape Times" not reporting it.]

Mr. Searle: Well, my lord, a reporter is sent there, and no report appears. And then, whether the matter is of public interest or not, it is said that, because these things were said by a director of the "Cape Times," they were suppressed.

[Hopley, J.: What hurts you, then, is the imputation?]

Mr. Searle: Yes, the allegation of a motive.

[Hopley, J.: If we were to have all the cases where motives are imputed before us, the Court would have too much work.]

Mr. Searle: I am sorry, my lord; but the question is, When is the line overstepped? To suppress a report for the motives alleged is a discreditable way of conducting the business of the company. The whole insinuation is discreditable to the company, and to the "Cape Times."

[Hopley, J.: I can see there is an element of discredit about it, as far as regards Park—or even Stuttford, if you come to that—but I do not see how the whole company, which now claims, is affected. Can you say how the whole company is damaged?]

Mr. Searle: I say it casts discredit on the "Cape Times" to have it said that it would do such things. And, of course, if it did this to one report, why not to others? That is what the man in the street will say. The man in the street will say, "Oh, that's the way with the 'Cape Times.'" Of course, if the thing has been done once, it may be done any time. Proceeding to refer to the contention that the "Cape Times" Company was not affected, Mr. Searle said that the defendant first asserted that Mr. Park was not referred to, and now, when the "Cape Times" Company sued, said that the company had no action. Mr. Searle went on to quote from the newspaper report of the case of *St. Leger v. Rowles*, tried by the Chief Justice on February 17, in which the plaintiff was awarded £25 damages on account of a statement made that he had caused a garbled report to be published in the "Cape Times"; and to refer to the case of the "*Cape Times*" v. *W. A. Richards and Company* (80, Supreme Court Reports, page 15).

[Hopley, J.: But in that case (the "*Cape Times*" v. *Richards*) the whole company is referred to. In this case it is a question of whether the edi-



tor, or sub-editor, or someone on the staff took a course which he ought not to have taken.]

Mr. Searle: That is just the point. It may be the editor or sub-editor or someone on the staff, and, there being a doubt, the company must have right to sue. Proceeding, he said that a newspaper company had a special duty towards the public not to resort to the practices or methods alleged in the present case; and, when it was said that it resorted to such practices from improper motives, it injured the company. For these reasons, he submitted that the case should not be stopped now, but that the matter should be allowed to proceed, and the whole thing thrashed out. The motion now made for absolution from the instance was most extraordinary, in view of the pleadings.

Buchanan, J.: This is an action brought by one newspaper company against another newspaper company for articles published in the defendants' paper. It is what is known in law as an *actio injuriæ*—an action found upon injury of the nature either to the honour, person, or property of the plaintiff. From the English authority, quoted by Mr. Searle, it would appear that the same principles of law govern such actions, no matter whether the plaintiff was a private individual or a company but at the same time, it is evident that different considerations apply when the action for damages is brought for a libel to a person than when the action is for a libel to a company. There are companies of two kinds, trading corporations and non-trading corporations, and it has been clearly shown that non-trading corporations cannot be libelled in their corporate capacity by imputing an act of the mind or intention. They cannot bring an action for libel if accused of murder or other crimes, and they cannot in the same way be honourable or dishonourable. It is no libel to say of a non-trading corporation that it is corrupt; but so to accuse any individual member of the corporation would, of course, be actionable. In this case the action is not brought by an individual member, but it is instituted by the corporate body, and being a trading company, I think the imputation of libel should be of a nature capable of injuring the reputation of the company in the conduct of its actual business, or in any way which may affect the business of the company. In this case no special damages have been alleged, and none proved, and there is nothing in the case to show that the business of the company has been in any way injured, outside what might be said to be its reputation. The charges complained of are contained in an article published by the defendant paper, and as the case now stands, we must take these charges as being entirely without founda-

tion. The principal complaint is this: The defendant paper says, apparently what happened after the election of certain Town Councillors, that the "Cape Times" thought well to suppress this interesting expression of opinion by one of its directors, and accordingly decided to suppress the whole of the report of the proceedings in the Mayor's parlour, which its representative had industriously compiled. Now, the whole of this statement, as far as the facts are concerned, is utterly without foundation, and as the case stands, we take it, therefore, that this charge is not true as far as the facts are concerned. Then, it says it invented and communicated to Mr. Stuttaford the ingenious theory, which is not supported by men who have larger acquaintance with municipal affairs than Mr. Stuttaford, that the proceedings in the Mayor's parlour were of a private character. Again, this allegation is not founded on fact. I find great difficulty in taking these charges in saying how they can be imputed as a libel upon a trading company. None of these allegations affect the business of the company, none of them affect the trading of the company, nor can I see how these allegations can have injured the company in any way. The suppression of an interesting expression of opinion by a newspaper may or may not be discreditable to the people conducting it. There is sufficient in this article to indicate that the proceedings in the Mayor's Parlour were, in the opinion of the "Cape Times," at least, and in the opinion of a great many people, private, and should not have been made the matter of a public report, but that did not appear to be the view of the editor of the defendant company's newspaper; though it would seem that the defendants' newspaper did not consider any of the speeches made in the Mayor's parlour of sufficient interest to report; but only culled from the speakers certain remarks reflecting on the opposition paper. But then we know that newspapers are very fond of publishing private information, and when they commit a libel in so doing, they must take the consequences. The simple ground on which this case must go off is that, assuming these allegations to be untrue, they cannot be read as actionable against a trading company. In this case, sitting as a juror, on this point I would not say that the statement made by one newspaper of this nature is actionable for a remedy in damages. I will not say anything further, because it is quite possible that in the action brought by the editor for personal damages, he may succeed in showing that he personally has suffered in his reputation as an editor. He is in a very different position. In this case I do not think what was said can affect.

the company in any possible way. It is because the plaintiff is a company, a trading company, and the allegations, made in the way they are made, do not, in my opinion, injure the reputation or the business of the company, or its prospects, in any way, or affect it injuriously, that I think absolution should be given in this case. But then I cannot understand why the defendant did not take exception to the declaration, and the whole application for absolution from the instance is founded on the declaration as it stands. The proper course, if absolution from the instance was to be applied for, was to take exception to the declaration. The case then might have been tried on the exception; it would have saved a great deal of time and unnecessary pleading. In giving absolution from the instance, this is expressly a case in which the Court cannot award full costs. Absolution from the instance with costs up to the exception.

Mr. Justice Hopley concurred, and said he was of the same opinion for practically the same reasons.

[Plaintiffs' Attorneys: Reid and Nephew; Defendants' Attorneys: Sauer and Standen.]

[Before the Hon. Sir JOHN BUCHANAN.]

### TRIAL CASES.

O'CONNELL V. O'CONNELL. { 1906.  
Feb. 2nd.

Mr. Benjamin, for the plaintiff, said that this was an action for restitution of conjugal rights, failing which a decree of divorce. Counsel was about to read the declaration, when

Buchanan, J., pointed out that the publication was not in order, and granted a commission *de bene esse* to take the evidence of Mrs. O'Connell, and extended the return day until 15th April, one publication in the "Gazette," Mr. Advocate Palmer appointed as commissioner.

### KILLINGSWORTH V. KILLINGSWORTH.

Mr. Gardiner was for the plaintiff, and the defendant was in default. The action was for restitution of conjugal rights, failing which a decree of divorce. There had been personal service on the defendant, who resided at present in England. The parties were married in London in March, 1898, and there was issue of the marriage one child, a girl of two years of age. The defendant had gone to England, and refused to return,

The plaintiff, in the course of his evidence, said that until July, 1905, he lived with his wife. In that month she admitted having misconducted herself, and suggested that she should go back to her parents, as she did not think she could honourably live with him. Plaintiff paid her passage home, and from time to time sent her money. At witness's suggestion, his wife wrote a letter to the effect that she would not return. If she had returned to the Colony, he would have instituted an action for divorce, and in order to avoid unpleasant evidence he made the suggestion to her not to return.

[Buchanan, J.: Can you bring any evidence of her adultery?]

Witness: Yes.

Buchanan, J., pointed out that it was unusual to sue the defendant for restitution of conjugal rights, and at the same time advise her not to come back. The application was for a decree of restitution of conjugal rights, and the plaintiff admitted that he had arranged with his wife not to return. The Court must have positive evidence that the defendant would not return, and if she did return the husband was bound to receive her. A decree of restitution would be granted, returnable on the 1st April, the plaintiff to arrange for the defendant's ticket by the steamer. If she failed to return, a rule *nisi*, returnable on the 7th June, would be granted calling on her to show cause why a decree of divorce should not be granted.

### PARKES V. PARKES.

This was an action for divorce brought by Arthur Samuel Parkes, a musician, of Cape Town, against his wife, Jane Parkes, on the ground of her misconduct with a man named Robert Barker, a lance-corporal in the Army Service Corps.

Mr. Long appeared for petitioner; respondent was not represented.

Arthur Samuel Parkes, the plaintiff, said he was married to the defendant, Jane Parkes, at Battersea, England, in June, 1897. They came to the Colony in December, 1903, and lived happily until December of last year. On the 2nd December his wife told him that she had lost all her love for him, and could not live without Barker, and that if she could not have him, she would commit suicide. She left on that day, and remained away until the 4th. She admitted having misconducted herself with Barker. Witness asked her to think of the child, and said he would still forgive her if she would leave Barker. She said she loved neither witness nor the child—a boy of seven—and she afterwards went to live with Barker in Caledon-street. Barker had now gone to Bloemfontein, and wit-

ness's wife, he believed, was leaving that day.

Evidence was called to the effect that the respondent and Barker had lived together as man and wife in Caledon-street.

A decree of divorce was granted.

#### WIGGETT V. WIGGETT.

Mr. Benjamin, for petitioner, said there was a defect in the service, and he applied for an extension of the return day until the 15th April.

The application was granted, and leave given to take the evidence of the petitioner on commission.

#### COURTENAY V. COURTENAY.

Mr. Benjamin applied, on behalf of the wife, Jane Elizabeth Courtenay, for an order for restitution of conjugal rights, failing which a decree of divorce. The petition and supporting evidence of the plaintiff (taken on commission) showed that the parties were married at Wolverhampton, England, in March, 1895. There were two children of the marriage. Defendant came to South Africa in 1902, and the wife and children followed. They lived at Cathcart for a time, until the respondent was discharged from his situation. Petitioner was compelled to earn her own livelihood, and travelled for a time with a concert party. She now lived in Johannesburg, while respondent was at Kimberley. Her husband had written to her from Kimberley promising amendment, and in one letter he made an unfounded charge against her. He had never offered to provide her with a home, and had not contributed to the support of herself or her children. She was now in a position as housekeeper at Johannesburg. She was willing to return to her husband if he provided her with a home.

A decree of restitution was granted calling on respondent to return to or receive the applicant on or before the 15th March, failing which a rule nisi would be issued, returnable on the 1st April, calling on respondent to show cause why a decree of divorce should not be granted, why the petitioner should not have the custody of the two children, and why respondent should not be ordered to pay £2 a month for the maintenance of each of the children until they attain the age of 16 years.

#### LOVELL V. LOVELL.

This was a petition for an order for restitution of conjugal rights, failing which for a decree of divorce, brought by the wife.

Mr. Close was for the petitioner.

Evidence of the marriage having been given,

Elizabeth Jane Lovell was called, and said she was a widow when she married the respondent. The ceremony took place on the 23rd April, 1891, and they lived happily for ten years. On the 4th April, 1901, respondent was called out as a member of the Cape Garrison Artillery. She had never heard from him since. She had made inquiries, but could find no trace of him. He had been struck off the register of the Artillery for desertion. Before the Artillery was called out, he was working on the railway. She lost a bequest on her second marriage, but since, by the death of a child, the property had reverted to her.

By the Court: They had been living on good terms, and she had no idea why respondent left, or where he had gone to.

Mr. Close, replying to his lordship, said the defendant had not gone to the front, unless he did so under another name, and with another regiment.

An order was granted calling on respondent to return on or before the 15th March, failing which the usual rule nisi to be issued, the order to be published once in the "Cape Times."

#### HARRIS V. DOYLE.

Dr. Greer was for the plaintiff; Mr. Upington for the defendant.

Dr. Greer said he had advised his client to accept judgment for the amount tendered in the plea (£12 10s.), with costs to date of tender, and he would therefore withdraw the case.

Judgment was entered for plaintiff for £12 10s., with taxed costs to date of tender, plaintiff to pay the subsequent costs.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

#### GENERAL MOTIONS.

BRUCE V. KIPPS. { 1906.  
Feb. 3rd.

This was an action for provisional sentence brought by Jessie Martyn Bruce, on a promissory note for £1,000,

made by George Benjamin Kipps, of Kalk Bay.

The affidavit of James David Low, of the firm of Thomas Masterton and Co., stated he was agent for the plaintiff, who was at present in Europe. Negotiations were carried on between the defendant and Mr. James Bruce, husband of the plaintiff. He recollected Mr. Bruce handing to his firm the note of sale, which he stated incorporated the terms and conditions, and thereafter the defendant negotiated with witness's firm with the apparent purpose of carrying the agreement into force. Defendant did not then allege that the sale was conditional upon the plaintiff or her husband obtaining the consent of the bondholder to leaving one-half of the existing band as a first bond on the property, but in order to assist the defendant, who stated that he had difficulty in financing the transaction, witness's firm, as an act of grace, approached the bondholder to consent to such an arrangement, but the bondholder declined to do so. In order still further to assist the defendant, the firm made several suggestions to him with a view of easing his financial position, and yet enabling him to complete the contract he had entered into. These suggestions were not alternative propositions to the contract, but schemes which would have rendered it more easy for defendant to carry out the contract. Defendant did not assume his present attitude until, in consequence of his failure after a very considerable time had been allowed him, witness's firm instructed plaintiff's attorneys to take the matter up. As defendant had never inspected the diagram, witness did not see how defendant could state that the house tendered him was not the house he would have selected.

The affidavit of George William Newitt Oldham stated that defendant told him he had bought one of plaintiff's houses, and asked him to find a tenant for same as from September 1.

The affidavit of George Edward Griffiths stated he remembered being present about August 16, 1904, when there was a discussion regarding the contemplated purchase by Kipps from Bruce of one of two cottages. Bruce made it clear that there was a mortgage for £1,000 on the villas, and he represented to Kipps that the bondholder would consent to split the bond into two, and let one half remain on each property, so that Kipps would only have to find £200 in cash, as, if he were unable to raise the balance of the purchase price on the second mortgage, Bruce was prepared to allow it to remain on the property.

A similar affidavit was made by defendant.

Mr. Gardiner appeared for the plaintiff, and Mr. Benjamin for the defendant.

De Villiers, C.J., said the only way to settle this matter was to let it go to trial, and the Court would therefore make an order to that effect, costs to be costs in cause.

#### SAUERLAUDER V. LAZARUS.

Dr. Greer moved, as a matter of urgency, for the arrest of the defendant, failing his furnishing security. The affidavit of the plaintiff stated he was a hotel proprietor at Muizenberg, and the defendant owed him £152 for hotel board, etc., for himself, his wife, and family. He had left the hotel, and was at present residing in Cape Town, but belonged to the Transvaal. Applicant had no security, except three cases of linen and a life insurance policy, which had no surrender value until the decease of the defendant, and the premiums were in arrear.

An order for the arrest of the defendant was granted, power being given him to apply to the Court for discharge of the order.

#### BECKER V. WOLFAARD.

Mr. Burton moved, on behalf of Jan. A. Becker, of Ladismith, to make absolute a rule nisi interdicting Guillaume Jacobus Wolfaard from alienating or further encumbering certain landed property pending an action to be instituted against him by petitioner to compel him to pay into the Guardian Fund the purchase money of the land transferred to him or to give security for the due payment of the money when it should become payable.

Mr. Close opposed the motion. The applicant's petition stated that by the will of Jacobus Wolfaard and his wife, now deceased, the testators, who were married in community of property bequeathed to their two sons, Guillaume Johannes Jacobus and Frederick Johannes, certain two plots of redeemed quitrent land situate in the division of Ladysmith for the sum of £1,400, subject to the condition that the survivor of them should retain a life interest in the property, and that the same should not devolve upon the sons until after the death of the survivor, when £1,400 should be paid into the joint estate of the testators. Cornelia Christina Wolfaard died on January 22, 1900, without having altered the terms of the bequest, leaving her two sons surviving. Frederick Johannes Wolfaard surrendered his estate as insolvent in June, 1900. The trustees of the insolvent estate sold to the petitioner his right to take over the half-share in the properties, as also all the insolvent's right and title to any inheritance owing to him out of the joint estate of the testator's as one of the residuary heirs. The trans-



fer of the property had been passed to petitioner, and the purchase money due had been secured to the heirs of the joint estate by a mortgage bond passed by petitioner in favour of the estate payable after the death of the survivor of the estate. The transfer of the other half-share in the properties was passed by Jacobus Albertus Wolfaard to his son, and Guiliame Johannes Jacobus Wolfaard in November, 1904, and simultaneously with the passing of the transfer Guiliame Johannes Jacobus Wolfaard passed a mortgage bond to Heltje Johanna Rossouw for £700, hypothecating the property, and thereafter in December, 1904, further mortgaged the property to Heltje Johanna Rossouw for £200. As far as petitioner could gather, Guiliame Johannes Jacobus Wolfaard had not either paid into the joint estate of the testators the purchase amount of the land nor had he given any valid or sufficient security that it would be paid when the same fell due. As petitioner intended instituting proceedings against Wolfaard to compel him to pay the purchase price of the farm into the hands of the Master, or otherwise, to give security for the payment, he feared that he would either alienate or further mortgage the land.

The affidavit of the petitioner stated that the applicant should have ascertained whether the bequest money due by deponent had been settled by making proper inquiries. Before the transfer of the bequeathed property was made in respondent's favour, his conveyances had to explain matters satisfactorily to the Registrar of Deeds. This was done by supplying him with a statement signed by the executors, which showed that setting off the bequest money against amounts due by the estate there remained due to the deponent the sum of £124 9s. 5d. Previous to the death of deponent's mother deponent sold certain property to Jacobus M. Crafford for £600. In order to pay deponent, the purchaser raised a loan for this amount on security of the property purchased together with the farm Kuny, purchased from deponent's father. At that time there was an existing bond for £600 on deponent's father's (the testator's) property, and it was arranged between the testator and this deponent that this latter bond should be paid off with the £600 deponent got from Crafford, and this was done. The testator was to have passed a bond for this amount in deponent's favour, but this was not done. Testator subsequently paid £100 to deponent, for which deponent gave the promissory note which erroneously figures in the liquidation account. This, together with certain small debts, amounting to £34 3s. 9d., due to testator by deponent, reduced testator's indebtedness to deponent to £465 16s. 3d., with £174 13s. interest. There would have to be a division of bequest moneys (£1,700) be-

tween the seven heirs, which would give to each £240. Therefore deponent's position with the estate on January 31 was as follows: Bequest amount due, £700; amount due to deponent by estate, £465 16s. 3d.; interest, £174 13s.; amount due, ex-division bequest moneys, £240; balance due to deponent by estate, £130 9s. 3d. It would be seen that the £700 due by deponent to the estate as and for bequest money was fully secured, and he would have to receive nearly £200 over the bequest money he had to pay. It would be injurious to deponent, and his business to be prevented from dealing with his property in a full and free manner, and either mortgaging or disposing of the land inherited from his parents if occasion arose, nor would it prejudice the petitioner or any of the other heirs in any way, if he did so.

Mr. Close argued that the proper remedy was by action. It was, he submitted, wrong that his client, whose means and position were not challenged, should have his property tied up until the hearing of the action, when, in the meantime, he might have an advantageous offer for it. His client had all the documents in his favour.

Mr. Burton said that if what the old man said was true, it was perfectly clear that the respondent did not come into court with clean hands.

De Villiers, C.J., said he did not think the learned judge would have granted the order if he had known what was to be said on the part of the respondent.

Mr. Burton said that if the respondent had a good case, it could not prejudice him to have the order made, because he could sell the property subject to the decision in the case.

The Court ordered that the rule be made absolute, the applicant to go to trial at the Circuit Court forthwith, costs of the application to be costs in the cause, the interdict to be discharged, in case the respondent gives security to the satisfaction of the Master for any sum not exceeding £700 that may be found to be due to the heirs of his father.

#### FINLAYSON V. FINLAYSON.

This was an application by Catherine Finlayson to have made absolute a rule nisi, dated January 22, 1906, and returnable on February 1, to operate as an interim attachment of all moneys belonging to the respondent Alexander Finlayson, in the possession of Christopher Brady, attorney, of Cape Town.

Mr. Upington appeared for the petitioner, and Mr. Benjamin was for the respondent.

Mr. Upington explained that on January 22 the petitioner (Catherine Finlayson) applied to Mr. Justice

Buchanan in Chambers for an order restraining the sum of £30, or whatever amount up to £115 that might be held by Christopher Brady, attorney, Cape Town, for the respondent, to meet allowance for maintenance alleged to be due, balance of certain taxed costs, pending compliance with an order of Court, dated September 15, 1902, together with a further sum, which the Court might deem sufficient for the purpose of enabling the petitioner to defend the action for divorce, brought by the respondent, now pending, with costs.

The petition of Mrs. Finlayson, put in on that occasion, set forth that she was married in community of property to Alexander Finlayson on May 1, 1900, and there was one child of the marriage. On July 2, 1902, the petitioner applied to the Court for an order requiring her husband to pay over a sum of money sufficient to enable her to institute proceedings against him for a judicial separation, on the ground of cruelty and intemperance, and an order regarding the temporary custody of the child, and for alimony, pending the result of the action. On August 2, 1902, the Court made an order requiring the petitioner's husband to contribute £10 towards the costs of her intended action, and to pay her £2 per month for the maintenance of her child and self, *pendente lite*, and to restore to her the minor child. Petitioner's husband having failed to comply with the Court's order, she made further application, on September 15, 1902, to have him committed for contempt of Court, when it was ordered that a decree of attachment be made, provided that, before noon on September 16, the respondent did not deliver up the child, and pay £2 per month for the maintenance of the applicant (the present petitioner) and her child, until the further order of Court, the respondent to pay the costs of the application. The child was delivered up within the stipulated period, but the respondent failed and neglected to pay the monthly instalments, and on February 1, 1906, would be in default £82, representing 41 months at £2 per month. The respondent had further failed to pay the costs of that application, taxed and allowed at £27 0s. 7d., except for £5 on account. On January 16 the petitioner was served with a summons, issued at the instance of her husband, claiming restitution of conjugal rights, failing which, a decree of divorce, with an order for the custody of the child of the marriage, to which the petitioner had entered appearance. The petitioner had been informed that her husband had for over four years past been in the employ of the Telegraph Department, and had been drawing a fair salary, from which, if he had wished, he could have contributed the prescribed sum of £2, and made an

effort to meet the costs. The petitioner had a good defence to the action commenced against her by her husband, and was desirous of being awarded the custody of the child. She submitted that her husband should be required to comply with the order of the Court of September 15, 1902, and make a deposit of a sum sufficient to cover the costs of her defence, before he was allowed to proceed any further with his contemplated action. The petitioner was desirous that the money deposited by her husband with Christopher Brady be attached, as she was apprehensive that her husband, when he ascertained that the action was to be defended, might withdraw the same, and leave her to meet the costs which had already been incurred, and such further costs as might be incurred in connection with the various applications.

Upon that application, Mr. Justice Buchanan caused the rule *nisi* to be issued, which it was now sought to make absolute.

Mr. Benjamin read the respondent's affidavit, which stated that he was a linesman engaged by the Postal and Telegraph Department at Oudtshoorn, and was earning £12 10s. per month. He denied the alleged cruelty and drunkenness, and said he had always been ready and willing to provide the petitioner and the child with a proper home and maintenance, according to his station and means; but his wife had wilfully and wrongfully deserted him and refused to return. He admitted the order of the Court directing him to pay £10 and £2 per month, but such order was made in his absence in ignorance. He admitted the decree of personal attachment, but had always been ready and willing to support his wife and child if they returned to him. The said attachment had never been enforced. The petitioner had never proceeded with her action for judicial separation, nor had she ever demanded payment of the £2 per month. On the contrary, she had informed him that she did not require any money from him or anyone else. His wife had left him in December, 1901, when he was ill in bed; that was the third time she had deserted him. For the purposes of the proceedings instituted by him against his wife for restitution of conjugal rights, he had borrowed the sum of £25 from Mr. Roberts, of Oudtshoorn. Of that sum, he had paid petitioner's attorneys £5 and his own attorney £26, and, so far as he was aware, the whole amount had been exhausted at the present time.

Mr. Upington said that this man had set the order of Court at defiance, though for four years he had been drawing £12 10s. per month.

[De Villiers, C.J.: Yes, but if Attorney Brady has spent this money for his



dient, how can the Court give an order to restrain the money?]

Mr. Uington: He says "partly." He submitted that if Mr. Brady had a balance in hand, it should be attached. The respondent's first duty was to comply with the order of the Court, before he came to the Court to ask for any further relief.

De Villiers, C.J., said that the rule nisi would be made absolute, to the extent of £10, with leave to apply for the reduction of such sum on production of proof of the amount owing to him (Attorney Brady).

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPELY.]

MILLS V. CAPE TOWN	{	1906.
TOWN COUNCIL.		Feb. 5th.
		" 6th.
		" 8th.

#### Damage—Negligence—Landslip.

*A landslip having occurred on the side of a hill at an elevation above the plaintiff's house, there was a rush of water and mud which broke a water-pipe (which had been laid by the defendant Council also above the house) and destroyed the house.*

*Held, that in the absence of proof that the breaking of the pipe contributed to the damage, or was caused by the defendant's negligence, the defendant Council was not liable.*

This was an action brought by Samuel S. B. Mills, to recover from the Cape Town Corporation, damages to the extent of £7,160, by reason of the defendant's negligence in improperly laying, and failing to protect a

pipe at Clifton-on-Sea, the breakage of which, and the improper construction of a pathway, caused a landslip to sweep away the plaintiff's house on June 10 last.

The plaintiff's declaration was as follows:

1. Plaintiff resides at Sea Point, and is registered owner of a certain property known as "Clifton," which is situated on the slope of the Lion's Head, between Camp's Bay and Sea Point; defendants are the Town Council of the City of Cape Town, as incorporated by and under the provisions of Act 26 of 1893.

2. At some time, the exact date whereof is not material to this action, defendants, through themselves, their agents, or servants, constructed and laid a line of iron piping for the purpose of conveying water from a certain pressure tank on the Kloof Nek to a certain reservoir which supplies water to the Municipality of Green and Sea Point, the said line of piping crossing a ravine running up the mountain at a spot above plaintiff's property, at which spot it was improperly and negligently constructed, and was not protected or shielded, so as to guard against the possibility of a break being caused as in the way hereinafter mentioned.

3. Defendants, through themselves, their servants, or agents, further constructed a path, or road, running round the Lion's Head in the direction of plaintiff's property aforesaid, and thence onward to the Kloof Nek, which path or road was so improperly and negligently constructed as to intercept, collect, and concentrate the rain falling over a considerable area, no means being provided for the safe conduct therefrom of the water so intercepted and collected.

4. On or about June 10, 1905, after a considerable fall of rain, the volume of water intercepted, collected, and concentrated by the said path or road, and which, but for the existence of such road, would have distributed evenly and run differently, and in other directions forced its way into the said ravine above plaintiff's property, carrying with it earth, rocky material, and other debris, and this, or some rock loosened thereby, or both of them together, broke the aforesaid line of pipes at the spot in the ravine aforesaid, and, augmented by the water escaping from the broken line of pipes, rushed down the ravine into plaintiff's property, and on or about 11th June, 1905, swept away the homestead thereon and the furniture and contents thereof, together with the garden, terraces, trees, and large bodies of soil; whereby plaintiff has suffered damage which he estimates in the sum of £7,160.

Wherefore plaintiff prays:

- (a) Judgment for the sum of £7,160.
- (b) An order from defendant to make provision for the safe disposal of the water intercepted, collected, and concentrated by the path or road aforesaid.
- (c) A further order to duly protect the line of pipes aforesaid from liability to breakage at or above plaintiff's property.
- (d) Interest *a tempore morae*.
- (e) Such further and other relief as may seem meet.
- (f) Costs of suit.

To this declaration defendants pleaded as follows:

1. The defendants admit par. 1 of the declaration.

2. As to par. 2 thereof they say that the line of iron piping carrying water from the pressure tank situate in Kloof Nek, to the Sea Point reservoir was laid about September, 1896, and was laid, with the exception of a certain portion not now in question, below the surface of the ground.

3. The defendants deny that the said line of piping was improperly or negligently laid or constructed in any manner, but say that it was laid and constructed by and under the supervision of a competent engineer, to wit, Mr. Thomas Stewart; that it was laid, constructed, protected and shielded in the best manner possible where it crossed the aforesaid ravine.

4. As to par. 3 thereof, they admit that the constructed a narrow road or path running from the Lion's Rump round the Lion's Head at the base of the crags, and thence onward to the Kloof Nek; they deny that the said road or path was improperly or negligently constructed, or that the same did in any way intercept or concentrate the rainfall over a considerable area as alleged, or that no means were provided for the safe conduct from such road of the water collected thereon.

5. As to par 4 thereof, they deny that on or about June 10th, as alleged, any large quantity of water was interrupted, collected, and concentrated by the said road or path aforesaid, which water, but for the existence of such road or path, would have distributed evenly or run differently in other directions, and that such water was forced into the ravine as alleged; but they admit that on the 8th, 9th, and 10th days of June there was a heavy rainfall at Clifton and in the neighbourhood thereof.

6. They say that, as a result of this rainfall, on the morning of Sunday, the 11th of June, the sides, as well as the centre of the ravine, situate above plaintiff's property, became thoroughly saturated with water, and that a landslip was caused along the said ravine in consequence, starting near the top of

the ravine, and that the water running down the ravine and the sides thereof, together with earth, rocky material, and other debris slipping down, found its way down the said ravine from the point or points considerably above where the said iron piping crosses the ravine, and, rushing down the said ravine, scoured out the same, broke the iron piping at the point where it crossed the ravine and then swept down the said ravine on to the plaintiff's property.

7. When the said pipe was broken the water escaping therefrom did increase the volume of water rushing down the ravine, but not to any material extent which would have affected any damage done to plaintiff's property by the said landslip and rush of mud and debris from the upper portion of the said ravine above the iron piping aforesaid.

8. They admit that the plaintiff's house and the furniture, together with garden, terrace, trees, and portion of soil on his property, were seriously damaged or destroyed, but they deny that the said damage amounted to £7,160, as alleged, and they deny that the same was due to any act or negligence of their's, and say that the same was caused by the accidental landslip and rush of debris as aforesaid, and was due to *vis major*, or to causes for which they, the defendants, are not responsible.

9. Save as above, they deny all the allegations in pars. 2, 3, and 4 of the declaration.

Wherefore, they pray that plaintiff's claim may be dismissed with costs.

The replication was general.

Sir H. Juta (with him Mr. Benjamin), for plaintiff. Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), for the defendants.

Samuel Solomon Blumenthal Mills, plaintiff, said the stream down the ravine ran all the year round. Two masonry tanks supplied water for domestic use, and a nine-inch pipe led the superfluous water down to the sea from a catchpit. There was, in addition, a furrow made by witness, because the grating of the catchpit sometimes became blocked, and there was slight flooding. Before the occasion in question, there were just as heavy rains. The pipe constructed by the defendants was exposed to the extent of twelve or thirteen feet. Witness had experience as a contractor, and said that the pipe should not have been left exposed. It was not until after the accident he had any knowledge of the path. After that he saw furrows where the water rushed down. At the lower edge of the path, there was a quantity of debris.

If the pipe had been sufficiently protected, he thought any landslip would have spread over the pipe, and distributed itself on the terrace below. When the flood came down, witness and others did what they could to repair the furrow, and returned to the house. Later on he returned and worked under candle light, but the rush of water continued, and he sent to Sea Point for assistance. The furrow was repaired, and they went to breakfast. At breakfast they heard a rumbling noise. Witness saw the mud wall with boulders crushing through the trees. It was a rolling wall of mud, that struck the house in the middle, and swept it practically into the garden, and buried it. He actually sold the place for £8,750 in 1904, exclusive of furniture, but the sale was cancelled, witness giving the buyer a piece of land in compensation.

Cross-examined by Mr. Schreiner: There were several slips near Clifton in 1902, both along the Kloof-road and the Victoria-road. He was aware that there was a very heavy rainfall that season. The breaking of the six-inch pipe was one of the causes of this landslip. He assumed that the pipe had been broken at 10 o'clock on Saturday night, and would be surprised to learn that it was intact at 10 o'clock on Sunday morning. He could give details of the damage at £7,160.

Howard Bull, who was camping out at Clifton in June, 1905, said he was acquainted with the pipe and the ravine at Mr. Mills's place. When he saw the pipe in 1903 the pipe was exposed to the extent of eleven feet. He was not surprised at the quantity of water that came down at the time in question as he had experienced as heavy rains before. The water continued to rush for hours after the rain ceased. Witness saw the mud rush come through the house.

Cross-examined by Mr. Schreiner: He had seen the pipe on many occasions. It was a customary walk of his along the ravine.

James Colley, a contractor, of Sea Point, stated he knew the plaintiff's property well. He connected the water pipes to the plaintiff's tanks. The pipe in question he saw in 1898, and he was quite positive the pipe was exposed then. He had never seen any protection of the pipe. He had never come across an engineer who would allow him to run a pipe in such a condition through a ravine. The pipe put down by Mr. Mills was sufficient to carry off the water. There was evidence of a succession of dams being formed on the road.

Cross-examined by Mr. Searle: When he saw the pipe first, he remarked to the plaintiff that there was a risk of it being broken by falling boulders.

Alexander Tate, who was engaged at work at Clifton in 1901, stated the pipe was exposed then about a pipe's length, and eighteen inches above the ground.

Wilhelm Versfeld, Government land surveyor, who drew up a survey of the ground around the pathway, said that above the places where the land slipped there were traces of the water concentrating in breakages. If there had been no path, the water would have distributed itself as it did formerly.

S. Sassin, proprietor of the Clifton Hotel since August, 1903, said he first saw the pipe shortly after he bought the property. The pipe was exposed about ten or eleven feet, and about twelve inches above the ground. There were no traces of any protection. Between nine and ten o'clock on Saturday evening, June 10, he went up to see what was the cause of the extraordinary and sudden rush of water. He had seen as heavy rains, but never such a rush of water.

Jacobus Adrian Monson, farmer, who lived near the Lion's Head, said when the road was constructed there was no provision for taking off the water. The road was improperly made. He was there from when he was a boy, and although he had seen heavier rains, he had never seen anything like that on the mountain side. The road, he thought, was the cause of the slip.

Cross-examined by Mr. Schreiner: He had seen a landslip in the hollow a year before, when the road was not in existence. In the early part of 1905 there were several fires, and the bush was cleared considerably, thereby loosening the soil.

Petrus Maskew, Government land surveyor, said the effect of the path in question would be to concentrate the water.

H. H. Evans, civil engineer, spoke to visiting the place three or four days before the washaway. He could see no indications of disturbance above the pathway. He did not consider it a proper thing to expose the piping. At the present time it was by no means safe, and neither was the path.

George Lacey Good, Civil Engineer, in practice for thirty years, said he visited the scene on Thursday week, and found no provision for the drainage from the path. Witness described the effect of such a path cut on the mountain side. It would have the effect of concentrating water to some

extent, and the result of water flowing over the rocks might be the starting of mischief.

Cross-examined by Mr. Searle: He was under the impression that the pipe had broken some time before the accident.

Henry Solomon, who had known the pipe for years, said it had never been covered.

Charles E. Waite said he was residing in Mr. Mills's house during Mr. Mills' absence in 1904. Witness frequently went up the glen in the evenings, and often noticed the pipe, which was exposed to something like 12 to 14 feet.

Thomas Olive, member of the Institute of Civil Engineers, attributed the destruction of the property mainly to the breakage of the pipe. The path undoubtedly had the effect of concentrating water. The whole source of the trouble was the pipe, which had disturbed the stability of the valley. About 200 feet above where the pipe crossed, a huge boulder had recently come away, and he thought changes in the ground would continue to take place. The witness said he would make the path much wider.

Other witnesses — contractors and builders—were called to testify as to the fairness of the prices for plans and quantities put in by the architect.

Sir Henry Juta closed his case.

Thomas Stewart, C.E., stated he had had a great deal of experience of water-works. Witness had the general supervision of the laying of the pipe track to supply Sea Point with water from the mountain. The pipe was of 6 inches diameter inside, and specially constructed to resist pressure. The pipes were all tested before they were laid down. The pipe at the ravine was laid on decomposed granite. There was no masonry whatever. The pipe was covered with a bed of black soil. He saw the place after the accident, about June 22, and he had been there several times since. On plans which witness prepared, he gave evidence as to certain main slips marked above the pipe track. The pipe would have gone had it been built in with brick if a slip had occurred which witness described.

[De Villiers, C.J.: What is your theory of the cause of the accident?]

The witness said the only theory he could form was that the water came down in a large quantity from the bare granite above slip No. 1, and that the luxuriant vegetation above slip No. 1 was burnt away by the fire, and its holding power had gone. The landslip got waterlogged, and the water performed the function of grease. At No. 3 slip the fall was practically precipitous, so that the mud and stone which came down formed the mud wall. It came down until it encoun-

tered a softer material, formed by the admixture of granite and clay, and then its operations were easily carried out. The clay was wet and slippery, and the boulders and water coming down undermined and scooped out the bed of the stream from slip No. 5 downward. The bed had been deepened at the pipe about 13 feet below the old level of the ground. The same force that brought the mass down to the pipe would have carried it on without the pipe bursting at all.

Cross-examined by Sir Henry Juta: The water which came down after the rain had ceased that morning would come from the absorbent part of the catchment area. He thought the pipe was broken during the night. He considered the landslip broke the pipe. It might happen that the water had washed away the soil at the pipe and left it exposed. Probably if he had seen the pipe exposed he would have had it covered up, but he thought it was covered up. He had not seen it since two years after it was laid. There were undoubtedly heavier rains than last season.

Witness described the arrangements at the reservoirs at the time of construction. His opinion was that the landslip caused the breaking of the pipe.

By De Villiers, C.J.: If he had to lay the pipe now, he would build a large masonry dam, and put the pipe inside it, because subsidiary stuff must come down, and there were boulders in a dangerous position. When he laid the pipe first he did not adopt that precaution, because there was no evidence of boulders coming down.

Johannes Combrinck, who had resided for over thirty years at Camp's Bay, said as Field-cornet he made an investigation on the day of the accident. The mud wall was forty feet long and four feet in height. Boulders, which must have come from the top, came through the house. He went up to the pipe track and saw that the damage came from above. From the 3rd to the 11th June there was a rainfall of 8.62 inches at Camp's Bay. There were fires in the beginning of 1905, and he noticed when there were fires there were generally more slips. Last year there were more fires than any year he remembered.

Cross-examined by Sir Henry Juta: There had been fires at Clifton before, and there had been heavier rains than last year.

When the witness concluded his evidence, the Chief Justice said that the Bench did not require further evidence for the defence until they had heard Sir Henry Juta in argument.

Sir H. Juta: The pipe was in an unsafe condition from the first. It should not have been laid in the bed of a stream and padded with soil. It would only have cost about £80 to cover the pipe in



properly. We have had a good deal of theory but no actual evidence to show that the damage was caused by the mud rush. At all events the pipe should not have been allowed to remain exposed, and to become more and more exposed every year. If any protection had been given to the pipe the soil would not have been washed away from under it. It is clear that the pipe had become exposed in 1905, no matter how it was originally laid. It is curious that the accident should have happened just after the road was made. The two ravines under the road have gone, but other ravines remain intact. The road was on a high gradient, and was not constructed on scientific principles; it was the real cause of the concentration of the water which caused the accident. There were no breaks above the road, but only below. Then, the water has been brought from one catchment area into another, although the defendants deny the possibility of this.

[De Villiers, C.J.: Your witnesses minimize the quantity of the water.]

They were speaking only of the fall, not of the stream. A small quantity of water concentrated on a mountain side may have very serious effects.

[Counsel proceeded to argue further on the facts of the case.]

Mr. Schreiner was not heard.

De Villiers, C.J.: Everyone must sympathise with the plaintiff in the heavy loss he had sustained by the destruction of his property. If the Court had found evidence to sustain the theory that the Council was responsible for the loss, it would have had no hesitation in awarding full damages against the defendants. His Lordship was by no means satisfied that the road had anything to do with the accident, or that it concentrated water from any part of the catchment area, which would not otherwise have reached the plaintiff's property, and he was not satisfied that any such quantity of water as would affect the pipe below had accumulated. The main landslip was on the right ravine, and if the landslip occurred immediately before the accident above the pipe, then it would be quite sufficient to account for all the damage. He was not satisfied that if the pipe had been constructed upon a more approved principle the accident would not have occurred. The Town Council could hardly be expected to provide against emergencies like this, which could not be anticipated. His Lordship was not satisfied that if the pipe had been protected by masonry it would not have been crushed by the boulders coming down. It was just possible that the breakage of the pipe might have contributed to the accident, but it was more than probable that the accident to the plaintiff's property would have occurred even if the Council had

never constructed the pathway or laid the pipe. He quite accepted the theory of Mr. Stewart that the fire on the slopes had a great deal to do with those landslips. This rainfall was enormous, and everything seemed to have been in readiness before June 10 to cause the damage, and to his lordship's mind there was no satisfactory evidence to connect the breakage of the pipe and this damage, and unless the Court was satisfied that there was such connection it was impossible for the Court to give judgment for the plaintiff. It lay upon the plaintiff to prove that it was the act of the defendants which contributed to this result, and even before the defendant's evidence had been led the Court was not satisfied that the Council was responsible, but they thought it advisable to hear, whether or not, defendant's chief witness. Certainly, after hearing the evidence of Mr. Stewart and Mr. Combrinck, the Court was satisfied that the cause of the damage was not that put forward by the plaintiff. Judgment would therefore be for the defendants, with costs, with liberty to the taxing officer to allow a reasonable amount for the preparation of plans for the use of the Court. There would be no order as to the making of the pipe safe, as it had not been made clear there was any danger at present.

Hopley, J., concurred.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

## APPEALS.

REX V. THERON. ( 1906.  
( Feb. 5th.

Master and servant—Act 18 of 1873, Sec. 15.

This was an appeal by Thomas Theron from the decision of the R.M. of Murraysburg, fining him £3, or the alternative of a month's imprisonment with hard labour, for contravening section 15 of Act 18 of 1873.

Dr. Greer appeared for appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Howel Jones said before the case was gone into he would like to point out to the Court that there was an exhibit in the lower Court which was not at present in court. He believed the Court would like to see that exhibit before finally deciding on the

case. The case was one in which the accused was charged with refusing to permit a servant in his employ to remove certain cattle, the property of the servant, from his kraal. The defence set up was that the servant owed the appellant a certain amount of money, and a pocket-book was produced to prove that. Although the pocket-book had been produced in the Magistrate's Court, it could not now be found.

[Buchanan, J.: Does the production of this book affect your case?]

Mr. Howel Jones: No, my lord.

[Buchanan, J.: Does it affect your case, Mr. Greer?]

Dr. Greer also applied in the negative.

[Buchanan, J.: The case can be heard, and if necessary judgment can be reserved pending the production of the book.]

Dr. Greer explained that in this matter the appellant was charged with having contravened section 15 of Act 18 of 1873, in that he refused a boy named Mdingi, in his employ, permission to remove 17 goats and 19 kids, his property, from his farm, and was fined £3, or the alternative of one month's imprisonment with hard labour. The appeal was on the grounds that the conviction was against the weight of evidence, and also that he was charged under the wrong section, in that he had lawful grounds for refusing the delivery of the goats.

The evidence of Mdingi, the servant in question, as given before the Magistrate, was to the effect that he was ill, and went to see a Dr. Heindrick, who ordered him back to Kafirland. He did not pay his doctor's fee in full. Mdingi went to Theron and asked him for his goats, which he had received as wages for services rendered. Theron said Mdingi owed him £6 2s., and on being asked how it was due, Theron replied that he had paid the doctor's account, which amounted to £6 2s. The doctor, on being asked, said Theron had only paid him 13s. Mdingi told Theron he wanted the goats, and Theron told him to bring the money he owed, and he would get the goats, but he could not do that.

Appellant's evidence before the Magistrate was to the effect that he engaged Mdingi at a monthly wage of 10s., or a goat. He elected to take the latter. On various occasions he made him advances amounting altogether to £9 7s. When Mdingi told him he had been ordered back to Kafirland, he asked for his goats, and appellant told him that when he paid him the amount due he would refund him his goats.

Confirmatory evidence was given by other persons, who saw Theron paying moneys over to Mdingi.

Counsel having been heard in argument on the facts, Buchanan J. said the accused was charged under section

15 of Act 18 of 1873. This Act was known as the Masters and Servants Act, and the section under which this case was brought made it a crime for a master to retain stock which belonged to a servant. The section also provided that when the criminal charge was tried, if it was proved to the Magistrate that the accused had acted without reasonable cause, the Magistrate could give a civil judgment for the delivery of the stock with costs. The servant in the present case had 32 goats running with his master's. He had been ill, and on leaving his master's service had demanded delivery. The master refused to give delivery, saying he had paid £6 2s. to a doctor in Murraysburg for attendance on the plaintiff, and would not hand over the stock until that amount was paid. The servant made a complaint at the Magistrate's office, and was sent to an agent. That gentleman, on inquiry, found that, instead of paying £6 2s. to the doctor, the defendant had only paid him 13s. The doctor gave evidence to that effect. The Magistrate, with this evidence before him, held that the master had no reasonable cause for retaining the goats. The Magistrate stated he thoroughly believed the plaintiff, and the demeanour of the defendant was not at all satisfactory. The master's story was that he had advanced £9 7s., £6 2s. of which he alleged he paid to the doctor, and £3 5s. money advanced, and that he kept the goats for Mdingi until he had paid that amount off. The case was adjourned to enable the master to prove this, and he then produced a note-book, in which he stated he kept the plaintiff's account separate from the advances to his other servants, but which book contained no entries against the complainant. He obtained an adjournment to produce another book, which showed advances only to the plaintiff and nothing to other servants. The agent, when he demanded delivery of the goats, had tendered payment of the 13s. and of the £3 5s., but the accused still retained the property. Under the circumstances, it was not for that Court, sitting as a Court of Appeal, to upset the Magistrate's judgment, and the appeal would be dismissed.

#### REYNOLDS V. ESTATE TANNOCK.

This was an appeal from the decision of the Resident Magistrate at Prieska, giving absolution from the instance in an action in which the appellant was plaintiff and the respondent was defendant, and which was brought before the Court in respect of certain furniture, which was lent by plaintiff to defendant for his use, and which was valued at £6 15s., and which was sold



by the trustees in the insolvent estate of E. H. Tannock.

From the evidence given by the plaintiff before the Magistrate, it appeared that he lent the furniture to Tannock. The respondent had an account with applicant's firm, but the articles of furniture referred to in the action were not mentioned. The evidence of the insolvent, who was called for the plaintiff in the lower Court, was to the effect that he got a loan of the furniture on the condition that he could buy it if he wished. He received an account from appellant's firm for £60, and asked appellant if the furniture in dispute was mentioned in it, and he replied in the affirmative.

Mr. Close appeared for the appellant, and Mr. Burton for the respondent.

Without hearing Mr. Burton,

Buchanan, J., said the defendant, as trustee in an insolvent estate, was sued by plaintiff to recover the price of certain furniture alleged to have been lent to the insolvent. If it was clearly established that that furniture was only lent, there would be no doubt of the plaintiff being able to recover from the trustee, as the trustee would have no legal right to sell it; but when the Court came to the evidence of the insolvent, who gave evidence for the appellant, it would be seen that he stated that when he got his account he asked if the furniture was included in it, and the appellant replied "Yes," and this statement was not denied by the plaintiff. Whether the furniture had been paid for or not would have to be adjusted in the insolvent estate. The Court held that the Magistrate was thoroughly justified in giving a verdict of absolution from the instance, and the decision would be upheld.

#### REX V. GOOLAM.

This was an appeal from the decision of the Assistant Resident Magistrate at Woodstock, sentencing the appellant to three months' imprisonment, with hard labour, for indecently assaulting a little girl.

A preparatory examination in this case had first been taken, and the accused was committed for trial. The case was remitted to the Magistrate, who sentenced the accused to three months' imprisonment with hard labour.

The appeal was based on the grounds that the conviction was against the weight of evidence, and the evidence adduced did not support the charge.

From the evidence adduced for the plaintiff in the lower Court, it appeared that the child, who was seven years of age, went into the accused's shop for sweets, and that he then committed the assault.

For the defence the crime was denied, and evidence in confirmation was given by a boy in the shop.

The Magistrate, in his reasons, said the girl gave her evidence in a very clear manner, and from what the witness for the accused said he did not believe he was present at the time of the assault.

Dr. Greer (for the appellant) having been heard on the facts, without calling upon Mr. H. Jones, who appeared for the Crown,

Buchanan, J.: The accused was charged with committing an indecent assault on a little girl, aged seven years, and according to her story, there were only accused and herself in the shop at the time. Learned counsel for the appellant urged that the girl's statement should have corroboration. The circumstances were such that there could not be any corroboration, but there were surrounding circumstances by which the child was corroborated. There was the fact that the child ran away from the shop, and went home frightened. That evidence was given by the mother, who, in her evidence, did not unduly support the charge made by the girl against the prisoner. The girl said the accused, when she went into the shop, put his arm around her waist, calling her "dear," and touched her. When the girl went with the police constable to the accused's shop, the accused said he had put his arm around her, and called her "dear," and turned her out of the shop, as she was trying to get at the sweets. The accused called a boy, named Mahomed, but the Magistrate, in his decision, said he did not believe the boy was present. The Court concurred with the Magistrate's view, because if they looked at the evidence given by him it would be seen that he stated that all the accused said was "You must ret," which contradicted the evidence of the prisoner, the child, and her mother. The Court quite agreed with learned counsel for the appellant that in cases of that kind the Judge, the jury, and magistrates should act very cautiously. The Court did not see grounds for that Court, sitting as a Court of Appeal, interfering with the finding of the Magistrate, and the appeal would be dismissed.

#### REX V. RICHARDS.

This was an appeal from the decision of the Resident Magistrate at Vryburg, fining the appellant £50 and one year's imprisonment, with hard labour, for committing the crime of incest.

From the evidence adduced in the lower Court for the prosecution, it was alleged that the accused committed himself with his illegitimate daughter.

The relationship was denied by the accused, who stated that the

girl, who was known as Annie Richards, had been adopted by him when very young, and was not the daughter of the accused. The girl denied that accused had in any way misconducted himself with her, and although having an illegitimate child, denied that accused was the father of it.

A considerable amount of evidence of a very contradictory nature, which was given in the lower Courts, was read by counsel.

Mr. Gardiner appeared for appellant, and Mr. Howel Jones for the Crown.

Buchanan, J.: It would have been much more satisfactory if the Crown had exercised its discretion by sending this case to trial before a jury. It was especially the class of case that should go before a jury, but instead it was sent to the Magistrate's Court, and decided by the Assistant Magistrate. There were two matters that were necessary to be proved to substantiate the charge. It was necessary to prove the parentage of the girl and also the intercourse. On the first point, the Court had some hesitation in saying that from the records the parentage of the girl had been established, but the Magistrate went very deeply into the evidence, and he (the judge) thought there was evidence to justify the finding as to the parentage of the girl. Now the Magistrate, acting as a jury, had found that the parentage had been established on the evidence given, especially by the girl's mother. Her evidence was to the effect that when she was unmarried the prisoner had intercourse with her. The prisoner admitted this, but said it was eleven months before the birth of the child, but the woman said that no other person had had anything to do with her between that time and the birth of the child. Immediately after the birth of the child it was taken away by the accused, and the mother shortly afterwards married a man named MacPherson, or McQueen. The child was christened on the same day in the mother's maiden name. McQueen said he knew when he was engaged to Annie's mother that she was enceinte, and that he only waited for the birth of the child to marry her. It seemed hard to think that if McQueen was the father of the child and he was willing to marry the mother, that he would have let the child be taken away. Then there was the further evidence of the accused treating the child as his own child, and it calling him father. Then, again, there was his conduct when the child became enceinte, of his taking her away to her sister in another colony, and the statements he made when doing so, and the fact of the permit for them to travel being made out in the name of Miss Richards. Under all

those circumstances, the Court did not think it would be justified in assuming that the Magistrate was wrong in arriving at the decision he had. The conviction would have to stand, and the appeal be dismissed.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and a Jury.]

GODFREY V. FRANK. { 1906.  
( Feb. 6th.

Motor car — Negligence — Damages.

This was an action brought by Benjamin John Godfrey, proprietor of the Model Printing Works, against Arnold Frank, a veterinary surgeon, claiming £1,500 as damages for injuries sustained by being knocked down by a motor-car.

Mr. Burton, in opening the case for the plaintiff, said it was one for damages for injuries caused to plaintiff by a motor-car belonging to the defendant. From the declaration it appeared that on the evening of April 7 last year, plaintiff was paying a visit to his brother at Maitland, and while crossing the road at about 7.30 on his return, he was knocked down and run over by a motor-car, the property of the defendant, and which was being driven by a chauffeur. The accident was caused by the carelessness and negligence of the chauffeur, and his failure to regulate the speed, which was excessive. Plaintiff sustained severe injuries to his leg, etc., and had been prevented for some time from attending to his business. The defendant's plea set forth that plaintiff was deaf and dumb, and that it was in consequence of this infirmity that the accident occurred, and not through any negligence on the part of the chauffeur. Due care had been exercised, the hooter was constantly sounded, and two powerful lamps were burning as a warning to anyone using the road. There was no tender, and defendant denied all liability. In his replication, plaintiff admitted that he was deaf and dumb, and that the hooter had sounded once. The accident, however, was not caused through his infirmity, but through the carelessness of the chauffeur.

Mr. Burton, with him Mr. P. Jones, appeared for plaintiff, and Mr. McGregor, with him Dr. Greer, for defendant.

Evidence was given by Mr. Hudson Scott, of Maitland, who witnessed the accident. He also put in a plan of the locality taken by himself from actual measurement. The car was pulled up very quickly after it struck the plaintiff. The car pulled up about the centre of Essex-street. The occupants looked round, and again drove off. Witness ran after them, but did not catch up with them. Dr. Pears then attended Godfrey, and the defendant returned and looked at him. Witness asked him to take Godfrey to the hospital, but he refused. The hooter was blown just before the fourth milestone. Witness only heard the hooter sounded once. The car must have been travelling about 12 miles an hour. There was no slackening of speed before Godfrey was struck. Witness felt when he saw the man stepping off the footpath that there was going to be an accident.

In cross-examination, witness said he had been a builder, but was now a broker. He did not own a motor-car, but he could form a very fair idea of the speed a conveyance would attain.

At the time the accident occurred it was fairly light, but not as light as daylight?—The sun was not shining.

I put it to you that however fairly one may try to judge it would be very difficult to place the distance on this occasion. There might easily be a margin of error?—I have travelled the road for the last three years, and know every inch of it, and I will say I am not a foot out in my measurements.

In further cross-examination, witness said that when he heard the hooter, he looked round and saw the car about 30 yards away.

I believe you say the sound of the hooter was not very melodious?—No.

In fact it had a jarring sound, and I put it to you that you might have heard a second hoot without observing it?—No. I only heard it once.

Why are you so very emphatic on the position of the car when the hooter was sounded. Many cars pass through your village?—If you had a car pass you like that one passed me you would remember the position.

But what makes you so clear on the position?

[Buchanan, J.: The accident would impress it on him.]

In further cross-examination, the witness said the car was travelling on the left-hand side of the road when it passed him. The car swerved when it passed the three women, and went to the wrong (right) side of the road. The car might have had lights.

You know it had?—No, I do not. I saw it had lights after the accident, but I did not notice them before.

I put it to you, that two bright lights like one sees in a motor-car will involuntarily interest the eye?—I cannot say if it had lights.

Had the driver the car under proper control?—I cannot say, but after he struck Godfrey, he pulled up very quickly.

Witness (continuing) said he saw Godfrey step off the pavement, but did not see him again before he was struck. He had only just stepped off the pavement when the car struck him.

You told us you did not see him on the road before he was struck?—As a matter of fact, I saw him in the air.

According to your plan, how far from the path was the car when it struck Godfrey?—About 6 feet.

Well, it would take more than two steps to take Godfrey from the path to the road?—I don't think so.

How far from the accident did the car stop?—About 33 feet.

It stopped twice, and the first time Franks got out, did he not?—No. I had called Musset out and got the doctor before Franks turned up.

You have said something about the defendant refusing to remove Godfrey; as a matter of fact, didn't he send a cab for him?—I have since heard that he sent a cab about nine o'clock.

Didn't he tell Godfrey's brother that he could not take him in the motor-car?—That I cannot say.

Leslie Scott, son of the last witness, and who was accompanying his father along the main road on the night in question, gave corroborative evidence. He saw Godfrey step off the footpath, and the next thing he saw was Godfrey up in the air. The car was travelling very fast. He had heard what his father said about calling on Franks, and corroborated him.

In cross-examination, witness said the hooter was blown when the car was near the fourth milestone.

Mr. McGregor: I suppose the milestone has now become an historical matter in the village?

Witness: As far as I know, it is a well-known spot.

Witness (further cross-examined) said the car got up speed after being called on to stop.

Mr. McGregor: How do you know that?

Witness: It started slowly, and gradually went faster.

Mr. McGregor: But motor-cars, when starting, generally start slowly, and get up speed.

Arthur Mussett, broker and estate agent, of Maitland, stated he was sitting in his office, which fronts the main road, when he heard a hooter sounded. Immediately after Scott shouted "Mussett," and he also heard him saying, "You can go on; I know you." Witness immediately went for the doctor, and ran up to the car, which had stopped, and he met the

occupant getting out. He knew the defendant, and said, "Hello, Dr. Franks, it's you!" Defendant was surprised at being identified.

Mr. Burton: Who is Dr. Franks?—He was then Veterinary Inspector for the German Government.

He is well known?—Oh, yes.

Witness (continuing) added that he asked Dr. Franks to take Godfrey to hospital in his motor-car, but he refused, and after some time promised to send a cab from Salt River, which arrived about nine o'clock. The road is very quiet at night-time, and the hooter was plainly heard.

In cross-examination, witness said Dr. Franks's hooter had a distinctive noise, which was easily distinguishable from others.

In reply to the jury, the witness said it was quite light when the accident occurred.

In cross-examination, witness said the speed at which motor-cars travelled affected his nerves.

Charles William Fisher, detective in the Maitland Police, recollected the accident being reported to him. There was a prosecution before the Magistrate, and at witness's request, Scott drew a plan of the place. The marks on the ground were quite clear when witness saw it.

Mr. Burton called the plaintiff, and, addressing the jury, said every effort had been made on both sides to get an interpreter for him, as he was both deaf and dumb, but the efforts had been unsuccessful. The only way they could solve the difficulty was to get his brother to interpret. The defence agreed to this course.

Buchanan, J., said that was the course adopted in the Magistrate's Court.

The plaintiff, Benjamin John Godfrey, was then sworn, and in reply to Mr. Burton, through his brother, said he was born deaf and dumb. He was proprietor of the Model Printing Works, and was a married man with four children. He always went about unattended, and had cycled many thousands of miles without an accident. How do you manage to avoid accidents?—I keep my eyes open.

The witness then detailed the visit to his brother, and stated that he left there to catch the 7.35 p.m. train to Cape Town. Before crossing the road, he looked up and down to ascertain if any traffic was approaching. Not seeing anything approaching, he essayed to cross the road, but just as he did so he saw a motor-car almost on top of him, and endeavoured to get back to the path, but the car caught him in the side, and he was knocked down. If the car had gone straight along the road, he might have been able to save himself, but the car crossed the road in his direction. When witness was knocked down, he felt a sharp pain in his leg, and, after twisting his leg round, he

became unconscious. The next thing he remembered was being taken to his brother's house. He was taken home to Salt River that night, where he was attended by the doctor for two months. Witness had to use crutches up to November last. He had had to give up cycling, as the leg was weak. As witness had been suffering acute pain recently, he went and consulted Dr. Fallon. Witness had had to pay Dr. Peare £40 for medical attendance, about £5 for medicines, drugs, etc., and a nurse £4. Witness was away from his business for two months, during which time he got a man to look after it at a cost of £18. Witness, when he returned to business, was unable to attend to it properly. He could not use his bicycle to get about to get orders. He had not been able to use the treadle machines in the course of his work. He submitted an extract from his books showing how his business had fallen off. From May, 1903, to May, 1904, there was a credit balance of £294. From May, 1904, to March, 1905, there was a credit balance of £326, or an average of £29 per month, whereas from March, 1905, to the end of the year his average takings were £9 10s. The month before the accident he took over £120, and during the months he was away the takings only amounted to an average of £23 a month. He had also started a small dairy business before the accident, but had had to give it up. Prior to the accident he had been in very good health.

In cross-examination, the plaintiff said he had not tried to ride his bicycle since the accident, and Dr. Peare told him he would not be able to do so for another two years.

When you showed the jury a few minutes ago how the accident occurred, you moved about very well?—I took care to keep on one leg.

Haven't you been walking without your stick recently?—Only for a short distance in the office.

This accident will not interfere with your general health, will it?—It does now.

But it is all going to pass away?—Let us hope so.

In further cross-examination, the witness said that at the time of the accident it was twilight. The motor had strong lights. In the dark those lights could be seen a mile away. In the twilight they could be seen about a hundred yards away.

Dr. Peare said that when called to Godfrey he found him lying in the road near the footpath. On examination he found that Godfrey's right leg was broken, and a black bruise about two inches in width, running from the outside of the right calf down to the inside of the right ankle. After five weeks' confinement to bed, the plaintiff was allowed to get up and ambulate by



means of crutches. It was about three months after the accident ere the plaintiff could use his right foot. On September 29 a "skyograph" was taken of the leg.

Mr. Burton: That's the "X" ray.

Witness: Yes, "skyograph" is synonymous with photograph.

Continuing, witness said that the skyograph revealed a fracture of a small bone in the ankle joint, and that would affect him for one or two years.

[Buchanan, J.: He must have suffered a considerable amount of pain?]

Witness: Yes.

Mr. McGregor: The fractures have mended well, and that leg is now as sound as the other, eh?

[Buchanan, J.: I suppose you mean to say that the leg is stronger now than it was before.]

Mr. McGregor: No, my lord.

[Buchanan, J.: But it might be like that. It is very unusual to get a fracture in the same place again.]

Resuming, the doctor said that there would be always a certain amount of neuralgic pain experienced by the plaintiff, for nerves were usually of a neurotic temperament. The damage had been caused by impact.

Further medical evidence was given by Drs. Richards and Fallon.

Mr. Burton closed his case.

For the defence, Dr. Simpson Wells, F.R.G.S., said that he had examined the plaintiff at the wish of the defendant. He found a thickening of the fibula, about three or four inches above the ankle on the outer side, indicating the site of a fracture, which had healed, and there was also a slight thickening of the shin bone, indicating that a small chip of bone had been broken off, which was common in such accidents. The unions were perfect, but he thought that the plaintiff should be precluded from cycling for a considerable time to come. In such circumstances the plaintiff might be able to cycle again, but he would have to be careful.

Cross-examined by Mr. Burton: The plaintiff might suffer from neuralgic pains in the fracture.

Nicholas William Rory, the chaffeur, said that at one time of his career he had driven a Harbour Board traction engine, and had worked for a cycle company, and several private individuals as a chaffeur. On entering the village he slowed down to from 8 to 9 miles per hour and sounded his hooter frequently. He avoided two men and three women, and presently he saw a man tacking across the road. Witness altered his course, sounded his hooter, and tried to clear the man, but the latter swerved round, threw up his arms, and fell under the car. Witness applied his brakes, and drew up within two and a half lengths in the centre of the road. Mr. Franks shouted, "Hi, man! What want you there?" and soon after dismounted.

Witness then formed ahead a little, in order to enable a cart, showing no lights, that he had passed, to have plenty of room. If Godfrey had continued on his course, the accident would not have occurred.

Cross-examined by Mr. Burton: He slowed down again in the village, after passing the women, to about 8 or 9 miles an hour.

Yet, you entered at that rate?—I slowed down again.

Why?—Because it was dark there, through the trees overhanging the road.

Trees, eh! That's strange. I cannot see any trees shown on the plan.—There were trees, sir.

The attorney for the plaintiff informed Mr. Burton that there were no trees in the vicinity.

Continuing, the witness admitted having been convicted for negligent driving in connection with the case. The plaintiff rolled for some time after being struck.

Counsel having addressed the jury, his lordship summed up, and the jury, after a short consultation, brought in a verdict for plaintiff for £550 damages.

Mr. Burton moved for judgment, with costs.

[Buchanan, J.: Any objection, Mr. McGregor?]

Mr. McGregor: No, my lord.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ESTATE GOUWS V. ESTATE ( 1906.  
MARAIS AND OTHERS. ( Feb. 7th.

Will, joint — *Fidei-commisum residui*—Interpretation.

*P. G. and his wife G. G. executed a mutual will, whereby they bequeathed to one H. G., married in community to one W. F. M. the sum of £400 and to the child of H. G. £350. H. G. had more than one child when the will was made, and the name of the child was left blank. The survivor was appointed sole heir, with the proviso that he or she should*



*have power on the death of the first dying to sell the estate by public auction. It was directed that on the death of the survivor the entire estate should be sold by public auction and that the proceeds should be divided into two equal portions, whereof the one should go to the brothers and sisters of the testator and the other to the brothers and sisters of the testatrix, with right of succession to their descendants. On the death of P. G., G. G. adiated and sold a bond with secured value of £750 to one H. M. for £100. The plaintiff now sued for (a) a refund of the said £750 (less £100), or (b) of half that amount (less £50), being a portion of P. G.'s estate.*

*Held, that as the terms of the will did not contemplate any diminution of the joint estate during the life time of the survivor, it was not the intention of the testators to constitute a fidei-commissum residui, and that judgment must be given in terms of prayer (b).*

*Held further, that the bequest to the child of H. M. was null and void on the ground of uncertainty, and that parol evidence of the testators' intentions was not admissible.*

This was an action in which Daniel Mills Dyason, in his capacity as the executor dative of the estate of the late Pieter Johannes Gouws, of Fraserburg, sought an order against Hebrege Johanna Christina Marais (born Jooste), in her individual capacity and as executrix of the estate of the late Willem Francois Marais and as mother and natural guardian of her minor child, Pieter Johannes Gouws Marais, and Antonie Johannes Botes and Christian Frederick Klem, as executors testamentary of the late Gertruida Rachel Anna Gouws (born Maritz), to have certain rights declared.

The plaintiff's declaration was as follows: (1) The plaintiff is Daniel Mills Dyason, of Fraserburg, who sues in his capacity as executor dative in the estate of the late Pieter Johannes Gouws. (2) The defendants are (1) Hebrege Johanna Christina Marais (born Jooste) in her individual capacity and as executrix in the estate of the late Willem Francois

Marais, and as mother and natural guardian of her minor child, Pieter Johannes Gouws Marais; (2) Antonie Johannes Botes and Christian Frederick Klein in their capacity as executors testamentary in the estate of the late Gertruida Rachel Anna Gouws (born Maritz), all of the district of Fraserburg. (3) Pieter Johannes Gouws and Gertruida Rachel Anna Gouws hereinafter called respectively the testator and testatrix, being married in community of property executed a mutual will on October 22, 1893. (4) By the terms of the will the testators bequeathed to the first defendant, married to the said Willem Francois Marais the sum of £400, and to the child named — the sum of £350, and to the youngest daughter of the late P. B. Rossouw named Marie Louise the sum of £300; the said bequests being subject to the conditions that they should be paid out after the death of the survivor. (5) After making the bequests the testators appointed each other reciprocally heirs of everything, and further provided as follows: That the survivor shall further have the right in case he or she shall so elect to sell everything or to have same sold by public auction—when the survivor dies a public sale of the entire estate movable and immovable shall be held the proceeds of which after deduction of the costs and bequests shall be divided into two equal parts, of which one part shall be divided in equal shares amongst the brothers and sisters of the testator, and the other half amongst the brothers and sisters of the testatrix, and in case of the predecease of such brothers and sisters to their lawful descendants. (6) The testator died on May 10, 1900, without having revoked the said will and there were no children of the marriage. (7) The testatrix thereafter took out letters of administration as executrix testamentary of the testator's estate, and an inventory of the joint estate was framed showing it to be worth £6,621 9s. 9d., including a certain farm called Matjes Vallei, and thereafter, on June 6, 1901, a first liquidation account was filed with the Master, showing a balance of £6,219 18s. 5d. for distribution, but no further liquidation account was filed or any distribution made. (8) Thereafter, on October 24, 1902, the testatrix passed transfer of the immovable property, including the farm, from the name of the testator into her own name as sole heir, subject to the conditions of the joint will; copies of which are also hereunto annexed; and she adiated and accepted the benefits conferred by the said will and remained in full enjoyment and possession of the whole of the joint estate, save with regard to the bond hereinafter referred to, up to her death. (9) Prior to, and at the date of testator's death, one Willem Francois Marais was indebted to him in the sum of £750 upon a mortgage bond dated November 3, 1891: the interest on

the bond was paid up to October, 1902. Marais died subsequently to testator; the property specially mortgaged under the bond was at the time of passing the bond and still is of the full value of £750 and upwards. (10) After Marais's death, on January 12, 1903, the testatrix purported to sell the bond to the first defendant for the sum of £100, and endorsed upon the bond "settled, January 12, 1903 (sd.) G. R. A. Gouws": the sum of £100 was paid by the defendant to the testatrix, but the bond has not been cancelled, and still remains registered against the W. F. Marais: the first defendant was fully aware of the provisions of the mutual will. (11) On November 24, 1902, the testatrix made a further will confirming the mutual will, and stating that the heirs therein named should be considered as heirs under this last will. On the same date the testatrix made a declaration attached to the will of November, 1902, wherein she stated that the child of the first defendant to whom the £350 was bequeathed, should have been and was intended to be Pieter Johannes Gouws Marais (who is a son of the first defendant); the defendant has had several children who are still living. (12) Thereafter, on November 16, 1903, the testatrix made a further will appointing one G. Visser as her executor, and confirming the mutual will and thereafter, on May 4, she made a codicil appointing the second defendants as executors: copies whereof are annexed. (13) The testatrix died on October 24, 1904, without having re-married, and leaving no issue. (14) Thereafter the second defendants took out letters of administration as executors testamentary of the testator's estate; and in or about January 10, 1905, the plaintiff was appointed executor *dativo* of the testator's estate.

The plaintiff claimed: (a) That the joint estate of testator and testatrix was massed or consolidated by the mutual will, and that the testatrix, having adiated and accepted benefits thereunder could not in law dispose of the mortgage bond for the sum of £100 to the first defendant, to the prejudice of the heirs of the testator, to wit, his brothers and sisters, who were entitled to half of the joint estate after the payment of the legacies. (b) That the first defendant, in her capacity as executrix of the estate of the said W. F. Marais, be ordered to pay into the joint estate the sum of £750 (less £100 paid on account), with interest from October 7, 1902, at 5 per cent. Or in the alternative to (a) and (b) should the Court be of opinion that the mutual will did not mass or consolidate the joint estate, an order that the first defendant pay the one-half of the bond (less half the sum paid on account) to the plaintiff. Or, in the alternative, as against the second defendant, that they bring up and ac-

count for to the testator's estate the full half-value of the said bond, to wit, the sum of £375 (less £50). (c) That the farm Matjes Vallei and the other landed property registered in the name of the testatrix as aforesaid be declared to form part of the joint estate, and to be distributed in terms of the mutual will. (d) That the bequest of £350 be declared void and of no effect, for uncertainty; or not binding in any manner against the testator's estate.

The defendants' plea was as follows: (1) The defendants admit paragraphs 1 and 2 of the plaintiff's declaration, save that the name of the second executor in the estate of the late Gertruida Rachel Anna Gouws is Christian Frederick Klem, and not Klein, as stated. (2) They also admit paragraphs 3, 4, and 5, save that they crave leave to refer this Honourable Court to the terms of the will itself for greater certainty. The word "the" at the end of the second line of paragraph 4 should be "her," and "P. B. Rossouw" should be "P. D. Rossouw." (3) The defendants admit paragraphs 6 and 7. (4) They admit paragraph 8, and say that the testatrix enjoyed possession of the said estate as the sole heir thereof, under the said mutual will and subject to the conditions thereof. (5) They admit paragraphs 9 and 10, save that they say the said bond was actually sold to the first defendant for the sum stated, and that the first defendant bought and paid for the same *bona fide*, for the above consideration, and without knowledge of the provisions of the mutual will, except in so far as she was aware that she and her minor son, Pieter Johannes Gouws Marais, were to be legatees thereunder. The fact that the bond has not been cancelled in the Debts Registry is due to the parties concerned not having been aware that such cancellation was necessary. 6. The defendants admit paragraphs 11, 12, 13, and 14, and say that the declaration referred to in paragraph 11 correctly sets forth the intention of the testators in respect of the child of the first defendant, to whom the bequest was made, and that there is no uncertainty as to the identity of the legatee. The said P. J. G. Marais was the godson of the testators, and lived in their house for several years. (7) The defendants contend that there was no massing of the joint estate, but that, even if there was, the true construction of the mutual will is that the survivor was appointed sole heir, with the right to deal with and dispose of all the property of the joint estate during her lifetime at her pleasure, and that only such balance of such joint estate as should be left at her death was to be divided in equal shares between the brothers and sisters of the testators respectively. (8) They contend, therefore, that the testatrix

had the right to dispose of the bond as she did, provided only that the legatees mentioned in the mutual will were not prejudiced thereby, and they say that the plaintiff is not entitled in any case to recover any sum in respect of the said bond from the first defendant. But if this Honourable Court should find that the testatrix exceeded her powers by disposing of the said bond as aforesaid, and that the plaintiff is entitled to recover one-half of the said bond (less half the sum paid), then the second defendants are willing to acquiesce in the second alternative to claims (a) and (b) of the declaration. (9) As to claim (c) thereof, the landed property in the joint estate has been sold, with the acquiescence of the heirs, and part of the purchase price thereof has been paid, and is deposited to the credit of the estate in the bank, while the remainder falls to be paid at divers dates in the near future. The second defendants are willing that the said proceeds should be distributed according to the terms of the mutual will. Subject to the above, the defendants pray that the plaintiff's claims may be dismissed, with costs.

Mr. Searle, K.C. (with him Mr. Py-mont), for plaintiff; Mr. Van Zyl for defendants.

Daniel Mills Dyason, attorney, practising at Fraserburg, and plaintiff in the action, stated he was executor dative in the Gouws' estate. In the inventory of property filed by Mrs. Gouws shortly after the death of her husband, he found a bond by W. F. Marais in favour of Mr. Gouws for £750. He made inquiries, and found that the bond was in the possession of the widow Marais. He made application to her for it, and she referred him to her attorneys. He communicated with them, and they replied that he could inspect the bond at their office. Witness replied stating that as he might have to institute an action in the matter, he warned them not to cancel the bond. Witness subsequently inspected the bond. The interest on the bond was paid up to October, 1902.

To the Court: The bond was released on the payment by the widow Marais of £100.

Witness, continuing, said it was agreed to bring the different questions in dispute before the Supreme Court for settlement. William F. Marais died in May, 1902, leaving eight children, all minors. The late Peter Gouws and his wife went to reside in the village of Fraserburg early in 1900.

The assets of the joint estate after the death of the survivor had been sold by public auction. Witness was satisfied with the sales. As regards the bond, it was sold privately, and witness understood that the amount realised was used privately by the testatrix.

Cross-examined by Mr. van Zyl: The

testatrix used other moneys out of the estate. Witness did not know of her selling any other property privately.

In re-examination, the witness said the testatrix was of unsound mind shortly prior to her decease.

In reply to the Court, the witness said the estate at the time of the death of the testatrix was considerably reduced from what it was when the inventory was made.

Replying to Mr. Searle, witness said that the inventory showed a valuation of over £6,000, and now there was not more than £4,000. All the immovable property mentioned in the inventory was still to be found, but certain things—such as horses and carts, goats, etc.—were missing.

Mr. Searle closed his case.

A clerk from the Deeds Office submitted certain deeds of transfer in the estate.

R. du Bois Steyn produced the mutual will made by the testator and testatrix.

J. J. Botes, attorney, of Fraserburg, said that after the death of Mr. Gouws he transacted all the business for the widow, who was residing in Fraserburg. Witness drafted the will for her, and drew her attention to the blank left for the child's name. She asked witness to fill in a name, but witness replied that he could not do that.

Maasdorp, J., intimated a wish to hear counsel in argument as to whether the blank in the will could be filled in.

Mr. Searle: The will is vague. There is no Roman Dutch law on the subject, but the English law is perfectly clear. Theobald on Wills (5th edit., p. 241); *Wynn v. Littleton* (1 Vernon Ch., p. 241); *Bayliss v. Attorney-General* (2 Atkinson, 239); *Re Bacon's Will* (31 Ch. D., 460); *Hurt v. Hort* (3 Brown, 311). The Court will not admit parol evidence to supply blanks in a will, save where it is a mere question of a christian name. *Taylor v. Richardson* (2 Drury, 16). Stephen on Evidence (Art. 91 (7); Jarman on Wills (5th edit., 340 and 412). The only case bearing on the point in our Courts is *In re Herold* (1 Juta, 159). There there was a latent ambiguity, and extrinsic evidence tendered on behalf of the claimant was not admitted. See also *Re Bacon's Will* (31 Ch. D., 460) and the Encyclopedia of the Laws of England (p. 237), on patent and latent ambiguity, and when parol evidence is admissible to explain each. *Gord v. Needs* (2 M. and W., 129); *Hiscocks v. Hiscocks* (5 M. and W., 386). 4 Burge, p. 539.

Mr. Van Zyl: The cases cited on the other side are not in point. Here there is no question of a blank, for some child of Mrs. Marais is clearly indicated. In most of the cases cited there was no indication as to how the blank was to be filled in, but here we have an indication.

[Maasdorp, J.: You admit that when the testator died there were more children than one?]

Yes, but we say that the evidence would show that there was one specially favoured child. This was not Mrs. Marais' will, but a mutual will, and her statement is therefore admissible to show the intentions of the joint testators.

[Maasdorp, J.: You want to bring the unsworn testimony of one person to prove the intention of another person.]

It may be that the will is void for ambiguity, but I submit that we can call evidence to prove the intention of the testators. In the case of *In re Herold* parol evidence was admitted, but the will was thrown out because that evidence did not clearly show the intention of the testator. We only ask to be allowed to put our facts before the Court. See the judgment of Dwyer, J. in Herold's case.

Mr. Searle was not heard in reply.

Maasdorp, J., said the question had been raised whether a blank could be allowed to be filled up on evidence of the intention of the testator. It must be pointed out that if the proposed evidence were admitted, the Court would go much further than the cases which had been cited would warrant. It was proposed to prove what statement was made by the wife—that meant a double difficulty, the proving of what somebody else had said in reference to the intention of the testator. They had no declaration of the testator himself. If it was taken that the statement of the wife could prove the intention, then the cases were very clear. In cases where the intention was doubtful, the Court would admit evidence. Here, however, there was a latent ambiguity through the description being applicable to more than one legatee. The testator might have been in doubt, and although he at one time had an intention, he had no intention of filling in until he had given the matter further consideration. The Court would not rectify the will upon evidence of declaration of the circumstances, but in so far as that particular bequest was concerned, the provision would be regarded as void for uncertainty. He now held that the evidence which was tendered was not admissible.

Mr. Botes (recalled) stated that Mrs. Gouws had dealt with the estate as though she had full powers—she had lent money on bills and on bonds. On the death of Mrs. Gouws the property was sold by public auction, as authorised by the will.

Christian Frederick Klein, executor with the previous witness under the will of Mrs. Gouws, gave similar evidence as to Mrs. Gouws having lived on the capital of the estate, thus reducing its value. It was at the instance of this

witness that Mrs. Gouws was declared of unsound mind. Witness did not know that the bond on the Marais estate had been settled for a hundred pounds—that did not transpire till the death of Mrs. Gouws.

Mrs. Marais, who was an adopted daughter of Mrs. Gouws, also gave evidence. She had paid the interest on the £750 bond up to 1902, but her mother was so sorry for her, she having been ruined by the military, that she sold witness the bond for £100.

Under cross-examination, witness said she was always in the house with Mrs. Gouws, and was under the impression that she was to receive half the estate on the death of her mother, Mrs. Gouws.

Frederick Stainbridge, sheep inspector in the district of Beaufort West, who witnessed the release of the bond for £750, stated that the £100 was counted out in his presence in settlement.

Mr. Van Zyl closed his case.

Mr. Searle: In opening the case I said that there were only two points to consider; but now, since the legacy cannot stand, there is only one: whether the testatrix could deal with the whole estate or whether she was a mere usufructuary. In the first place, the survivor was empowered to sell everything in the estate, but only by public auction. On the death of the survivor the whole of the property was to be sold by public auction. Clearly, then, this was not a case of a *fidei commissum residui*.

[Maasdorp, J.: What was to be done with the money in the estate?]

Of course only what was saleable had to be sold. One does not sell cash by public auction.

[Maasdorp, J.: The other side contend that the survivor could sell for her own benefit.]

The fact that she is ordered to sell by public auction goes to show that she could not sell for her own benefit. Had she been empowered to do this, it could not have mattered to anybody else how she sold. Then on the death of the survivor the entire estate is to be sold by public auction; therefore she must have been bound to keep the *corpus* of the entire estate together and so was only a usufructuary. True, she was appointed sole heir but so was the survivor in *Strydom v. Strydom's Trustees* (11 S.C.R., 423), and yet the survivor was declared to be only a usufructuary. So in *Klopper v. Smit* (9 Juta, 167) the heir was held to be a usufructuary. In *Brown v. Rickardt* (2 Juta, 314) the heir was allowed to alienate the whole estate, *inter vivos*, and only what was left at the death of the survivor was to go to the further heirs. The cases of *Strydom* and of *Klopper* apply in this case rather than that of *Brown*, which is the leading case on *fidei commissum*.



*residui*. In 1903 the survivor makes over a bond for £750 for £100, thus practically making a present of £650 out of the estate. This bond, however, was never cancelled by her as executrix. The position of the defendants in that she had a right to do as she liked with the bond, and might have done what she liked with the land, and have given that to Mr. Marais. If the survivor was a fiduciary she could not make a present out of the estate to Mrs. Marais, a *fidei commissory*.

[Maasdorp, J.: Suppose Mrs. Marais had been a stranger, what would have been her position?]

It might have been difficult to have impeached the transaction, if consideration had been given, but such stranger would have been put on enquiry. In *Lange v. Liesching* (r'oord 55) the rights of *fidei commissories* in case of alienation of the *fidei commissory* property were discussed, but the case is not quite in point; *Lange v. Scheepers* (Buch., 1878, p. 92) is much more so. There the sale by a fiduciary to an outsider was set aside. See also *Oosthuijzen v. Oosthuijzen* (Buch., 1868, p. 51). As Mrs. Marais was one of the beneficiaries under the will, she cannot get benefits to the detriment of other beneficiaries. If Mrs. Gouws did a wrongful act her heirs must suffer.

[Maasdorp, J.: Yes, but her heirs are not the same as heirs of the joint estate.]

She left no heirs of her own. Where an heir knows that she is an heir she should not be allowed to accept a present from the executrix out of the estate.

Mr. Van Zyl: In our plea we deny that there was any massing of the estate. I do not press that point, but our position is that by the joint will a *fidei commissum residui* was created, and that that is clear from the whole tenor of the will. Mrs. Gouws, as executrix, had a right to sell for the purpose of paying the debts of the estate; hence when the will gives her power to sell after the death of the first dying that provision must have conferred upon her some special power in addition to that which she possessed in common with every executrix. Then again we cannot admit that there was any vesting before the death of the survivor, since it was only then that it became clear who the heirs were.

[Maasdorp, J.: In the case of a *fidei commissum* there never is a vesting in the *fidei commissaries* till after the death of the fiduciary. If she was a mere usufructuary the property must have vested in somebody else.]

The case of *Brown v. Rickardt* (2 Juta, 314) is similar to this *Klopper v. Smit* (9 Juta, 167) does not apply. In all the cases quoted on the other side

some specific bequest (often of a farm) has been made. Here there was a bequest of the entire estate. Then it must be remembered that the testators had no children, and so would not be so very anxious to keep the property together, and would not improbably leave the survivor all possible freedom by imposing only a *fidei commissum residui*. If there was not a *fidei commissum residui* Mrs. Gouws had a right to deal with her half share of the common estate. As to the rights of creditors, see *Haupt v. Van der Heever's Executor* (6 Juta, 49) and *Oosthuijzen's Testatrix v. Moffat* (5 Juta, 319). *Haupt v. Van der Heever* shows that should the surviving spouse sell to a *bona-fide* purchaser, the sale cannot be set aside. The sale, at all events as to half of the joint estate, must stand good unless it can be shown that the purchaser bought with knowledge of the terms of the will.

*Cur. Adv. Vult.*

*Postea* (February 26).

Maasdorp, J.: Pieter Gouws and his wife Gertruida Gouws executed a mutual will on the 22nd October, 1898, among the provisions of which we find the following as being material to the issues raised in this case:—"And now as if making a new disposition and before proceeding to the election of heirs we bequeath to Hebrege Jooste, now married to Willem Francois Marais, the sum of £400 (four hundred pounds sterling) and to her child called \_\_\_\_\_ the sum of £350 (three hundred and fifty pounds) upon this understanding, that these bequests shall only be paid out after the death of the survivor of us. Now proceeding to the election of heirs, we nominate and appoint the first dying the survivor of us (as heir) of all our property to be relinquished by us on demise, moveable as well as immoveable, nothing whatever excepted to be possessed by him or her during his or her lifetime, without contradiction of anyone whatsoever; the survivor shall further have the right, in case he or she so elect, to sell everything or to have it sold by public auction. When the survivor also dies, a public sale of the entire estate, of moveable as well as immoveable property, shall be held of which the proceeds, after deduction of the costs and bequests, shall be divided into two equal parts, of which the one part shall be divided in equal shares amongst the brothers and sisters of us the testator, and the second part amongst the brothers and sisters of us the testatrix, it being hereunder understood that in case the same should be deceased those portions shall then be paid out to their lawful descendants."

The testator died on May 10th, 1900. The testatrix, as executrix testament-



ary, framed an inventory of the joint estate, bringing it up to the value of £6,621 9s. 9d., and upon the liquidation account which she filed subsequently it was stated to be worth £6,219 18s. 5d. She adiated under the will, and took transfer of the land belonging to the estate in her own name,, subject to the terms of the will. Portion of the estate consisted of a debt due by one Willem Francois Marais, husband of Hebrege Jooste, mentioned in the will, upon a mortgage bond made in favour of the testator for £750, mortgaging a farm worth fully the amount of the debt. This bond the testatrix sold to Hebrege Jooste for the sum of £100, endorsed the settlement upon the bond, and delivered the document to Hebrege Jooste on January 12, 1903. The bond has, however, not yet been cancelled. It is said by the plaintiff in his declaration that when the transaction took place Hebrege was fully aware of the provisions of the said mutual will, but this last allegation is denied by the defendants. The testatrix died on October 24, 1904. The plaintiff in this case is the executor dative of the testator's estate, and he sues Hebrege Marais as executrix of her husband's estate and natural guardian of her child Pieta Marais, and the two other defendants as the executors testamentary of the testatrix, in an action wherein he claims from Hebrege the payment into the joint estate of the sum of £750, the amount of the bond delivered to her by the testatrix, less the sum of £100, which was paid by her; or, otherwise, the payment to plaintiff of half that amount, less half the sum paid, as belonging to the testator's estate; or, otherwise, he claims the payment of the latter amount from the executors testamentary of the estate of the testatrix. The plaintiff further claims that the bequest of £350 be declared void and of no effect through uncertainty. The plaintiff bases his first claim upon the ground that the joint estate of the testator and testatrix was massed and consolidated by the will, and consequently the testatrix, having adiated under the will, could not in law dispose of the mortgage bond for the sum of £100 to the prejudice of the heirs of the testator. The defendants meet this contention by saying that there was no massing of the joint estate, but that even if there was, the true construction of the mutual will is that the survivor was appointed sole heir with the right to deal with and dispose of the property in the joint estate during her lifetime at her pleasure, and that only such balance of the joint estate as should be left at her death should be divided in equal shares between the brothers and sisters of the testators respectively. They proceeded, however, to state that if it be found that the testatrix exceeded

her powers, the executors of her estate are prepared to pay to the plaintiff, as executor of the testator's estate, half the amount of the bond, less £50. The first point to dispose of is the counterclaim of the defendants that the testatrix had full power to alienate the estate, with the obligation to account only for the residue. This contention would place the will in question upon the same footing as the kind of will mentioned by Voet (36.1.56), where the spouses make their will in the same instrument, and therein institute each other heir, with power to alienate, but subject to the proviso that at the death of the last-dying the residue of the estate shall be equally divided between the heirs-at-law of the first and of the last dying. The gist of this passage lies in the proviso; thereby the *fidei commissum* is constituted, and therein it appears that a diminution of the estate is contemplated by the alienation provided for in the will. But these are the very words which are wanting in the will in question. In this will the right to sell is given to the survivor, and this right may be one either to sell for her own account,, in which case the sales would be in diminution of the estate, or to sell on account of the estate, when there would be no diminution. It is quite conceivable that it might be very convenient for the survivor to dispose of land, and have the proceeds as part of the joint estate, and without leave granted by will, the survivor would have no right to sell the entailed property. It seems to me that this was the difficulty the testators intended to obviate. It also seems to me that the passage of the will immediately following shows that no reduction of the estate by the sales was contemplated; where it is provided that when the survivor also dies a public auction of the entire estate shall be held and the proceeds of the entire estate shall be divided amongst the heirs. Then, again, it is provided that the sale by the survivor shall be by public auction: which provision is evidently for the protection of the joint estate, and would have been unnecessary if the survivor could deal with the property as she pleased. This case seems similar to that mentioned by Voet (36-1-63), where he says, "In addition to this, in cases where the testator has given the fiduciary the power to alienate, the alienation which has taken place holds good, and the fidei-commissory heir cannot revoke the alienation, but has to content himself with security for the due restitution, after the vesting of the right or the fulfilment of the condition, of the value of that which has been alienated, so that the value is substituted for the thing." In this case I am of opinion that the power was given to the testatrix to sell the property in the estate by auction and to account for the proceeds as

portion of the estate. Upon the widow's death the entire estate had to be accounted for in accordance with the inventory or liquidation account; or, as far as the plaintiff is concerned, in the interest of those who take the testator's half, half of the entire estate has to be accounted for. No question is raised in the case except as to the amount of the bond, and in all other respects the parties are satisfied to regard the estate as intact. The transaction in respect of the bond is called a sale for the sum of £100, but it is quite clear that, considering the value of the security, it amounted to neither more nor less than a gift of £650 to the estate of Marais, of which Hebregge Marais was executrix. As such the transaction cannot be regarded as protected by the provision in the will giving the testatrix the right to sell the property. The plaintiff contends that as there was a massing of the estate the entire estate must be accounted for and dealt with in terms of the will, but he only raises that contention in the interest of the heirs succeeding to the testator's estate, and it seems to me that that object is gained without holding that such a massing took place. It is quite clear that the testator instituted his wife fiduciary heir to his half of the estate, with a direction to leave that half upon her death to his brothers and sisters in equal shares, and that half must now be accounted for to the fidei-commissory heirs. Amongst other things, half the value of the bond must be accounted for. In the first instance, the amount is claimed from Hebregge Marais, to whom the alienation was made, or, in the alternative, it is claimed from the executors of the testatrix, who made the alienation. Now, it is quite clear that the estate of the testatrix is liable for the amount claimed, and her executors possess the means, and have expressed their willingness to pay it, in case the Court should find that the alienation was wrongfully made. It is therefore unnecessary to enquire into the liability of Hebregge Marais in this respect. Nor is it necessary to decide whether or not there was a massing of the estate, because the question does not affect the issue raised in this case, it being clear that the testatrix was fiduciary heir to her husband, and had to account to the fidei-commissory heirs for his estate after adiating under the will. The plaintiff's claim, that the bequest of £350 be declared void and of no effect through uncertainty, was virtually decided when the Court rejected, as inadmissible, the evidence which was tendered by the defendants to show that it was the intention of the testators to bequeath the amount to Pieter Johannes Gouws Marais, one of several

sons of Hebregge Jooste, who was married to Marais. The defendants tendered evidence to prove that the testatrix, after the death of the testator, had made a declaration to one of the witnesses as to the intention of the testators when making the bequest. It appeared from the authorities cited at the Bar that where in a will the name of a person intended to be benefited had been left totally blank, the Courts in England have invariably refused to admit evidence to supply the omission. The authorities were so clear upon the point that I had no hesitation in rejecting the evidence. It consequently remains uncertain for whom the bequest was intended. The bequest will therefore be declared void and of no effect on the ground of uncertainty, and the executors of the estate of the testatrix are ordered to pay to the plaintiff half the amount of the bond less £50: that is the sum of £325. The Court also declares that the landed property mentioned in prayer (e), or the proceeds thereof, form a portion of the joint estate. Costs to come out of the estate. Parties to the suit who have given evidence are declared necessary witnesses. Executors of the estate of Mr. and Mrs. Gouws to have taxed costs as between attorney and client allowed out of the estate.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset. Defendants' Attorneys: Walker and Jacobsohn.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

VUSS V. VUSS. { 1906.  
Feb. 7th.

This was an action for restitution of conjugal rights, failing which a decree of divorce on the ground of the defendant's malicious desertion.

Mr. Lewis was for the plaintiff, and the defendant was in default. Counsel said plaintiff obtained leave on the 16th November to sue his wife by edictal citation, and personal service was ordered, if possible, failing which publication. There was an affidavit that personal service was impossible.

The defendant was ordered to return to co-habitation by the 1st May, failing which to show cause why a decree of divorce should not be granted, with costs, by 1st June, the rule to be personally served if possible, failing which, publication in the same manner as before.

ZERF V. FAGAN.

This was an action brought by Adam Jacobus Zerf, and Marthinus Johannes Zerf, against Henry Allan Fagan, to recover sums of £69 10s. 9d., £12, and £50, for wages due to workmen, wages due to the plaintiffs, and damages respectively, in respect of a building contract. The plaintiff's declaration was as follows: The plaintiffs carry on business in partnership as builders at Somerset West and elsewhere; the defendant is a landowner, residing at Somerset West. In or about February last the plaintiffs and the defendant entered into an oral contract, whereby the plaintiffs agreed to give their services to the defendant as foremen in and about the building of a certain house at Somerset West. and to engage workmen for the said work; and the defendant agreed to pay to each of the plaintiffs respectively the sum of 10s. per day, payable weekly, for their said services, and also to furnish the plaintiffs weekly with money wherewith to pay the wages of the said workmen, and also to supply all the materials necessary for the building of the said house; and the defendant further agreed that if the total cost of the said house on completion should be less than the sum of £1,745, he, the defendant would pay to the plaintiffs the difference between the said cost and the sum of £1,745. Thereafter the plaintiffs duly rendered their services to the defendant, and carried out their part of the said contract until the 15th July last. On the 8th July, and also on the 15th July, the defendant wrongfully refused and failed to pay to the plaintiffs the moneys necessary for paying the wages of the workmen employed on the said building during the weeks ending on the said dates respectively, amounting altogether to the sum of £69 10s. 9d., for which sum the plaintiffs are liable to the said workmen. There is also due to the plaintiff the sum of £12, being the wages due to them as foremen for the weeks ending on the 8th July and 15th July respectively. By reason of the defendant's default in paying the said sums, the plaintiffs have been unable to pay the said workmen, have been unable to proceed with the said building, have been deprived of the wages which they would otherwise have earned as foremen under the said contract, have been threatened with lawsuits by the said workmen, have been injured in their credit and reputation, and have thereby and otherwise suffered damage in the sum of £50. Wherefore they pray: (a) Judgment in the said sums of £69 10s. 9d. and £12 respectively, with interest *a tempore morae*. (b) Judgment in the sum of £50 as damages. (c) Alternative relief. (d) Costs of suit.

In reconvention, the defendant claimed £116 18s., due to him, being

an amount overdrawn; £223 15s., an expenditure which he incurred; and £252 6s. 6d., as damages for breach of contract.

Mr. J. E. R. de Villiers for plaintiff; Mr. Burton for defendant.

Evidence having been given, and counsel for the plaintiff heard in argument on the facts,

Hopley, J., said he regretted very much that the parties should have come to the Supreme Court, and incurred such a large expenditure in such a case. He believed the defendant's version of the contract, and gave judgment for the defendant with costs, and for the plaintiff in reconvention for £500, with costs.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. } 1906.  
Feb. 8th.

Mr. Gutscho moved for the admission of Robert Arthur Inchbold as an advocate.

Granted.

Mr. Buxton moved for the admission of Albert Myburgh van der Byl as an advocate.

Granted.

Mr. Swift moved for the admission of Roelof van der Merwe Euvraad as an attorney and notary.

The application was granted, the oaths to be administered at Colesberg.

Mr. Van Zyl moved for the admission of Chas. W. M. Malan as an attorney and notary and conveyancer.

Granted.

Mr. Alexander moved for the admission of Louis Alexander as an attorney, notary, and conveyancer.

Granted.

Mr. W. P. Buchanan moved for the admission of Carl Ferdinand Markotter as an attorney and notary.

Granted, the oaths to be administered at Paarl.

Mr. Lewis moved for the admission of Max Gurland as an interpreter in the Yiddish language.

Granted.

## PROVISIONAL ROLL.

VISSER V. JACOBSON. } 1906.  
 { Feb. 8th.

Mr. Van Zyl moved for provisional sentence on the sum of £234, less £50 paid on account, amount due on promissory note. The note (Mr. Van Zyl remarked) was not dated, but it became due in December last.

Granted.

WOODHEAD, PLANT AND CO. V. WALTER.

Mr. P. S. T. Jones moved for provisional sentence on a cheque for £20, which was not honoured when presented.

Granted.

BOSSCHER V. LIPMAN.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate.

Granted.

BURGDORF V. DE JAGER.

Mr. Payne moved for a provisional order of sequestration discharged.

Granted.

MICHAU V. BASSON.

Mr. De Waal moved for provisional sentence on a mortgage bond for £250, with interest at the rate of 10 per cent. from January 24 last, and that the property specially hypothecated be declared executable.

Granted.

WIENER AND CO. V. SAMSODIEN.

Dr. Greer moved for the final adjudication of the defendant's estate.

Granted.

## ILLIQUID CASES.

MAKWA V. BABA. } 1906.  
 { Feb. 8th.

Mr. Lewis moved for judgment, in default of plea, on an amount of £73, wages due.

Granted.

WALKER AND CO. V. VAN DER MERWE.

Mr. Lewis moved for judgment, under Rule 329d, for £26 9s., amount due on goods sold. Since the summons had been served, the amount had been paid, less 10s. He now applied for judgment on that amount, with costs.

Granted.

CLARKE AND CO. V. THOMAS.

Mr. Lewis moved, under Rule 329d, for judgment for an amount of £33 13s. 11d., due for goods sold, less £26 5s. 5d. paid on account.

Mr. W. P. Buchanan, who appeared for defendant, said an appearance had not been entered, as it was understood the case was settled. The amount claimed, it was contended, was due for the cost of carriage from Worcester to Cape Town.

Mr. Lewis said they had not had a copy of defendant's affidavit.

Mr. Buchanan said his client had only heard the previous afternoon that the case was to be heard. It had been hanging over from January 12, and consequently they had not much time to get the necessary affidavits together.

Buchanan, J., said the defendant would have to pay the costs of his default.

Mr. Lewis said his clients had given credit for the value of the goods, but they were now charging for freightage, insurance, etc.

Mr. Buchanan contended that the plaintiffs should have withdrawn their summons, and have issued a new summons. He asked the Court to reserve to defendant the right to claim back the costs.

The case was adjourned to enable an action to be brought by the plaintiffs.

FRIEDLANDER AND ANOTHER V.  
 DE HETON.

Mr. Russell moved for judgment under Rule 329d for £23 6s., amount due for professional services rendered and moneys dispersed on defendant's behalf.

Granted.

GUTHRIE AND ANOTHER V. SWANEPOOL.

Mr. Van Zyl moved for judgment under Rule 329d for £60 9s., amount due for professional services rendered.

Granted.

LIBERMAN AND ANOTHER V. NELSON.

Mr. Lewis moved for judgment under Rule 329d on a sum of £39 7s. 6d., less £31 17s. paid on account.

Granted.

ABDURJAH V. PEREGRINO.

Mr. De Waal moved under Rule 329d for an order compelling the defendant to hand over to plaintiff an account and all documents and receipts in the plaintiff's estate.

Granted, the defendant to file the account and deliver the documents within seven days.

**MILLS V. MCMULLEN.**

Mr. Du Toit moved for judgment under Rule 329d on an amount of £215, rent due.

Granted.

**TRUTER V. LOUW.**

Mr. D. Buchanan moved for judgment, under Rule 319, in default of plea. The amount involved was £54.

Granted.

**REHABILITATIONS.**

1906.  
Feb. 8th.

Mr. Gutsche moved for the discharge from insolvency of Samuel Blatt. The estate was sequestrated on the 31st August, 1901. The liabilities were £1,114, and he paid 1s. 3d. in the £. The reports of the trustees were favourable.

Granted.

Mr. Bailey moved for the discharge from insolvency of Johannes Bernhardus Haasbroek. The estate was sequestrated on June 30, 1898. The reports of the trustees were favourable.

Granted.

Mr. Swift moved for the discharge from insolvency of Hosias Hossiasohn. The estate was sequestrated four years ago. The reports of the trustees were favourable.

Granted.

**GENERAL MOTIONS.**

**McKILLOP'S CURATOR V McKILLOP.**

This was an application for the confirmation of the sale of certain property, situate at Green Point.

The affidavit of the curator bonis (Arthur Kilwarden Wolfe), stated that on taking charge of the estate he found that there were many liabilities to meet, and although he had not as yet discharged these liabilities he had succeeded in reducing them to a considerable extent, so that at the present moment, exclusive of the bond debts of the estate, there only remained due to the concurrent creditors something like £200. The assets of the estate consisted exclusively of immovable property, amongst others, there was a property at Green Point, registered in the name of Jas. Henry McKillop. On August 31 petitioner obtained an order from the Court confirming the sale of certain other property, situate at Newlands, and the proceeds of this property after deducting the bond, with interest, had been and still were being appropriated towards payment of the debts of the estate and the upkeep, and McKillop and his wife, who had been living apart for the last twelve months. There

was still £205 to come in from the property, of which £72 was due in respect of interest on bonds. About the 18th January, petitioner obtained an offer of purchase for Coleraine Lodge and sold it for £2,000 provisionally. As additional security for the second bond of £600 to be passed by the purchaser, on the property, he was giving other property at Green Point registered in his name. The sale of this property would relieve the estate of its largest liability a bond of £1,400, and would enable the petitioner to wipe off all the concurrent debts, and leave him with a fairly substantial balance in hand. The price at which the property had been disposed of was £300 in excess of the price originally paid for it. The concurrent creditors had lately been pressing for payment of their claims, one of whom had already issued a summons, and at a meeting of creditors the condition of affairs having been presented to them, they signified their consent to wait until April 1, on or before which time petitioner hoped to be able to satisfy their claim.

The affidavit of the respondent stated he was desirous that the landed property in his estate should not be disposed of. It appeared from the curator's petition that he intended selling Coleraine Lodge for £2,000, the property was of considerably more value, and would realise a better price if sold at a more opportune time. If the property was sold, no portion of the purchase money should be allowed to remain on a second mortgage even though further security was given. He held that the interest payable was amply covered by the present rental of the premises, and the rental (£120 a year) was very low, as it had been reduced by the curator from £252 per annum. If the balance purchase of his Newlands property had been paid in cash, and not allowed to remain on mortgage, there would have been sufficient funds to settle the major portion of the claims due at the present time. Therefore, he was desirous that no application for the confirmation of the sale of his property should not be granted. In a replying affidavit the curator bonis said it was necessary in view of the pressure brought to bear on all sides to sell the property. The property had been let at £10 a month, because it was all the curator bonis could get for it. It had been vacant for two months at the time it was let.

Mr. McGregor for applicant; Mr. W. P. Buchanan for respondent.

Buchanan, J., remarked that he felt that Wolf was acting, as he thought, in the best interests of the estate.

Mr. McGregor said that, perhaps, there might be a disposition on the other side to accept an arrangement.

Mr. Buchanan said it was true that Mr. Wolf might be doing everything he thought correct, but he did not feel



that he could enter into any arrangement.

Buchanan, J., said that he felt a great difficulty as to the order applied for. It was not as if the Court had any control over the persons or property concerned. There would be no order made on the application, but Wolf would have his costs out of the estate. He thought that McKillop would be very wise in accepting Wolf's suggestion, but the Court could not force him to do so.

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*Ex parte* ERASMUS.

Mr. Gutsche made application for an order authorising the payment of certain moneys, to be expended on the education of three minor children. The Master had reported favourably on the application.

Order granted, in terms of the Master's report.

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*Ex parte* MARAIS AND ANOTHER.

This was an application by Gerhardus Schoeman Marais and Elizabeth Maria Marais (born Kotzee) for an order confirming the purchase of certain property.

Mr. W. P. Buchanan was for the petitioners.

The petitioners' affidavit set forth that they had been married out of community of property, and the Court had previously issued an order authorising the sale of their one-seventh part of certain farms in the Bedford district at £2 per acre in satisfaction of a bond. That property had been sold at £2 5s. per acre, and after the payment of the bond and legal expenses, there would be a balance over of £750, wherewith to purchase other property. The petitioners had entered into a deed of sale for the purchase of certain residential property in the town of Bedford for £550, subject to the approval of the Master of the Supreme Court as to the property being worth that price. The petitioners intended to use this property as a boarding-house for children attending Bedford Public School, and persons coming into the town for Nachtmal, and for that purpose would require furniture to the value of £60. Further, they were desirous of erecting on the property a stable and shed, at a cost of £90. They, therefore, prayed for an order authorising the Master to confirm the purchase of the town property, the expenditure of the sums mentioned in furnishing the house, and the erection of the stable and shed, costs of the application to come out of the balance of £750.

Mr. W. P. Buchanan said that the Master seemed to think that the petitioners would not carry out their pro-

posals as regards the establishment of a boarding-house.

Buchanan, J., said that an order would be granted confirming the purchase of the town property for £550, the balance of the £750—£200—to be paid over to the Master, who would be authorised to pay out therefrom sums for the purchase of the furniture and the erection of the stables, as he might deem fit.

Order made accordingly.

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*Ex parte* DAVIES.

Mr. W. P. Buchanan applied, on behalf of Sarah Jane Davies, in her capacity as executrix testamentary to the will of George Paine Davies, her husband, for leave to execute a certain bond. The petitioner's affidavit set forth that her husband died on July 28, 1902, leaving six children. The most important of the assets in the deceased's estate was a tobacco-growing business. For the conduct of that business, the petitioner required to make purchases of tobacco leaf; but she was not able to do so, as the Standard Bank declined to give her an overdraft on the account in the estate. The petitioner now asked for an order authorising her to execute a general covering bond, to enable her to overdraw the account with the Standard Bank to the extent of one-half the amount of the security to be given against the bond. There was property in the estate to the value of £6,000, which the petitioner offered as security.

Order granted as prayed, the security against the bond to be the property valued at £6,000.

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BERRANGE V. BERRANGE.

Mr. Russell, for the petitioner (Mrs. Berrange), moved for leave to sue the respondent (Daniel Frederick Berrange) by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Counsel explained that the parties were married at Grootfontein in 1882, and the respondent was now in Heidelberg, Transvaal, and without the jurisdiction of the Court.

Leave granted, as prayed, citation returnable on March 31.

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GORDON V. GORDON.

Dr. Greer applied for the petitioner (Mrs. Gordon) for an order calling upon the respondent, her husband, to show cause why he should not be ordered to pay the respondent £50, to enable her to proceed with an action for judicial separation, on the grounds of violence, and to hand over a sum of money for

the petitioner's maintenance pending the suit.

The petitioner's affidavit set forth that the respondent was in receipt of a salary of £15 per month, besides which he was in receipt of an income from a boarding-house which he conducted. The parties were married out of community of property.

The respondent appeared in person. Questioned by the Court, he said: I am penniless, my lord. She wants £50—I have not got fifty shillings in my possession to-day. I am willing to take her back.

[Buchanan, J.: Have you been guilty of violence?]

The Respondent: Only of taking liquor from her at six o'clock in the morning. I have only £12 10s. per month. I have no boarding-house now, and I have to support my two children.

At the request of Dr. Greer, the respondent was put in the witness-box and examined. He stated that his salary was £12 10s. per month. He had no boarding-house now. He had had a few lodgers living with him, but had to give them up at the time his wife left him, on January 3. He had also had to give up his house and store his furniture. He did not think that the value of the furniture was more than £50. He now lived with his mother, to whom he had to pay £6 per month for his own board and lodging and £3 per month for that of the children.

Buchanan, J., said that the parties were married out of community of property, and the case was not one in which any order could be made.

#### KOTZE V. PARTRIDGE.

Mr. J. E. R. de Villiers moved for leave to sue the respondent by edictal citation for the payment of the capital amount of a certain mortgage bond passed by the petitioner in favour of the respondent, with interest, and for an order to attach the mortgaged property *ad fundandam jurisdictionem*. Counsel explained that the respondent had disappeared from Cape Town some time ago, without leaving anyone in charge of his affairs. It was now believed that Partridge was employed in London in a motor-car business.

An order was granted to attach the property *ad fundandam jurisdictionem*, with leave to sue by edictal citation, personal service to be effected, failing which publication in the "Daily Telegraph" (London) and the Government "Gazette," citation returnable on June 1.

#### STEVENS V. STEVENS.

This was an application for an order on the respondent, George Henry

Stevens, for the payment of alimony, pending an action for the restitution of conjugal rights, failing which a decree of divorce.

The petitioner's affidavit set forth that she had previously instituted proceedings against the respondent for restitution of conjugal rights, but the case was withdrawn, on condition that the respondent would live with the petitioner. The respondent, after that, offered the petitioner 10s. per month, on condition that she would live apart from him. She refused the offer. The respondent declined to live with her because she was coloured, and he was of European extraction.

The respondent's affidavit stated that he had never lived with the petitioner as her husband. She was a Matabele native. After marriage, she lived in his father's house in the capacity of servant. He had not undertaken to live with her as a condition to the withdrawal of the proceedings for restitution of conjugal rights previously instituted, but withdrawn. The respondent was only a labourer, employed at the Rochester Brickworks, Salt River. His pay was only 5s. 9d. per diem, plus £36 per annum, which his father gave him. He could not afford to pay more than 10s. per month.

The replying affidavit of Susan Stevens asserted that she had not been in any sense a hired servant in the respondent's father's house. She believed that her husband had taken work as a labourer only as a subterfuge.

Dr. Greer was for the petitioner, and Mr. J. E. R. de Villiers for the respondent.

Buchanan, J., said that it was clear that the applicant had a good case; but it was not, on the other hand, denied that the respondent had provided her with a respectable place in which to live, which she had left. In these circumstances, he would make no order for alimony, but would order that the respondent pay to the applicant's attorney £5 forthwith, and £10 on the applicant's suit for restitution of conjugal rights being set down for hearing.

#### Ex parte VAN DER MESCHT.

Mr. Gutsche applied for leave to pass transfer of certain property to the Colonial Government, the petitioner being the guardian of a minor child. The Master raised no objection.

Order granted.

#### LOUBSER V. ESTATE BOTHA.

Mr. Sutton, for the petitioner, made application for leave to sue, *in forma pauperis*, the executors in the Estate Botha for the transfer of certain pro-

perty. Petitioner's affidavit set forth that she was engaged by Mr. Botha as housekeeper, on condition that her board and lodging were provided, and that, on her master's demise, she was to receive from the estate £500, or a certain cottage. Mr. Botha was now dead, and the executors repudiated liability.

Buchanan, J., granted a rule nisi, subject to the certification of donation, calling upon the respondents to show cause why an order for the transference of the property should not be issued, the rule to be returnable on February 27.

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*Ex parte* THE EXECUTORS OF THE LATE DEAN.

Mr. Watermeyer applied for leave to mortgage certain property in the estate of the late Mr. Dean. The affidavit of the petitioners, Mr. Gus Trollip and Mr. E. R. Syfret, set forth that, last year, the roofs of certain cottages in the estate at Newlands, were blown off in a storm. In order to prevent further damage by rain, it was found necessary to replace the roofs immediately. There being no available cash in the estate, the executors had paid for this work themselves, and now sought to mortgage the property to the extent of £180 to obtain repayment of the money expended by them.

[Buchanan, J.: The only question is whether they ought to be paid out of the income in the estate.]

Mr. Watermeyer: The income is only £200 per annum, out of which the widow has to support herself, and her children.

Order granted.

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*Ex parte* WALLIS.

Mr. Van Zyl applied, on behalf of the trustee, in the insolvent estate of J. Fcurie, C. son, for the appointment of a commission for the examination of certain witnesses. It was suggested that the Assistant Resident Magistrate, Calitzdorp, should be appointed commissioner.

Order granted, the A.R.M., Calitzdorp, to be the commissioner for the examination of the witnesses.

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*Ex parte* VAN BENSBERG.

Mr. Bailey moved for an order authorising the amendment of a certain deed of transfer. It appeared that the amendment was made necessary by an error in the conveyancing.

Order granted.

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*Ex parte* REID AND ANOTHER.

Mr. Payne moved for an order, authorising the issue of the copy of a cer-

tain bond. Counsel stated that the notice of the application had been duly advertised, and no objections had been lodged. Notice had also been served on the Registrar of Deeds, who had called for a declaration from the attorney, in whose hands the bond had been. The attorney had, however, left Cradock, and was now in Johannesburg. He had declined to give assistance in the matter, unless on conditions, which were not acceptable to the petitioners.

Order granted.

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COLONIAL GOVERNMENT V. ROSENBERG.

Mr. W. P. Buchanan moved for leave to sue the defendant by edictal citation for £4, amount of quitrent due on a farm, and for the attachment of the farm.

The application was granted, the return day being fixed for March 1.

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FOORD V. FOORD.

Mr. P. S. T. Jones moved, on behalf of Edith Foord, for leave to sue her husband (Charles Foord) for restitution of conjugal rights.

The petitioner stated that the parties were married in Cape Town, and he left for Kimberley, where he joined an irregular corps. In 1902 she went to England. Her husband also went to England, and then went to Canada. She heard from him in 1905, when he asked her to join him. She replied, consenting, but had not since heard of him. There was one child of the marriage.

The application was granted, June 1 being fixed as the return day.

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*Ex parte* HENNING.

Mr. Van Zyl moved for the appointment of a curator.

The affidavit of the petitioner stated that her husband had been curator to his brother, who had been declared a lunatic. The husband had since died, so petitioner asked for the appointment.

The application was granted.

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*Ex parte* STRACHAN AND WIFE.

Mr. Sutton moved for the registration of an ante-nuptial contract.

The affidavit of the petitioners stated that they did not think it necessary to have the signatures appended to the contract previous to the wedding. No creditors would object to the course. The signing of the contract would be to the benefit of the wife.

The application was granted.

*Ex parte* SWART.

Mr. Jones moved for leave to pass transfer of certain property to the Colonial Government.  
Granted.

*Ex parte* STEYTLER, EXECUTOR DATIVE IN THE ESTATE OF THE LATE WASSERFALL.

Mr. D. Buchanan moved for the cancellation of a certain bond.  
Granted.

*Ex parte* CLAASSENS.

Mr. Roux moved for leave to pass transfer of certain property.  
Granted, in terms of Registrar of Deeds report.

*Ex parte* GOODMAN.

Mr. Paine moved for an order authorising the attachment of certain property.  
The application was granted, personal service to be effected if possible.

*Ex parte* PETERSEN.

Mr. Swift moved for an order authorising the Registrar of Deeds to amend a certain deed of transfer, in which the third Christian name of the applicant had been omitted.  
Granted.

*Ex parte* THE EXECUTORS TESTAMENTARY IN THE ESTATE OF THE LATE OWEN.

Mr. P. S. T. Jones moved for an order authorising the cancellation of certain sales. In none of the cases had transfer been passed, whilst in some cases part of the purchase money had been paid.

A rule nisi, returnable on April 1, calling on all persons interested to show cause why the application should not be granted, was made.

*Ex parte* ZIETSMAN.

Mr. Watermeyer moved for an order authorising the Registrar of Deeds to register certain property in petitioner's name.  
Granted.

*Ex parte* EDRIES.

Mr. W. P. Buchanan moved for leave to mortgage certain property. He stated that the petitioner was the sole

surviving grandchild and heir to the property in question.  
Order granted.

LOTTEL V. BURMAN.

Mr. De Waal moved for an order for the removal of the respondent, Harry Burman, from the office of executor testamentary in the estate of Hyman Plottel, with costs of the application.  
Order granted as prayed.

*Ex parte* KRUGER.

Mr. Van Zyl moved for an order cancelling the appointment of Hendrik Jacobus Gerhardus Kruger, as joint executor testamentary in the estate of A. M. Kruger, and for leave to act as sole executor, with costs of the application. He said that Hendrik Jacobus Gerhardus Kruger had become insolvent and insane since his appointment.

[Buchanan, J.: Has Kruger been declared insane?]

Mr. Van Zyl: No, my lord.

[Buchanan, J.: Has notice of these proceedings been served on him?]

Mr. Van Zyl: It does not appear so from the papers, my lord.

[Buchanan, J., allowed a rule nisi, calling upon the respondent to show cause why the petitioner should not be allowed to finish the administration of the estate alone, the rule to be returnable on February 22.

*Ex parte* THE ESTATE OF THE LATE VAN ZYL.

Mr. De Waal moved for leave to pass transfer of certain property.  
Order granted.

*Ex parte* THE EXECUTORS ESTATE BEVERN.

Mr. Struben moved for the amendment of a certain order of Court. No objection was raised by the Master.  
Order granted.

*Ex parte* GIERKE.

Mr. Watermeyer moved for leave to amend a certain deed of transfer. The amendment sought for was in the direction of having the petitioner's full and correct name placed on the deed, in substitution for the incorrect name appearing thereon at present.

Buchanan, J., asked if the Registrar of Deeds had reported on the application.

Mr. Watermeyer replied that he had not.

Buchanan, J., said that no order would be made, pending the production of an affidavit showing that the property was not mortgaged, and that no one else beside the petitioner had an interest in it, and the production of the report of the Registrar of Deeds.

*Ex parte* THOMPSON.

Mr. Percy Jones moved for leave to execute certain powers of attorney, etc., on behalf of a minor son. The Master had reported favourably on the application.

Order granted.

GERMAN GOVERNMENT V. STOLL-REITHER.

Mr. Van Zyl moved to have the award of the arbitrators in this matter made a rule of Court, in terms of a consent paper put in.

Mr. Payne appeared to give consent on behalf of the respondent.

In reply to the Court, Mr. Van Zyl said that the award was for £6,780 7s. 6d.

Award made a rule of Court, in terms of the consent paper.

LESTER V. LESTER.

Mr. Watermeyer moved to amend a certain rule of Court. Counsel explained that a previous application for leave to sue the respondent by edictal citation had been refused on the grounds that he was in Cape Town. Since then a letter had been received from the respondent, addressed to the petitioner, through her attorneys, in which he stated that he had gone to England. His address in England was not known, and the petitioner now sought to have the existing order of Court amended, and for leave to sue the respondent by edictal citation.

Granted, personal service of the citation to be effected, failing which one publication in the "Daily Telegraph" (London) and the Government "Gazette," the citation to be returnable on March 31.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

## TRIAL CAUSE.

HEATHCOTE V. COLONIAL GOVERNMENT. 1906. (Feb. 9th.)

Materials for railway—Compensation—Act 19 of 1874—Works in connection with railway.

*The Colonial Government, in constructing a railway under Act 19 of 1874, took materials from the plaintiff's quitrent land, not only for the purpose of constructing and maintaining the railway itself, but for works in connection therewith; such as the building of railway stations, labourers' cottages, schools for their children and hospitals.*

*Held, that the plaintiff was not entitled to compensation for materials used for the railway itself, including bridges and culverts, over which the line of railway passed, but that he was entitled to compensation for materials used for building railway stations, labourers' cottages and other works in connection with the railway.*

This was an action brought by Charles Heathcote, a farmer, residing in the Cradock district, to recover £1,000 damages in respect of certain stone taken from his farm for certain purposes, for which he said he was entitled to compensation. The declaration set out that in 1881 the Act 14 gave the Government authority to construct a railway through the Cradock district. In 1889, without notice to the plaintiff, the defendant came to the land, which was not being used for the line of railway, and opened a quarry, and took stone, not only for railway purposes, but for extraneous purposes. The land consequently had depreciated in value. The defendant offered to pay £25, which the plaintiff refused to accept. The plea set out that the tenure of the land was subject to the ordinary conditions. The quarry was



opened with the full knowledge of the plaintiff, who had never objected. It was not necessary by law to obtain the consent of the plaintiff. They now tendered £50, with costs to date, for stone unlawfully taken.

Mr. Searle, K.C. (with him Mr. Douglas Buchanan), was for the plaintiff; and Mr. Schreiner, K.C. (with him Mr. Howel Jones), appeared for the defendants.

Charles Heathcote, the plaintiff, stated when the railway was completed, the quarry was not open. In 1889 the Government opened it, without giving him any notice. In 1891, when the Government got beyond the limit, he made application for compensation. At that time he was not in a position to go to law, and he left the matter in abeyance. There were about ten houses at the quarry, in which families resided, and plaintiff had been occasioned great inconvenience.

Wm. John McWilliam, architect and Civil Engineer, of Port Elizabeth, said he surveyed the quarry in October last. He made a rough estimate of the amount of stone taken from the quarry at between 11,000 and 12,000 cubic yards. The stone was a good building stone, being slightly harder than the Queen's Town stone. In the rough, in the quarry, it would be worth about 2s. a cubic yard. Fifty per cent. of the stone had been used for quarters.

Joseph McKillop, stone and marble merchant, of Cape Town, said that from 1s. to 1s. 6d. per cubic yard would be a fair price for the stone in the quarry. He considered it quite as good as the Queen's Town stone. If business was good, he had no doubt there would be a market for the stone in Cape Town.

Cross-examined by Mr. Schreiner: He had only seen the samples; he had never been to the quarry.

[De Villiers, C. J.: How would this stone do for the new law courts?]

Witness: Very well, indeed, my lord.

Charles Magee, stone merchant, considered two shillings a cubic yard a fair price for the stone in the quarry.

Cross-examined by Mr. Schreiner: He had not seen the stone worked, but he could tell what it was worth by looking at it.

Mr. Searle closed his case.

Walter Bruce Brown, district engineer, said the stone was taken because it was the most convenient to hand. The portion of the farm from which the stone was taken was worth about £5 a morgen. The Government had erected buildings with the stone at Alicedale, about 150 miles away. There was no market for the plaintiff's stone.

Another witness stated that stone was a most expensive one to work. The stone was more adapted for rough work.

Mr. Searle (for plaintiff) cited *Logan v. Colonial Government* (11 C.T.R., 114, and 13 C.T.R., 607). It has been contended for defendants that Act 19 of 1874, and not Act 14 of 1881 governs this case: but the terms of these two Acts are identical. The Divisional Council has a right to take materials for the purpose of making roads. The Government may take land for railways, and then they expropriate it; if they take materials they do not expropriate. Had the Divisional Council taken materials for other purposes than road-making or repairing they would have been bound to compensate. *Wallace v. Randall* (3, E.D.C., 87), and *Landmark v. Van der Walt* (3 Juta, 300). In Logan's case it was argued from Landmark's case that land would be expropriated for railway purposes without compensation, but see the Privy Council judgment (13, C.T.R., 607), also sections 11 and 12 of Act 9 of 1858. In Logan's case the Privy Council held that under section 11 the Government could not take land unless they gave compensation. In *Slabber v. Bell* the main question was as to the right to enter on the property. Here that question does not emerge. The defendants have given up a great part of their case, and now the whole question between us is as to their right to take materials wherewith to build stations. Plaintiffs are clearly entitled to compensation.

Mr. Schreiner (for defendants): The important point in this case is the right of the Railway Department to take material from quitrent land. The leading case on this point is *De Villiers v. Cape Divisional Council* (5 Buch., 50), where see the judgment of De Villiers, C. J. The argument on the other side does not notice the difference between the right to take materials and the right to expropriate land. See *Slabber v. Bell*. The Act of 1904 says nothing about stations, but the expropriation of land for stations and the taking of materials for stations stand on different grounds. In Logan's case the judgment of the Privy Council went far beyond that of Buchanan. A. C. J. A station is necessary for railway purposes, a railway school (I must admit) is not. A bridge is part of a railway and so is a station, but it is urged that although the Railway Department may take stone for the former, they may not for the latter. No doubt Logan's case was a bad case for the Government, but the doctrine laid down in that case should not be extended. I submit that the doctrine stated in *De Villiers v. Cape Divisional Council* is the law of this Colony.

Mr. Searle was not called upon in reply.

De Villiers, C. J.: In the case of *De Villiers v. Cape Divisional Council* (5 Buch., 50) it was decided by a majority of this Court that lands held in quitrent tenure are not subject to the rights reserved to Government under Sir John Cradock's Proclamation of 1813, of taking materials thereon for the purpose of making or repairing public roads, but the judgment was reversed on appeal. Considerable reliance has now been placed on my remarks as the dissenting Judge in the original case as to the Common Law, independently of the Proclamation, in regard to the rights of the Crown in respect of quitrent lands, but the context shews that those remarks did not form the grounds of my decision, which was based upon the terms of the Proclamation. It is impossible to hold that rights beyond those specifically mentioned in the Proclamation were intended to be reserved to Government in the face of the distinct language of the fourth section: "Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads and raising materials for that purpose on the premises." In the subsequent case of *Stellenbosch Divisional Council v. Myburgh* (5 Juta, 8), it was held that the right to take gravel from uncultivated quitrent land for the repair and maintenance of roads extends to all roads beyond the limits of such land, and it is now contended that if the wide interpretation of the powers of the Government which was adopted in that case be applied to the present case, the right of the Government to take building stone from the plaintiff's land for the purpose of building railway stations, schools for the children of railway employees, cottages for railway employees, and so on, without compensation, should be upheld. The plaintiff's counsel has admitted the right of the Government to use the stone for building culverts and bridges all along the line of railway authorised by Act 19 of 1874. These culverts and bridges form part of the railway, and although they are not in immediate proximity to the plaintiff's land, their construction falls within the principles laid down in *Stellenbosch Council v. Myburgh*. The defendants' counsel, on the other hand, has admitted that labourers' cottages, hospitals, and schools are not such railway purposes as would justify the use of the plaintiff's stone for their construction without compensation. The chief question, therefore, which remains for consideration is whether railway stations may be so constructed.

The decision of this question depends upon the construction to be placed on the 11th section of Act 9 of 1858 and the 3rd section of Act 19 of 1874. The

4th section of Sir John Cradock's Proclamation had reserved to the Government the "right of making and repairing public roads, and raising materials for that purpose"; and the question is, whether the subsequent railway legislation extended that right to other purposes than "the making and repairing of railways" without compensation. The judgment of the Judicial Committee in *Colonial Government v. Logan* (13, C.T.R., 607) appears to me to be conclusive on this point. It is true that the question in that case was whether the Government could take land for works in connection with the railway then in question without compensation, whereas the question in the present case is whether materials can be taken without compensation, but the reasons for holding that compensation was there payable would be equally applicable to the present case. The 11th section of Act 9 of 1858 places the taking of land and the raising and carrying away of materials on exactly the same footing. The 3rd section of Act 19 of 1874 enacts that "all and singular the powers which are by Act 9 of 1858 bestowed on the Commissioners of Roads in regard to taking or acquiring lands and materials necessary for the making or repairing of any such main road as in the Act mentioned, or of any works in connection therewith, are hereby bestowed upon the Governor . . . as if the said railways were public roads." The Judicial Committee held that where land is taken under this section for works connected with the railway, and not for the construction and maintenance of the railway itself, the Government must pay for the land thus taken. In the absence of any distinction taken in the Act between land and materials, I am of opinion that materials taken for works in connection with the railway other than construction and maintenance of the railway itself must also be paid for. The building of a railway station is a work in connection with the railway; but the station is not part of the railway. This point was expressly decided in *Slabber v. Bell* (4 Searle 3), and I see no reason for dissenting from the judgment in that case. The result is that there must be judgment for the plaintiff for the value of materials used for other purposes than the construction and maintenance of the railway. The quantity of stone thus used is 8,693 cubic yards, and as I value the stone at the rate of sixpence per cubic yard, the judgment must be for £217 6s. 6d. with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné. Defendants' Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WEBB V. ANDERSON AND CO. { 1906.  
Feb. 9th.

Negligence—Contributory negligence—Damages.

This was an action in which Alfred Webb, a painter, of Cape Town, claimed the sum of £100 as damages for injuries alleged to have been caused through the negligence of the defendant's servants.

The plaintiff, in his declaration, stated that late in the afternoon of the 24th August he went to the defendants' premises in Strand-street for the purpose of making some purchases, and while there he fell down an open, uncovered, and unlighted staircase, of the existence of which he was not aware. He received injuries by reason of which he was confined to his bed for several days under medical treatment, and he was still suffering from the injuries. He alleged that the fall was occasioned by the negligence of the defendants' servants.

The defendants, in their plea, stated that plaintiff came to the shop after the hour of closing. In order to oblige him, one of the salesmen proceeded down the cellar by means of the staircase in question, to which neither plaintiff nor any of the public had access. The plaintiff voluntarily offered to accompany the salesman, which he did at his own risk. Plaintiff was aware of the existence of the stairs, and received warning. Defendants said that the fall was due to plaintiff's own carelessness and negligence.

In his replication, plaintiff said he followed the salesman at the latter's express invitation, and he denied that the existence of the stairs was mentioned to him.

Mr. Lewis was for the plaintiff; Sir H. Juta, K.C., with him Mr. Benjamin, was for the defendants.

Dr. Frank M. Morris described the injuries received by the plaintiff, and said that for three months, the plaintiff was unable to follow his occupation. He was still in a nervous condition, but witness believed he would in future be able to work as usual.

Alfred Webb, the plaintiff, said that at the time of the accident he was carrying on business as a painter in Cape Town and the suburbs. He was in August foreman to Mr. Angus, of Wynberg, and he earned between £12 and £14 a month. On the 24th August he was sent in by Mr. Angus to purchase some white lead from the defendants. He reached the shop at 5.55 p.m., at which time there was no sign of the shop

being shut. It was then getting dark. There were no lights in the shop, and it was darker in the shop than in the street. Witness went to the counter, and saw a salesman named Barnett, to whom he gave a card from Mr. Angus. Witness asked for half a hundredweight of white lead. Barnett asked witness if he wanted to take it with him. Witness replied, "Yes," and Barnett said: "Stop this way." Witness followed him behind the counter towards the back of the shop. Witness had never been behind the counter before. It was dark in the shop, but witness could see the shelves projecting. They turned to the right, and it became suddenly very dark. Barnett was walking a yard and a half ahead of witness, but as soon as they turned the corner witness lost sight of him. Just as they turned witness fell down a hole into the cellar. Before this happened witness did not know of the existence of stairs, and Barnett did not mention them to him. He did not lose consciousness, but was suffering great pain, and was unable to rise. Barnett could not get witness out, and some other assistants came and helped him. They had to strike a match in the cellar to see. They put witness in a cab, and Barnett took him home to Hope-street. Barnett helped to put him to bed, and afterwards went to fetch Dr. Morris. Witness was in bed for ten days. Even now, when witness tried to go up a ladder, he became sick and dizzy. He had not been in any employment since the accident. He had a job at Sea Point in September, but he had to give it up. He still suffered pain.

Cross-examined by Sir H. Juta: Witness had not seen the lift in the shop. He had been with a Mr. Richardson to the defendant's shop, but he had never gone down into the basement with Richardson. He did not collide with Barnett. It was not true that he followed Barnett down the steps, knowing they were there, and that he slipped. He did not tell Mr. Angus that he said to Barnett, "Tell me where it is, and I will get it."

Phineas Friedman, an auctioneer, said the plaintiff was living at his house at the time of the accident. On the 24th August, Barnett came home with Webb. The former afterwards went for Dr. Morris. Barnett said, "I don't know whatever possessed me to ask him to come down 'there.'"

Hudson Scott, broker, builder, and contractor, gave evidence as to certain plans put in. The part of the shop near the stairs was very much darker than the rest. Witness had been behind the counter to purchase goods, and he had seen people at the far end. He was at the shop at noon the previous day. He walked to the stairs, and if he had not stopped for a moment he would not have seen the stairs, it being very dark there.

Herbert Evans, private detective, Percy Hunter, agent, and Thomas Herbert, solicitor's clerk, gave evidence as to the darkness at the head of the stairs, and as to seeing customers behind the counter.

Mr. Lewis closed his case.

Frederick G. Richardson, painter and decorator, said he was formerly in partnership with the plaintiff. On one occasion, in March last, he went down these stairs into the basement with plaintiff. They followed the shopman down out of curiosity. Witness commented upon a machine which stood in the basement. Anyone near the stairs must hear the sound of a person walking down the stairs. He considered the stairs were easily visible to anyone walking along.

Gustav Anderson, the defendant, said that the clerks and the boys employed in the shop were constantly using these stairs, and no accident had ever happened to them. Occasionally a customer was asked to go round the counter if something special were required to be seen, but they very seldom went down the stairs. There were two flights of steps leading down. Each comprised eight steps, and were divided by a four-foot landing. A man going down the steps could be easily heard some distance away.

Joseph Hy. Barnett, salesman in the employ of the defendants, said that Webb came in as they were preparing to close the shop. Webb said he wanted the lead that night, and witness thereupon went to the basement to get it. He did not ask Webb to go with him, and the only reason he could suggest why Webb should follow him was that they were on rather intimate terms. Before he went to the basement, witness and Webb were together behind the counter, looking to see if there was any white lead there. When Webb fell, witness was about half-way down the second flight of steps. With ordinary care and caution, a person would not fall going down the steps.

Cross-examined by Mr. Lewis: Witness knew Webb was following him. When witness started, Webb said: "I'll come with you."

Wm. Angus, the plaintiff's previous employer, said that after the accident Webb told him that the way the accident happened was that two shopmen were quarrelling as to who should go to fetch the lead, and that he (Webb) then said: "Tell me where it is, and I will get it myself."

Sir H. Juta closed his case, and counsel were then heard in argument on the facts.

Maasdorp, J., said that, while not finding it proved—it might be so, or it might not—that plaintiff had been down the stairs, or knew of their existence, he came to the conclusion that the plaintiff showed

negligence in having proceeded so hurriedly, when, under the circumstances, he should have stopped or proceeded slowly. If plaintiff had proceeded slowly, he (the learned judge) thought there was sufficient light for him to have seen the stairs. Judgment must therefore be for the defendant, with costs.

[Plaintiff's Attorneys: C. E. P. Hughes. Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

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## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### MOTIONS.

KING BROS. V. WASSER- { 1906.  
FALL'S ESTATE. { Feb. 10th.

Mr. Searle, K.C., was for the applicant, and Mr. Burton was for the respondent. This was an application on notice of motion, calling on the respondent, the executor in the estate, to show cause why a writ of execution should not be issued against the goods of the estate, for an amount of taxed costs.

Hopley, J., said it seemed to him that the executor adopted a prudent, and not a negligent, course in going into the case. The application would be refused, with costs.

ESTATE VAN DER BYL V. BAILIE AND OTHERS.

Mr. Gutsche was for the applicant, and the defendants were in default. This was an application for a variation of the previous order on the arbitrator, so that he be ordered to award to the plaintiff his three-tenths share, and to one of the defendants one-tenth share of a certain farm, and for an order on the Registrar of Deeds to pass to transfer certified copies of diagrams and other documents necessary for the purpose.

Order as prayed.

DABROLL V. DUGGAN.

Mr. Gardiner was for the applicant, and Dr. Greer was for the respondent.

This was an application to make absolute a rule calling on the trustee in the estate of Humphreys and Turkington to show cause why he should not pay over to the applicant a certain dividend in the insolvent estate, which was due to the respondent Duggan.

Dr. Greer pointed out that it would be manifestly unfair to pay over the money, when there might be a good defence put up by Duggan. The money, he thought, might be interdicted pending the hearing of a suit in the Magistrate's Court.

The matter was ordered to stand over *sine die* the interdict on the trustee to continue until the matter is decided in the Supreme Court.

#### GORDON V. UNITED PROVIDENT ASSOCIATION.

Mr. Watermeyer was for the applicant, and Mr. Gardiner was for the respondent. This was an application for an order on the respondents to pay the cost of an application in this matter. The petitioner sued the respondents to compel them to allow him to inspect the share register, but before the petition was heard the respondents complied. An affidavit was put in on behalf of the defendants, denying that the inspection was refused.

Mr. Gardiner read a long affidavit by the secretary of the company.

Hopley, J., remarked that there was a great deal of argumentative matter in it. Whatever way the costs went, the costs of such an affidavit would not be allowed. People must be taught what to put in affidavits.

The defendants had no right to demand what reasons the applicant had for demanding to see the share register. When the inspection was tendered, the company ought to have paid any costs incurred. The respondents would be ordered to pay the costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

HEYDENBYCH V. STANDARD BANK AND OTHERS. { 1906.  
Feb. 12th.  
" 24th.

Insolvency—Preference—General covering bond—Future advances—Tacking incumbrances—Privity of debt—Privity of registration—Cession of bond.

*C., being a customer of the respondent bank, ceded to the bank, as security for promissory notes of M. & Co. in his favour discounted and to be discounted for him by the bank, a duly registered general covering bond for £5,000, passed in his favour by M. & Co. Upon the insolvency of M. & Co., the respondent trustee awarded to the bank a preference over the movables in respect of debts incurred by M. & Co. to C. after the date of the cession.*

*Held, that it was no valid ground of objection on the part of the appellant, in whose favour a special covering bond, with the general clause, had been passed after C.'s bond, that the debts proved by the bank were incurred after the date of the cession.*

*Held, however, that inasmuch as a mortgage under a covering bond only takes effect as the debts thereby covered are incurred, the bank was not entitled to a preference over the appellant in respect of debts incurred by M. & Co. to C. after the date of debts incurred by M. & Co. to the appellant under his duly registered covering bond.*

This was an appeal from a judgment given by the Hon. Mr. Justice Buchanan



in an action brought in the Supreme Court by the present appellant, Benjamin G. Heydenrych, financier, Observatory-road, against the respondents, for an order for the amendment of a certain account and plan of distribution in the insolvent estate of Mackie, Young, and Co. Mr. Burton (with him Mr. J. E. R. de Villiers) was for appellant; Mr. Searle, K.C. (with him Mr. Close), was for respondents.

Mr. Burton said that in his account the trustee distributed the proceeds of the estate among certain of the preferent creditors, and he gave the Standard Bank a preference upon certain bonds, which were in their possession, as against the applicant's bonds. The original application called upon the respondents to show cause why the account and plan of distribution should not be amended as to a sum of £2,603 1s. 1d. awarded to the Standard Bank upon a proof of debt for £6,000 odd, on the ground that the claim made by the said bank was in respect of liabilities incurred by the respondents subsequent to the cession of the bonds to the said bank, and that the said amount be awarded to other bondholders in their order of preference.

[De Villiers, C.J.: There are no facts in dispute; it is a simple question of law.]

Mr. Burton (proceeding) said that the applicant had certain special bonds over the insolvent estate, viz., May 17, 1902, £500; January 7, 1903, £600; and May 8, 1903, £500. There was also a bond dated June 11, 1904, which did not come into the case at all.

[De Villiers C. J.: Those were special bonds, but a question arises under the general clauses?]i

Mr. Burton acquiesced. Continuing, counsel said that the bank held two bonds, of £5,000 and £3,000 respectively, but the latter might properly be dismissed from the case, as the preference was eaten up by the first bond. Now, the first bond was dated the 23rd April, 1901, but it was passed by Mackie, Young, and Co. to Creswell, Sons, and Co., who were the supporting firm in England of Mackie, Young, and Co.'s business in South Africa. With the bond was an agreement between the parties for advancing certain sums of money, and the bond was to be given in order to cover the advances. On the 12th December, 1902, or prior to the two bonds of the applicant in 1903, the original bondholders or mortgagees ceded out and out that bond of April, 1901, to the Standard Bank, and the question now was whether, in respect of any advances made in the first bond of £5,000, after the date of the cession, the bank could claim preference as against the bonds of the applicant, which were passed subsequently to the cession to the bank.

This appeal is brought on the grounds

(1) that the preference claimed by the Standard Bank under a certain general mortgage bonds is in respect of liabilities incurred by the insolvents subsequent to the cession of the bonds to the Bank by virtue of which they claim and they ask that the amount awarded to them be awarded to other bondholders in order of preference. (2) The charge of £1 10s. 4d. made for collecting rents should be met by the trustee as he charged commission on these rents. The appellant had certain bonds passed to him on May 17th, 1902, January 7th, 1903, and March 8th, 1903. In 1901 there was a bond for £5,000 passed by Mackie, Young and Co., and bonds were also passed on April 23rd, 1901, and December 12th, 1902. Before December 12th, 1902, the advances to the firm did not amount to anything like £5,000. After the cession Creswell and Co. made further advances, and the question now is whether the claim of the appellant is not preferent to claims in respect of these further advances. A bond is only a security for a debt which exists at the time it is passed.

[De Villiers, C.J.: Cannot a covering bond be ceded as security for a future debt?]

Creswell and Co. made advances after they had ceded to the bank. They can have no preference in respect of these. All the bills enumerated at pages 23 and 45 of the record were subsequent to the date of the cession. Most of these bills were given to Mackie, discounted by Creswell and then ceded to the bank. A mortgagor cannot cede greater rights than he himself possesses. If he cede a bond it only carries preference up to the date of cession. The bank denies that the bond was ever ceded out and out, and says that it was merely deposited as collateral security. If the bond was ceded out and out they could have preference up to the date of cession. If it was a mere security the bank has no *locus standi*, and it is for the bondholder to sue. The relations between Creswell and the insolvents are very different from those subsisting between the bank and the insolvents. As to the rights of a cessionary, see Van Zyl's Judicial Practice (p. 570, 1st edit.). A bond is only a security for advances already made, Burge's Colonial Law (vol. 3, p. 218).

[De Villiers, C.J.: What law is he there speaking of?]

The Roman Dutch Law. He cites Dig. (20.4.12) and Carpzovius.

[De Villiers, C.J.: Was the cession to the bank absolute?]

Yes, see p. 27 of the record.

[De Villiers, C.J.: But would not the Court read that cession as having been by way of security?]

He cannot both retain a right and cede it.

[Maasdorp, J.: The original creditor does not necessarily lose all his right because he has ceded his bond.]

No doubt he may cede it as collateral security, but that must be clearly expressed, and such a cession gives the cedent no preference.

[Maasdorp, J.: Suppose a creditor advances money on a bond which has been pledged, cannot he get preference?]

There would be no preference if a third creditor were prejudiced. Our point is that possibly Creswell may have been satisfied by Mackie. Creswell has transferred his bond to the bank.

[Maasdorp, J.: How could the debts of Mackie to the bank have been settled?]

Buchanan, J., found that there was no debt due from Mackie to the bank. A bank may hold documents as security, but that does not make it a legal holder and would give no preference. Either Creswell or the bank has a preference for advances exceeding £1,500; both cannot have it.

[De Villiers, C.J.: The bond was passed to Creswell for advances both past and future. He cedes this bond to the bank. Cannot that bond ceded stand as security for future advances? What has been ceded?]

Certainly no preference for future advances.

[De Villiers, C.J.: Why not? If a bond covers future advances, why cannot the right to these be ceded?]

There is no privity of contract between Mackie and the bank.

[De Villiers, C.J.: No privity of contract is necessary.]

See p. 26 of the Record for the terms of the bond.

[De Villiers, C.J.: The bond ceded was an obligation for future debts to Creswell. Under a covering bond one cannot recover more than the sum actually advanced. A document like a bond may secure future rights.]

For similar cases I refer to *Trustees of Western Province Bank v. Horack* (5 Searle, 122). There the Western Province Bank was in the same position as the bank here. In no case like this has a claim for a preference ever been allowed.

[De Villiers, C.J.: Has it ever been made?]

Presumably.

[De Villiers, C.J.: Is there any decision to show that a first mortgagee would have preference over a second mortgagee in respect of debts incurred by an insolvent after a cession of the mortgage?]

I cannot contend that there is.

Mr. Searle (for the respondents): In this case the terms of the bond have not been complied with. The Standard Bank hold the bond and are the persons who have advanced money. At

p. 26 of the record the other side would wish to read into the bond the words "as long as Creswell is owner of the bond," but these words are not there. Our law allows almost any rights to be ceded; see Burge's Colonial Law (Vol. 3 p. 218). If in that passage the words "assignee of the first mortgagee" are in the nominative case, the reference to "tacking" gives no sense. Ord. 24 of 1846 (p. 411 in Vol. 1 of the Statutes) gives the conditions as to general bonds and was applied in *Harc v. Heath's Trustee* (3 Juta, 32). Heydenrych cannot be prejudiced by the arrangement between the bank, Creswell and Mackie, Young and Co.; see Maasdorp's Colonial Law (Vol. 2, p. 271). It is immaterial whether there was an out and out cession of the bond to the bank, or whether it was held as security. *Trautman v. Imperial Fire Co.* (11 S.C.R., 38). The passage of Burge cited on the other side is made clear by the reference given to *Pothier's Pandects* 20-4-1-1 to 32), *Netherlands Bank v. Frank's Liquidators* (Trans. Sup. Ct., 1904, p. 554).

Mr. Burton (in reply): This bond states an obligation on the part of Mackie, Young to Creswell; if it is made to mean anything more than this personal contract we shall have departed from the terms of the bond. The bank cannot have greater rights than Creswell had. As to accessory obligations see Voet (20-1-18).

*Postea* (February 24th). Mr. Burton argued on the question of preference granted to a covering bond and cited the case of *In re Carter* (2, Menz, 341), and Van Zyl's Judicial Practice (p. 569, 1st edit.), *Hollandsche Consult* (Vol. 1, Num. 291, p. 469). There it was held that preference dated only from the time the money was advanced. See also Vol. 4 (Num. 134, p. 228). Maasdorp's Institutes (Vol. 2, p. 272); Voet (20-1-20) and (20-4-30). The practice of this Colony is clearly opposed to both Voet and the Consultations. A general bond has no validity unless consideration has been given.

Mr. Searle (in reply): The point now raised is very important inasmuch as it affects our whole practice. See *The Discount Bank v. Daves* (1 Menz, 380); see the passage of Voet cited by Maasdorp.

[De Villiers, C.J.: That is quite in accord with our Ordinance.]

It is now sought to upset the Colonial practice during the last 60 years. The point has never been definitely decided, but the established practice has always been upheld, and if the opposite principle should be now adopted general bonds would be so much waste paper.

[De Villiers, C.J.: Is it not the practice of houses who accept covering bonds to expressly stipulate that the

person who gives them shall pass no further bonds without their consent?]

Yes, but our whole practice will be upset should it be held that the preference on such a bond dates only from the time an actual advance is made. *Hare v. Heatlie's Trustee* (3 Juta, 32), *S.A. Loan and Mercantile Mutual v. Cape Bank* (6 Juta, 184), *Brink, N. O. v. High Sheriff* (12 S.C.R., 414), *Burge*, Vol. 3 (216-217), Act 19 of 1871, Sec. 9, *Pothier* (24-13), *In re Rousseau* (1 Menz, 479).

De Villiers, C.J.: At the date of the insolvency of Mackie, Young and Co., the respondent bank was the holder of a general bond passed by the insolvents in favour of Creswell, Sons and Co., on the 23rd of April, 1901, and by them ceded to the bank on the 12th of December, 1902. The bond was for £5,000, but it was really a covering bond for past and future advances, and the amount was fixed, not as showing the actual indebtedness at the time of the passing of the bond, but in order to fix the amount, in compliance with the 4th section of Ordinance 28 of 1846, beyond which future advances should not be deemed to be covered. The cession to the bank purported to be an absolute one, but it is clear from the dealings between the parties that it was the ordinary case of a bank discounting the bills of its customer, and receiving, as continuing security, a bond passed in favour of such customer by his debtor. The bank, therefore, if it recovered from the debtor more than the amount due to it by such customer, would be bound to account for the difference to the customer. The bank proved on the insolvent estate for the sum of £8,000, and stated in the affidavit of proof that it held as security for the debt certain covering bonds including the bond now in question. Annexed to the proof was a statement showing that the amount of the debt was made up of promissory notes endorsed by the insolvents, and, lastly, by Creswell, Sons and Co., for whom they had been discounted by the bank. The first of these notes was dated the 20th of July, 1903, and the last on the 15th of December, 1904. The trustee, in his distribution account, awarded a preference to the bank, under the bond, in respect of the impledged moveable assets of the insolvent, over general bonds passed by the insolvent after the registration of the bond now in question. The appellant, who had proved on the estate under the general clause of certain bonds passed in his favour by the insolvents, objected to the award. The bonds in his favour were bonds for £500, £600, £500, and £600 passed and registered on May 17, 1902, 7th January, 1903, 8th May, 1903, and 11th June, 1904 respectively, mortgaging certain immovable

property, but containing the general clause. These bonds were also covering bonds for past and future advances. The debts covered by the bonds and proved in the insolvent estate by the applicant were made up mainly of promissory notes made by the insolvents in his favour. The date of the first of these notes was August 1, 1902, and the last June 15, 1904. The ground of the objection was that, although the applicant's bond was of a later date than the bank's bond, the latter could not claim a preference inasmuch as the liabilities thereby secured had been incurred subsequent to the cession of the bond to the bank. An application to a Divisional Court for an amendment of the account having been refused, the present appeal has been brought before a full Court.

I must say at the outset that I fully agree with the learned Judge in the Court below that the bank was entitled to the same preference as the firm of Creswell, Sons and Co. would have had upon the insolvent estate if they had not parted with the bond. The contract between that firm and the insolvents was that all debts which should thereafter be incurred by the latter to the former should be secured by the continuing bond, and the contract between the bank and the firm was that whatever rights should from time to time accrue to the firm under the bond should enure to the benefit of the bank in security for its claim against the firm. The firm if it had retained the bond, would have been entitled to any preference thereby conferred in respect of debts incurred at any time after the registration of the bond, and, by ceding the bond to the bank as a security, it ceded to the bank the right to such preference even in respect of debts incurred after the date of the cession. In support of the contrary view, reliance has been placed upon the following passage in 3 Burge's Commentaries, page 218: "A third mortgagee succeeding to the place of the first mortgagee, or an assignee of the first mortgagee, would not obtain a preference over the second mortgagee for any debt except that of the first mortgagee. He could not, therefore, tack his third to the prior mortgage." The passage, however, cited by Burge from the Digest (20-4-12, sec. 4), shows that he was contemplating a very different state of facts from the present, and it certainly does not support the inference drawn from it on behalf of the appellant. Under the law of England, if a third incumbrancer by mortgage, without notice of a second incumbrance at the time of lending his money, purchases the first legal mortgage, even after notice of the second mortgage, equity will tack both incumbrances in his favour; so that as the report in the

old case of *Marsh v. Lee* (2 Venta, 337) has it, "the third mortgagee shall thereby squeeze out and gain priority over the second mortgagee." The passage cited by Burge makes it clear that under the Roman law the third mortgagee, by acquiring the first mortgage, could acquire no greater rights, as against the second mortgagee, than those enjoyed by the first mortgagee, but it makes it equally clear that the third mortgagee, by stepping into the shoes of the first mortgagee, would enjoy the same rights as the latter would otherwise have enjoyed. I am unable, therefore, to agree that the mere fact of the debts proved by the bank having been incurred after the date of the cession of the bond deprives the bank of the preference to which the firm which ceded the bond would have been entitled.

Strangely enough it appears to have been at first admitted on behalf of the appellant that Mackie, Young and Co. would have been entitled, but for the cession, to preference in respect of debts incurred to them by the insolvents subsequent to the date of debts secured by the applicant's bond. These debts, it is said, relate back to the respective dates of the registration of the bonds and their relative preference must be regulated by the dates of priority of the bonds. I cannot, however, find any authority for such relating back, but, on the contrary, the opinion expressed in the Dutch Consult (1-291) is an express authority to the contrary. It is there laid down that where a bond is passed to secure future advances there is no mortgage until the debt is actually incurred and the jurisconsult adds that so far from the creation of the debt being drawn back to the date of the bond, it should rather be held that the creation of the mortgage is deferred to the date of the incurring debt on the principle that an accessory obligation follows the principal, and not the reverse. A similar doctrine is even more emphatically laid down by three eminent Dutch lawyers in a consultation reported in 4 Dutch Consult, 134, and their opinions are cited with approval by Voet (20-4-30).

During the re-argument on appeal a passage was cited by the respondents' counsel from Chief Justice Maasdorp's excellent "Institutes of Cape Law" (Book 2, ch. 33) to the effect that "a bond in security of future advances dates, not from the day when the advances were actually made, but from the date of the registration of the bond." If this passage was intended to mean that the date of the registration of such a covering bond fixes the date when, in competition with other preferent creditors, the mortgage operates upon all debts subsequently incurred by the mortgagor to the mortgagees this view would be in direct conflict

with part of a passage from Voet's commentaries immediately before cited by the learned Chief Justice himself. In that passage, Voet (20-4-30) points out, among other things, that a mortgage may be constituted for a debt which is suspended by a condition, and he holds that when once the condition is fulfilled the bond will have the same effect as if no condition had been inserted. He adds, however, that if the nature of the obligation to which the condition is attached be such that it depends upon the mortgagor whether or not the condition takes effect, it must on the contrary be held that he must have the preference in whose favour a later bond was passed for an unconditional debt before the condition of the first obligation took effect. Further on Voet proceeds thus: "It is upon this ground also that certain Dutch jurists advised that where a house had been mortgaged *coram lege loci* by an innkeeper for such ale or wine of uncertain quantity as might in future be sold and delivered to him by a brewer or wine merchant, the mortgage and preference did not take effect until the date of the sale and delivery of the wine and beer (Dutch Consultations 1, consult. 291, and part 4, consult. 134). Although according to more recent ordinances of Holland such a mortgage for an uncertain debt still to be incurred would not bind immovable property unless the amount to be brought within the obligation were fixed and the fortieth part of the amount" — being the Government revenue for the registration of the bond — "were paid into the Treasury." The inference drawn by the respondents' counsel from this last sentence that the Legislature of Holland had altered the rule previously laid down by Voet is not justified by anything said by the author. The sentence begins with the word "*quanquam*," which Berwick translates by "but," whereas the more correct rendering would be "Although." The requirement that the bond should be for a definite amount can have no bearing on the question whether the mortgage takes effect before the debt under a covering bond is actually incurred. It is admitted that if debts of a less amount than the stipulated sum are incurred the mortgage would only operate upon the sum total of the debts thus incurred, although duty had been paid in respect of the full stipulated sum. In the same way there is no inconsistency whatever in holding that the mortgage only arises as the debts are respectively incurred. If any of the debts are paid off the amount of the debt for which preference can be awarded in case of the debtor's insolvency is, *pro tanto*, diminished, and if fresh debts are thereafter incurred the pre-



ference, in competition with other creditors, must be regulated by the dates when those fresh debts were incurred. No case has been cited from any of the South African Courts that is inconsistent with the Dutch law thus laid down, and the remaining question is whether the Ordinance 28 of 1846 in any way modified the law. That Ordinance required that a covering bond should state that the same is intended to cover and secure future advances, and should express the sum beyond which such future advances should not be deemed to be covered, but the Ordinance in no way recognised the existence of any debt as a preferent claim until the debt was actually incurred. The proviso to the fourth section expressly provides that nothing therein contained should be construed so as to give validity or effect to any instrument or any part of any instrument which before the Ordinance would have been invalid or ineffectual. Van Zyl, in his Judicial practice (page 569), recognises the continued existence of the Dutch law on the point, for he says: "A bond may be passed for debts not yet or to be incurred, but it cannot give *jus prioritatis*, until the debt has actually been incurred, from which date or dates only the preference begins. For instance, take the case of what is commonly called the ordinary covering bond. The accounts between the parties should show what is due from time to time and the dates on which the various transactions took place. The bond should be for a *maximum* sum for the purpose of registration, but the mortgagee is always liable to prove what is due to him and from when." If a different doctrine has been followed by many trustees in the distribution of insolvent estates, such a practice cannot, in the absence of any judicial recognition of its legality, be binding in this court. A practice of this kind would not be such a "reasonable custom" as to justify the Court in declaring that the Dutch Law had been abrogated by disuse, in terms of *Seaville v. Colley* (9 Juta, 39). In my opinion the question of preference between two competing creditors under registered covering bonds does not depend merely upon the priority of registration of the bonds, but upon priority of the respective debts themselves. The dates when the respective debts were incurred are the dates when the respective bonds begin to operate in respect thereof. The bond of which the bank was the holder was registered before the bond in favour of the applicant, but if any of the debts secured under the bank's bond were incurred after the applicant had made advances under his duly registered bond, such advances should be paid in preference to subsequent credits given to the insolvents by the firm of Creswell, Sons and Co.

under their prior bond. Three of the applicants' bonds, amounting together to £1,600, had been registered and debts to the amount of £1,500 appear to have been incurred thereunder before any of the debts proved by the bank appear to have been incurred. It is possible, however, that some of the promissory notes proved by the bank may have been renewals of previous notes made by the insolvents in favour of the firm, in which case the dates when the debts really originated should be regarded as the date when the bond began to operate in respect thereof. Upon this point there is not sufficient information to enable the Court to give a definite decision. Upon the information now before the Court it appears to be extremely probable that it will be found that a larger preference has been awarded to the bank than it is entitled to, but the ground of the objection has been wrongly stated by the applicant in his original notice to the trustee and his subsequent motion before the Court. To save the costs of a further reference to the Court, a direction will now be given that a fresh distribution should be made according to which preference under the different covering bonds must be awarded according to priority of the dates when the debts respectively proved were originally incurred. As the judgment now proceeds upon grounds which were not urged in the Court below and not even on the first hearing of the appeal. I am of opinion that the costs in this Court, as well as in the Court below, must be paid by the insolvent estate, and that to this extent the judgment of the Court below should be amended.

Mr. Justice Maasdorp and Mr. Justice Hopley concurred.

[Appellant's Attorneys: Van der Byl and De Villiers. Respondents' Attorneys: S. Bank, Fairbridge, Ardorine and Lawton; The Trustee, Reid and Nephew.]

[Before the Hon. Mr. Justice MAASDORP.]

REX V. DE KLERK.

1906.  
Feb. 12th.

This was an appeal from a judgment of the R.M. of Gordonia, who had convicted the appellant (David F. de Klerk) of wrongfully and unlawfully selling or dealing in intoxicating liquors without a licence, and had sentenced him to pay a fine of £50, or, in default, three months' imprisonment with hard labour.

The grounds of appeal were: (1) That the summons charged the accused with contravening section 75 of Act 18 of 1883, there being no section 75 of the said Act, and that the summons was, therefore, vague and bad in law; and



2) that the conviction was contrary to the weight of evidence.

The record showed that one Jacobus Benadie said that he bought two cases of beer, each containing three dozen bottles, from the accused, and paid him £6 5s. The transaction took place at Narangas. The defence was that the beer was left by accused, who was a transport rider, with Benadie for storage.

The Magistrate, in his reasons for judgment, said that the accused was correctly charged at the hearing under the Act 28, and not Act 18, as set out in the summons, but no exception was taken at the trial, and he submitted that the point could not be raised in appeal. As to the case itself, he came to the conclusion that the story told by the defendant was an invention from beginning to end. The only reason he could offer as to why Benadie should make these damning statements was because he had drunk the beer.

Dr. Greer was for appellant; Mr. Howel Jones was for the Crown.

Dr. Greer said that it was not proposed to press the first ground of the appeal. He went on to comment on the discrepancies in the evidence for the prosecution, and argued that the Magistrate had drawn the wrong deduction from the evidence.

Without calling upon Mr. Jones.

Maasdorp, J.: I don't think the Court can interfere with the finding of the Magistrate in this case. As to the first point, it appears to have been merely a clerical error, and it was set right before the accused was called upon to plead, and, furthermore, there does not appear to have been any prejudice to the accused in consequence of this mistake, and its subsequent correction. The second ground of appeal is that the conviction was contrary to the weight of evidence. Now, it seems that there is a very clear and positive statement made by the purchaser of the liquor to prove the sale of the liquor, and the Magistrate has accepted his evidence as reliable, and taken it in preference to the evidence in contradiction of it given by the accused. I can find nothing in the proceedings which would lead me to believe that the Magistrate has acted wrongly in the view he took as to the credibility of the purchaser of the liquor. The appeal must therefore be dismissed.

**JOO LAMSIEN V. STIGANT, CHANTREY AND CO., LTD.**

This was an appeal from a judgment given by the Resident Magistrate of Wynberg in an interpleader suit, to which the present appellant was claimant and the respondents were defendants.

From the record it appeared that certain goods were attached by respondents under a judgment for £18 8s. 11d. and costs, which they had obtained against one S. A. Esop. Esop had carried on business as a shopkeeper in Broad-road, Wynberg, and an agreement was entered into between him and the appellant whereby the stock and business was sold to Joolamsien for £199 17s. 11d., against which £15, due to appellant for wages, was set off, and the balance was to be paid off at the rate of £4 a month. The appellant claimed that the goods were his *bona fide* property, but the Magistrate, after hearing one side only, gave judgment, declaring the goods executable, with costs.

The Magistrate, in his reasons for judgment, said that he was unable to accept the claimant's version of the transaction. His evidence appeared to be wholly unreliable. The man Esop a few days after the summons was issued against him mysteriously disappeared. The whole matter was so suspicious, and the evidence of the claimant was, to his mind, so unreliable, that he (the Magistrate) felt justified in considering that the contract between Joolamsien and Esop was not *bona fide*, but was entered into with a view of defeating the latter's creditors.

Dr. Greer was for appellant; Mr. Benjamin was for respondents.

Dr. Greer argued that the evidence and the agreement showed that the appellant had acted *bona fide* in purchasing the stock and business, that the goods were the appellant's, and that the Magistrate's decision was therefore wrong.

Mr. Benjamin submitted that the whole transaction between appellant and Esop was of such an extraordinary character that the Magistrate was quite justified in holding that it was not *bona fide*. A strange feature of the business was that Esop, who was supposed to be the creditor of Joolamsien, should have mysteriously disappeared.

Dr. Greer having been heard in reply.

Maasdorp, J.: "At the interpleader proceedings before the Magistrate, there was no evidence given by the respondent in this case to meet the evidence given by the claimant. As a matter of fact, this shop did at one time belong to Esop, and the burden of proof was therefore thrown upon the claimant that, after these debts had been contracted, he did become the *bona fide* purchaser of Esop's shop. It appears that nothing was really paid by the claimant to Esop. On the whole of the transaction, there does not appear to have been any consideration paid at all. It is stated that there was a sum of £15 for wages due by Esop to the claimant, but it is really a question

whether there was any debt due at all by Esop to claimant. It seems to me that the Magistrate has taken a correct view in this case, and that there was not sufficient evidence before him to show that this was a *bona fide* transaction. *Bona fides* would have been proved by the fact that something had passed between Esop and claimant, but not one single sixpence had passed, except that doubtful statement that there was a release from a claim for wages. Under all these circumstances, the Court cannot interfere with the finding of the Magistrate, and the appeal must be dismissed, with costs.

#### MUZLAK V. DONNITHORNE.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape, sitting at Woodstock, in an action brought by the appellant against the respondent to recover certain articles, or their value. In the Court below, an exception, taken by respondent, that the wrong party had been sued, was allowed.

It appeared that the plaintiff claimed in the Court below for the return of certain granite pillars, step-ladders, iron railings, etc., or payment of their value, £5 5s. Plaintiff had had certain property in Victoria-road, Woodstock, and the defendant had carried out certain repairs there, the property having been sold to one Chapman. Donnithorne had built in the granite, broken the ladders, and deprived plaintiff of other property.

The Magistrate, in his reasons for judgment, said that he granted absolution from the instance, because it was not clear from plaintiff's evidence whether Donnithorne or Chapman, or both, trading as Donnithorne and Co., were liable.

Dr. Greer was for appellant, Felix Muzlak; Mr. Burton was for respondent.

Dr. Greer submitted that the case should be sent back to the Magistrate to be tried on its merits, because clearly, whatever his position, Donnithorne was the proper person to be sued. It was not denied that the articles were the plaintiff's, but he was knocked about from pillar to post, and kept out of his remedy. Plaintiff had a *prima facie* ground for suing Donnithorne, and Donnithorne had not shown that he was not liable.

Mr. Burton said that Donnithorne had been sued individually. The contractors for the alterations were Donnithorne and Co., of which Chapman is a sort of partner. According to the evidence, either Chapman or Donnithorne and Co. should have been sued.

Maasdorp, J. : The plaintiff in this case sued for the return of certain property belonging to him or its value. It would be very difficult to gather from the evidence

what case it is that the plaintiff contends he has made out, because it would appear that plaintiff had lived in this house first, and afterwards sold this house to Mr. Chapman, and at the time of the sale some of the articles were left upon the premises, and consequently upon the premises of Mr. Chapman and in Mr. Chapman's possession. Mr. Chapman had improvements made, and some of these articles seem to have been used by the workmen for the benefit of Mr. Chapman. Under these circumstances, unless some responsibility can be fixed upon some other individual, the claim for the things would be against the person who possesses them. A claim is made against defendant, and in what particular capacity he is sued does not appear, because at one time he is treated as having acted merely as foreman of Chapman, and then he is taken to be a member of the firm. Under these circumstances, if his workmen did wrong, the responsibility would be upon the firm, but not upon the individual personally. The difficulty is to find out that the defendant has made himself responsible in this case. I think that the Magistrate was quite right in saying that he found it impossible to fix any direct responsibility upon the defendant in this case. The appeal must be dismissed with costs.

ODENDAL V. MARKS. { 1906.  
Feb. 12th.

Magistrate's jurisdiction — Counterclaim — Costs — Circuit Court.

*In a Magistrate's Court the appellant had been sued for a certain debt and put in a counter-claim for £10 10s. 6d. as witness expenses at a certain Circuit Court trial. The Magistrate dismissed the counter-claim, on the ground that he had no jurisdiction to tax costs in the Circuit Court.*

*Held, that the matter of counter-claim must be remitted back to the Magistrate to decide on the merits.*

*Semle, in his decision the Magistrate should allow costs on the Circuit Court scale.*

This was an appeal from a judgment of the Resident Magistrate of Prince Albert in an action brought by the respondent against the appellant to recover a sum of £70, less £35 paid on a promissory note, with interest. The

appellant put in a counter-claim for £10 10s. 6d., for his expenses as a witness for the plaintiff (Marks) in a case heard at the Circuit Court at Oudtshoorn. The Magistrate gave judgment for plaintiff as prayed, with costs, and disallowed the counter-claim. Mr. J. E. R. de Villiers was for appellant; respondent was not represented.

Mr. De Villiers said that the Magistrate seemed to have dismissed the counter-claim because, as he understood, it had been disallowed on taxation, but in that he seemed to have been in error, as a witness's expenses as against the party by whom he was subpoenaed were not liable to taxation.

Maasdorp, J. : In this case it would appear that the counter-claim made by the defendant is within the jurisdiction of the Magistrate, and it is one which would have to be proved by the defendant by evidence to be adduced. The Magistrate in his judgment says that no evidence was tendered in support of this claim, but I think that there must be a mistake there, because it would appear from the record—and the Court must be guided by the record—that a postponement was asked for to enable the defendant to adduce the necessary evidence, but the Magistrate did not entertain that application, because he ruled that he had no jurisdiction in the matter, because it was a question of costs in the Circuit Court, and he refused to proceed with the hearing of the counter-claim. The case ought to go back to the Magistrate to enter into his counter-claim on its merits, and I have no doubt that in considering the reasonableness of the demands of the defendant in this case, the Magistrate may be guided by what is allowed to witnesses under the tariff of the Circuit Court. But that is a matter which is within the discretion of the Magistrate, and he must go into the case and hear evidence upon the defendant's counter-claim. The case is referred back to the Magistrate to try defendant's counter-claim on its merits, respondent to pay costs of appeal.

*Ex parte* READ.

Mr. Benjamin moved, as a matter of urgency, on the petition of William George Read, for the attachment of certain funds standing in the Bank of Africa to the credit of Joseph Reesman, pending an action to be instituted by applicant. Petitioner said that he entered into a deed of sale with Reesman whereby he sold to the latter a cafe and tea room known as the "Corner Tea Rooms," in Oxford-street, East London, for £475, to be paid as to £400 in cash, and the balance of £75 to be secured by promissory note, due on the 1st March, 1906. Possession was to be

given to Ressman of the cafe on the morning of the 12th February. This morning petitioner had received a letter from Ressman, declining to keep to his bargain. Petitioner, on making inquiries, from the stationmaster and some friends of Ressman, found that he had left by that morning's train for Johannesburg, and had thus removed from the jurisdiction of this Court. Petitioner desired to enter an action to compel Ressman to carry out the terms of the deed of sale. From the unexpected and suspicious way in which Ressman had left the Colony, petitioner had reason to believe that he had done so to avoid the consequence of any action taken against him. Respondent had a sum of £287 10s. standing to his credit in the Bank of Africa, Cape Town, and petitioner desired an order for the attachment of this money, or any other sum not exceeding £500 standing to respondent's credit.

Mr. Benjamin informed his lordship that inquiries at the Bank of Africa showed that there was £286 2s. 6d. standing to Ressman's credit.

An order was granted for the attachment of £286 2s. 6d., pending an action to be instituted by petitioner forthwith, with leave to respondent to move to have this order set aside.

## SECOND DIVISION.

[ Before the Hon. Sir JOHN BUCHANAN. ]

KRYNAUW V. DE BEER. } 1906.  
Feb. 12th.

Mr. Van Zyl moved, as a matter of urgency, for a rule nisi, to act as an interim interdict restraining the respondent, Johannes J. de Beer, from acting on a certain power of attorney.

A rule nisi was granted, calling on the respondent to show cause why he should not deliver up the power, the rule to act as an interdict in the meantime, restraining the defendant from acting on the power, the rule returnable on the 22nd inst.

**MCKAY V. MCKAY AND BISCHOFF.**

This was an action for a declaration of rights under the will of the late J. T. McKay, that the defendants were bound to pay plaintiff a salary at the rate of £20 a month from March 1 to March 17, 1905, and thereafter £22 10s. a month from the next year, with an increase of £30 per annum, until his salary reached £30 a month, as long as the business was carried on, he tendering to render his services in the business, and for sums of £101 9s. 2d. and £25, with interest and costs.

The declaration set out that the plaintiffs and defendants carried on business in co-partnership in Cape Town, under the style or firm of McKay and Co., in terms of the will of the late Mr. John Thomas McKay, who died on March 17, 1902.

Under the will the plaintiff was entitled to an increase of salary amounting to £30 per annum from the date of his father's death, the said increase to continue until plaintiff was in receipt of a salary of £30 a month. The amounts due from the said business to Oreste Nannucci, and referred to in the will, were paid to him during the year 1902, within a period of two years from the date of the said J. T. McKay's death. In terms of the will plaintiff had no control of the business, the whole control being with the defendants; plaintiff continued in the business until March 13th, 1905, when he was forcibly prevented from performing his duties therein, and was ejected from the business by the second defendant. The defendants, from time to time, had disputes with plaintiff with regard to the amount of salary due to him, and other matters connected with the said business, and the defendants constantly refused, and still continue to refuse, to pay plaintiff the correct amount of salary to which he is, and has been, entitled since his late father's death. Plaintiff had received certain amounts from the defendants, on account of salary due to him, and he has also received cash and goods from March 1st, 1901, to December 31, 1904, out of the business, and paid into the said business certain sums. The plaintiff had framed a correct account of the above transactions from March, 1901, up to December 31, 1904, showing the amounts which should have been paid to him as salary, and there was a balance due to him of £101 9s. 2d. There was also due to the plaintiff £25, balance of salary for the months of January and February, 1905. The plaintiff contends that the defendants acted wrongfully and illegally in preventing him from continuing his services in the business, and ejecting him from the business. He was willing, and has tendered and hereby again tenders, to continue to render his services as before in the said business, but if defendants refuse to accept his services he contends that they were nevertheless bound to pay him the amount of his salary at the rate of £20 a month from March 1 to March 17, 1905, and thereafter £22 10s. a month for the next year, with an increase of £30 per annum until his salary reached £30 a month; the defendants dispute the above contentions.

Plaintiff claimed: (a) A declaration of his rights in the said business under the said will; (b) that the defendants are bound to pay him salary at the rate of £20 a month from March 1 to March 17,

1905, and thereafter £22 10s. a month from the next year, with an increase of £30 per annum until his salary reaches £30 a month, so long as the aforesaid business is carried on, he tendering to render his services in the said business; (c) the sums of £101 9s. 2d. and £25; (d) interest *a tempore morae*; (e) alternative relief; (f) costs of suit.

The will was as follows: I desire that the said business shall be disposed of as follows: One-half ( $\frac{1}{2}$ ) share to my said wife Eliza Ellen McKay; one-quarter ( $\frac{1}{4}$ ) share to John Peter Asland Bischoff; one-quarter ( $\frac{1}{4}$ ) share to my son Clarence Albert McKay. And, further, that the whole control of the business shall remain with my said wife and the said John Peter Asland Bischoff, my son, the said Clarence Albert McKay, not having any control over the management thereof. It is further my desire that, until the amount due to Oreste Nannucci is fully paid off, none of the said partners shall draw any amount beyond their stipulated salaries, viz.: My said wife a sum not exceeding twenty-five (£25) per month, the said John Peter Asland Bischoff, twenty pounds (£20) sterling per month, provided that should he wish to marry at any time after the expiration of two years after my death, his salary shall be increased to thirty pounds (£30) per annum until he is receipt of a salary of thirty pounds (£30) sterling per month, my said son Clarence Albert McKay the sum of ten pounds (£10) sterling per month, with an increase of thirty pounds (£30) sterling per annum for two years after my death, when the same shall cease, provided that as soon as the amounts due to the said Nannucci are paid off such increase shall recommence and continue until my said son receives a monthly salary of thirty pounds (£30) sterling. I wish it clearly understood, however, that such salaries are not to be drawn in prejudice to the instalment due to the said Nannucci.

The defendants, in their plea, denied the construction put upon the said will by the plaintiff. They state that the true construction of the said will was that the plaintiff was to receive an increase of salary amounting to £30 per annum, beginning after the expiration of one year from the date of his father's death, the said increase to continue until the plaintiff was in receipt of a salary of £30 a month, provided he continued to be employed in the said business. They admitted that they dispensed with the services of the plaintiff, and say that they were entitled so to do, but they denied that they used any force. They stated further that the plaintiff misconducted himself in and about the discharge of his duties in the said premises, in manner hereinafter set forth and in other ways, and prejudiced the welfare of the said business, and caused the said business to



lose customers. The plaintiff did not devote proper attention to the business, absented himself from business, treated certain customers with incivility, and persuaded and induced certain customers to patronise rival businesses, to the prejudice of the business of McKay and Co. They state that they owe the plaintiff the sum of £10 11s 9d., which sum they tender to the plaintiff, with costs to date. They denied that they acted wrongfully or illegally in dispensing with his services. They denied that the plaintiff was willing to continue to render his services, and state that the tender set forth was not genuine or made *bona fide*. The plaintiff was about to start business in competition with the business of McKay and Co. at certain premises in Longmarket-street, Cape Town, and had publicly advertised his intention shortly to open a music warehouse at the said premises.

The defendants claimed in reconvention: (1) A declaration of their rights in relation to the plaintiff in the said business. (2) An order dissolving the partnership and appointing a receiver to wind up the partnership. Or, in the alternative, in case this Honourable Court should not order the partnership to be dissolved, but not otherwise, then an order declaring that the plaintiff is not entitled to come on to the premises where the business of McKay and Co. is carried on, or to interfere with the conduct of the said business, the defendants being willing, in the event of the Court refusing to dissolve the said partnership, to give the plaintiff reasonable access to the books of the partnership and to pay to him from time to time his share of the profits, if any, of the business. (3) £100 damages. (4) Alternative relief. (5) Costs of suit.

Mr. Searle, K.C. (with him Dr. Rainsford) for plaintiff; Mr. Gardiner for defendants.

[Buchanan, J.: The defendants should have been sued as executors under the will, as well as in their private capacity.]

Mr. Gardiner said that no objection would be offered by the defendants.

Clarence Albert McKay, plaintiff, stated his father carried on business in Church-street as a music warehouse. Six months before his father's death witness received a salary of £10 a month, which went on by increases to £15, until he left in March, 1905. Witness protested against the defendants not allowing him the increases he was entitled to. Witness, when he attained his majority, was told by Mrs. McKay that he was a partner in the business. There was no trouble until his mother returned from England in 1902, and took objection to witness's engagement to a certain lady. If he persisted in the engagement, she said she would refuse to recognise him as a son. The defendants objected to him being over

an hour at his lunch. It was impossible for him to get his lunch at Rosebank in that time. Witness came into the business as early in the morning as the rest of the employees.

Witness, under cross-examination, admitted having said he did not mind whether his mother had to beg her bread. He usually arrived at the warehouse about 8.30 or 8.45 a.m., although the ordinary time for starting was at 8.15. He never persuaded people not to book at McKay's. At present he was earning £3 a week at the Tivoli, and his wife and himself did other work by way of teaching.

By Buchanan, J.: He repeatedly disobeyed the order of Bischoff.

William D. Gourlay, partner in the firm of Gourlay and Cavanagh, said prior to last July he had a music warehouse in Adderley-street, which, however, was not a success. About May he entered into negotiations with the plaintiff to open a music shop in Longmarket-street. The plaintiff was getting £12 a month as manager. Witness was satisfied with the way the plaintiff conducted the business.

Professional musicians who had had dealings with the warehouse for years said the plaintiff was always obliging and courteous.

Mr. Searle closed his case.

John A. Robertson, an accountant, stated that in January, 1905, he was called in to look after the financial affairs of the firm. Witness considered a reduction of the staff was absolutely necessary. The plaintiff was no aid to the business, owing to the friction between his mother and himself. He treated customers in an off-handed manner. Any sale at present would be prejudicial to the partnership.

By Mr. Searle: If there was a forced sale at present there would be a great loss; it would not realise the amount of the debts.

John P. A. Bischoff, partner in the firm, said he carried on the partnership under the terms of the will. Witness always had trouble with the plaintiff, who was rather rude to people he did not care about. He (witness) had to complain of the plaintiff coming late to business. He knew that there was strong objection on the part of the mother to the plaintiff getting married.

Eliza Ellen McKay said it was utterly impossible to get on with the plaintiff. It was a daily crucifixion to attempt to work with the plaintiff.

By Mr. Searle: She did not approve of the plaintiff's marriage.

This closed the evidence.

Counsel having been heard in argument,

Buchanan, J.: The will must be taken to mean that the plaintiff was entitled to the increase from the first month after his father's death. There would be judgment on prayer (a) for an



amount of £125. It was clear that the plaintiff disobeyed orders, which, under the will he was bound to obey, and his lordship thought the conduct of the plaintiff would have justified his dismissal by any ordinary employer. There could be no judgment in his favour in regard to prayer (b). The application for a dissolution of partnership had been withdrawn, and no judgment was asked for in reconvention. Costs would be ordered out of the estate against the defendants in their capacities as executors, and also their individual capacities. The plaintiff, being a partner in the business, would not be entitled to press his claim in competition with other creditors in the estate.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. DIERGARD, ALIAS { 1906.  
RAAP. } Feb. 13th.

Maasdorp, J., said that, as Judge of the week, he had before him the case of Rex v. Diergard, which had been heard by the Magistrate of Van Rhyn's Dorp. Accused had been charged with contravening sub-section 12, section 7, Act 27, 1882, by wilfully trespassing in a house. He pleaded not guilty, but was found guilty, and sentenced to pay a fine of £10, or, in default, three months' imprisonment with hard labour. The section only provided for a maximum penalty of £5, and the fine would, therefore, be reduced from £10 to £5, and the sentence amended accordingly.

#### *Ex parte TROMP.*

This was an application by Tromp, who was charged with murder, to be admitted to bail. Tromp had been charged before the Magistrate of Calvinia, and in December last he was committed for trial. An application made for bail was postponed on the Attorney-General representing to the Court that further evidence was to be led, and leave was given to petitioner to renew his application later. Further evidence had now been led, and the Attorney-General's Department consented to bail in two sureties of £1,000 each, and a personal bond of £2,000.

On the motion of Mr. Burton, order granted in terms of consent, sureties to be to the satisfaction of the Magistrate of Calvinia.

On the application of Mr. Burton, his lordship authorised the terms of order of Court to be telegraphed to Calvinia.

	1906.
BRADLEY AND CRAVEN V. RANER.	Feb. 13th.
	" 14th.
	" 15th.
	" 16th.
	Mar. 14th.

#### Sale and purchase—Article guaranteed for a specific purpose—Acceptance.

This was an action brought by Bradley and Craven, machine makers, Wakefield, England, against W. Raner, builder and brickmaker, Woodstock, to recover balance of purchase price of certain brick-making plant supplied to defendant.

Plaintiffs, in their declaration, said they supplied a brickmaking plant through their representative in South Africa, Robert A. Telford, to the defendant, in June, 1903, the purchase price to be £1,700. The arrangement was that part of the price was to be paid when the machinery was delivered, and the balance upon the machinery working satisfactorily. The defendant was to put in the foundations, and do the necessary brickwork and woodwork. Plaintiffs delivered the machinery on November 21, 1903, although on that date the engine contracted for had not arrived. Defendant paid £340 on account. The machinery was in good and satisfactory working order, and was being worked on December 8, 1903. From and after that date defendant proceeded with the manufacture of bricks from the said machine. Plaintiffs admitted that there was delay in the erection of the machinery, but said that it was due to circumstances beyond their control, and they deducted £530 as and for damages sustained by defendant by reason of the delay. Defendant had remained in full possession of the said machinery from the 8th December, 1903, and had manufactured bricks, but he neglected and refused to pay the balance of the purchase price. Plaintiffs claimed £1,360, balance of the purchase price, less £530 deducted as stated, interest on the sum of £830 from December 8, 1903, and costs of suit.

Defendant, in his plea, denied that the machinery had ever been in good or satisfactory working order, and said it was a condition of the contract that the plaintiffs should work the machinery for at least ten days, and that it should turn out a minimum of 20,000 bricks a day. The machine had never turned out anything like the number of bricks contracted for, and the quality of the

bricks was also defective. After December 8, 1903, the machinery was worked, but only experimentally, Telford being engaged in endeavouring, but unsuccessfully, to make the machine work. Defendant had never accepted the machine at any time as being satisfactory. After January 16, 1904, the machine ceased running, and no bricks had since been manufactured from it. He prayed that the claim be dismissed, with costs. In reconvention, defendant said that by reason of plaintiffs' breach of contract the machinery had been wholly useless to him, and he had suffered considerable loss and damage in consequence. He claimed judgment for the sum of £340, paid on account of purchase price; £1,526 10s., expended in making foundations, brickwork, and woodwork to receive the said machinery; £1,100, as and for damages caused by the failure of the plaintiffs to get the machinery to work satisfactorily, and costs. He also tendered to redeliver the machinery to the plaintiffs.

Mr. Gardiner (with him Mr. Gutsche) for plaintiff; Mr. Burton (with him Dr. Greer) for defendant.

Mr. Gardiner informed his lordship that plaintiffs admitted that the supply of 20,000 bricks a day for ten days had not been actually put out under Mr. Telford, but their evidence would go to show that that was due to the fact that defendant had not performed his part of the contract, because, among other things, he had not supplied the clay in the proper condition, the labour was defective, and the foundations he put in were not in a proper state.

Mr. Burton said that defendant's case was that he was not an expert in brick-making machinery, and that the plaintiffs' contract to supply 20,000 bricks a day had never been fulfilled, or anything like fulfilled. As to the quality of the bricks, when the smaller quantity was being turned out, 3,000 or 4,000 a day, there was no reason to complain of the quality; but afterwards, when the output was augmented, the bricks were too rough for use.

Mr. Gardiner intimated that a considerable amount of evidence had been taken on commission, including that of his principal witness, Mr. Telford.

Maasdorp, J. said that, as there would be a good deal of verbal evidence to be led, it might save the time of the Court a good deal if he read as much of the evidence taken on commission as he possibly could while he was out of court. He would endeavour to read over the evidence on commission privately.

Mr. Gardiner then proceeded to call witnesses.

David McPherson, brickmaker, in partnership with Mr. Cameron, at Walmer, explained the principles of construction and working of the

machine supplied by plaintiffs. The clay on his brickfields was, he said, similar to that on the defendant's ground, and he considered that the machine supplied by plaintiffs was the best machine with which to treat that kind of clay. His firm had a similar machine, although only part of it had been supplied by Bradley and Craven. He thought a dry pan would be better than a wet one for dealing with clay of that kind. He was of opinion that the machine was quite capable of producing 20,000 bricks a day; in fact, under favourable conditions, it would turn out 30,000 a day. He had timed the machine and found that it turned out 220 bricks in a period of five minutes. He had seen stones and weeds going into the machine that ought not to have been allowed. Telford was at that time superintending the running of the machine, but he was inside the shed, and the machine was fed from the outside. He did not think the stuff put into the machine was clean. The clay was also utilised in an unfit condition, and should have been allowed to lie about for a few days to "weather." The elevator pit was damp, but should have been dry. When the clay and elevator pit were damp or wet, the result would be that the buckets would corrode and clog, and would not pick up fresh material. He had seen the elevator pit choked up owing to the dampness. He did not think the labour employed by Mr. Raner was efficient for the work. The machine turned out first-class bricks, fit for the best buildings in Cape Town.

Cross-examined by Mr. Burton: Witness considered that the machine in question was quite suitable for making bricks from such clay as was found on defendant's ground. He was not aware that any other wire-cut brickmaking machine made by Bradley and Craven was in operation in the district.

Thomas Rushford gave similar evidence.

Edward Thomas Ashley, brickmaker, said that with the scraper in the position where he found it to-day, the pan could not turn out 10,000 bricks a day. It was possible that the scraper might have been shifted into its present position by reason of feeding the machinery with stones, or throwing too much material into the pan. He found ashes, glass, and a piece of slipper, which had evidently been intended to be mixed with the clay; the stuff was lying on a high platform. As to the brick produced in Court by defendant, he considered that its rough and soft condition was due to the ash having been introduced into the clay at the wrong stage. The machinery was now in a disgracefully neglected condition. In December, 1903, bricks were about 72s. 6d. per 1,000: in January, 1904, they had dropped to 48s. or 50s., and the price had been

dropping ever since. Under proper conditions, with suitable labour and the cleaning of the machinery, the plant would easily be able to turn out 20,000 per day.

Cross-examined: Witness had been interested in brickmaking about 14 years. He was formerly an attorney, but he did not see how that affected the question.

[Maasdorp, J.: If you were an attorney, you would make a better brick-maker.]

Mr. Burton (to witness): I am not suggesting anything wrong, you know.

By the Court: Witness could find nothing wrong with the machinery supplied by the plaintiffs. He thought any brickmaking plant would work the clay on defendant's ground.

John Auchterlonie, builder, said that he saw Raner's brickworks just before Christmas, 1903. He found that the yard was wet, and that no attempt had been made to dry it. The machine was turning out a first-class brick. The labourers employed in taking away the bricks from the machine at times did not keep pace with the output.

Cross-examined by Dr. Greer: Witness did not say that the wetness of the yard would affect the clay.

John S. Cameron, of the Walmer Brickworks, said that if the machine had been kept going and had been fed properly, it would have turned out the minimum quantity of 20,000 bricks a day. The fault was that defendant employed inexperienced men in running the business, both in regard to feeding and tending the machine, and taking away the bricks. He did not blame the supervision.

Cross-examined: Witness had been engaged in brickmaking about four years, and, like his partner (McPherson), had previously been a plumber. He had been in the brickmaking trade less than a year, when he made the inspection at defendant's works. He did not find fault with the quantity of labour employed in off-setting the bricks, but rather with the quality. He thought that an ordinary experienced off-setter would be able to deal with about 5,000 bricks a day. He believed that about seven labourers were employed by defendant. Witness did not see any barrows go off the iron plate track, or be upset when the bricks were being taken to the hacks.

By the Court: Witness's firm were making 15,000 or 16,000 bricks a day, but they had a reason for not exceeding that output. With full steam power, he believed they could produce by their machinery about 35,000 bricks a day. In his opinion Raner's machine was equal to that of his own firm.

Theo. C. Rogers, formerly a brick-maker, at Sea Point, having given evidence,

James D. Treadway, brick-setter, formerly in defendant's employ, said that

in the summer of 1904 he took a contract in partnership with one Williams to make certain bricks. The scraper of the machine seemed to be too high, and they threw stones into the pan to keep the clay loose. He thought the perforated grates must have been broken by those stones. The clay was very damp; they did not "weather" it, but simply put it into the machine as it came from the bank. The elevator pit was wet; the buckets came down without clearing their contents, and they had to strike the buckets to get the clay off. After a week's work, they gave up the machinery, because it did not pay, the output being 4,000 or 5,000, and one day 9,000.

Mr. Gardiner: This is the man they employed to make an experiment with the machinery.

Cross-examined by Mr. Burton: Witness had not previously had charge of a machine. He thought he could manage a machine. He thought the machine at defendant's brickyard was out of order, or he should have got better results. The engineman told him that they had done better with the machine than anybody else had done, and that there had been a good many trying it. Williams took him in as a partner, and he was to share any profit. Williams paid him 30s. at the end of the week. Williams was trying the machine to see if it could turn out 20,000 bricks a day. The trial was made in October, 1904. The stones were thrown into the pan from a bucket, and would be about the size of his fist.

Richard C. Broughton, builder and contractor, Cape Town, having given evidence, Mr. Gardiner closed his case.

John Stotter described the labour employed at Mr. Raner's works up to the time when the machine in question was stopped at the end of January, 1904. He stated that the burners and off-setters and others were all experienced and suitable men for the work. The first bricks were made by the machine on the 8th December. Mr. Walker, representing the plaintiffs, superintended the laying of the foundations and other arrangements for receiving the machinery. Mr. Walker erected the machinery. The machinery commenced running under his supervision, and continued for some days, until Mr. Telford came, and the operations were continued under their joint control. Witness had had 25 years' experience of brickmaking machinery. This machine worked all right as a machine, but the output at first was only 4,000 or 5,000 up to about 8,000. Subsequently the figures ran as follows: 9,600, 9,200, 13,300, 11,100, 8,000, 11,000, 8,700, 9,000, 6,000, 13,000, 17,500. The last day of working was January 12, 1904. When the output was about 7,000 or 8,000 a good brick was produced. The whole fault,

to his mind, was the construction of the pan. Witness suggested to Mr. Telford that the best pan to deal with soapy clay such as they had would be a wet pan. Mr. Telford thought they should have a dish pan, but when it came it was found to be an open base pan. Witness considered that with that clay it was quite impossible to put through the grates anything like 12,000 or 13,000 bricks per day on the average. With some kinds of clay the grates would pass through 30,000 or 40,000 bricks a day. The grates (produced) were drilled afresh after they had been in use a little while, with the result that matters were made worse, the holes being plugged immediately. Fresh grates were tried with large slots, but the result was that the elevators became choked. Telford told him on the 12th January that he was disgusted with the products of the machine, and that he was done with it. The bricks when the higher output was reached were unsuitable for use. They all did their very best on the 12th January to see if it were possible to get 20,000 bricks out of the machine. The machine ran a few days after the 12th January, but witness did not again see Telford at the brickfield. No more work was got out of the machine. Witness remained with Raner until February, 1905. In the meantime they went on making bricks by hand. Witness went to Johannesburg about 12 months ago. There was a good demand for bricks at the time the machine was being tried. They could have got a fair margin at 40s. a thousand bricks. Witness was a contractor under Raner, and he was to receive 25s. a thousand.

Cross-examined by Mr. Gardiner: Witness had a three years' contract to produce bricks on defendant's field. He did not know that the Pole whom Raner was getting out in 1904 was to be manager of the brickfields. He knew that Raner made an application to the Supreme Court in consequence of the action of the Immigration Officers, but witness never regarded this man as in any way manager of the brickfields. He would probably be foreman of the stables. Witness admitted that he had handed a statement (produced) to one Sykes in Johannesburg of evidence which he might give. He did not write out the statement, but he had read it over. The statement was written out for a consideration for Mr. Thornton. He admitted that the document contained the following passage: "I was repeatedly warned by Raner not to hurry on the starting of the machine." Raner, however, never interfered with him.

Mr. Gardiner: In order to help Thornton to get a consideration from Sykes, you handed him personally that statement as a statement of evidence which you might give, and you then led Sykes to believe that you might say

that Raner repeatedly warned you not to hurry on the starting of the machine, and you were warned, as you say, by Mr. Raner, not to show your hand, and you were hindering the working of the machine, but were compelled to do so?

Witness: I was never interfered with by Mr. Raner. While I am here, I defy anyone to contradict anything I have said.

Mr. Gardiner: What do you mean by "while I am here"?

Witness: While I am in this dock.

Mr. Gardiner: Box. Mr. Stotter, not dock at present. You mean to say that when you are not in the box you are not a truthful man.

Witness: I meant to say that I could say what I thought I would without injuring myself in any way.

Mr. Gardiner: Then, again, you say that the machine, as fixed and arranged at that time, or now, would turn out 30,000 first-class bricks in one day of ten working hours, provided she were manned by a full staff of average workmen, and that, as a test, you would undertake to do it?

Witness: Yes, with good clay, so I would; but not with that clay.

Mr. Gardiner: Furthermore, "At this time, to my disgust, Mr. Raner had come to the conclusion that there was more in trying to claim £10 a day than there was in working the machine." Is that so?

Witness: He never interfered, and he never said anything about what he would get for his time. I worked the machine for all it was worth. In further cross-examination, he said that he had been subpoenaed to give evidence by both sides, and he had drawn travelling expenses from both. He had received £10 from plaintiff's solicitors in Johannesburg.

Re-examined: He made the statement in question in order to assist a man in getting work in Johannesburg. Sykes was the Johannesburg manager for Bradley and Craver, and after the statement had been made, Sykes got work for Thornton to look after an American machine on one of the mines. Sykes approached witness in the first instance.

Thomas Laws gave evidence as to the stoppage of the machine and the rough bricks it produced. Some of the bricks were wheeled back to the clay-pit, as they were not fit to burn.

*Postea* (February 14th):

Mr. Burton said that at the last hearing he had practically concluded the examination-in-chief of the defendant, but the Court asked for fuller particulars as to the claim in reconvention, which had now been prepared.

Nathan Raner (the defendant) said that he claimed in reconvention a refund of £340, money paid upon delivery of the plant. He had incurred



expenses in preparing the foundations, brickwork, and woodwork for receiving the machine to the amount of £1,526 15s. He had heard the evidence of Mr. Mousett, quantity surveyor, who estimated the wasted construction at £946. He was prepared to accept that figure. Mousett, however, did not take into account the cost of off-loading and erecting the machinery. Witness had prepared a statement showing how the money was spent. The cost of off-loading and erecting machinery, including barrows, hacks and boards, was £159 15s. If the machinery were removed, he would have to return the ground to the lessors—the Roodebloom Estate—in its former condition. This would cost him £30. His expenditure on account of labour, coal, oil, etc., for working the machine was £315, at the rate of £10 10s. a day, reckoning up to the time of Mr. Telford's departure. He had had to pay interest on an overdraft from the bank at the rate of 7 per cent. on the instalment of purchase price paid, and cost of brickwork, foundations, etc., and off-loading and erecting machinery, the interest amounted to £232 13s. He also claimed in respect of rent he had had to pay for the ground. Witness had pug mills running, and if he had only been making bricks by hand, it would not have been necessary for him to take a lease for six years, as he could have got clay elsewhere at so much per 1,000.

[Maasdorp, J. (to Mr. Burton): That is rather a remote ground of damages.]

Mr. Burton: It was absolutely necessary expenditure for the purpose of receiving this machine.

[Maasdorp, J.: Yes, but it is too remote. It was not in contemplation. You claim for damages for the whole of the six years?]

Oh, no; it is only to the present date from the time we have been there. We say we have had to pay rent for ground which was useless to us.

Witness (continuing) said that the rent of the ground was £500 a year. He claimed damages on the basis of half the rent, the amount being £458. Other items included in his claim for reconvention were: £134, wages of watchman; £46 2s. 6d., insurance premiums on machinery and shed; £28 2s. 6d., steel plates for barrows. The total amount of witness's claim was £2,708.

Mr. Burton informed his lordship that, in view of the intimation from the Court, they had given up the claim for loss of prospective profits.

Defendant (continuing) said that he did not now make any claim for prospective profits; he only claimed actual out-of-pocket expenses in connection with the machinery. Against his claim he allowed to plaintiffs in respect of 135,000 bricks made and sold, a sum of £210

5s., calculated at £3 per 1,000, less 29s. for packing, burning, and loading, and £13 10s. in respect of 30,000 bricks, made during the trial of Williams, in October, 1904. Witness also allowed £7 for the wheelbarrow on the ground, £40 for hack boards, brick boards, etc., and £100 for the material, if left on the ground. After making the foregoing deductions, the net amount of his claim in reconvention was £2,337 5s.

In cross-examination by Mr. Gardiner, witness denied that he had prevented the machine from having a fair trial, or that he told Charles Stotter or others that he did not intend the output to be 20,000 a day. He had not withdrawn Kafirs from the clay bank, so as to prevent the machine from being properly fed, and, in fact, had never interfered with Telford, who was superintending the machine at the beginning for the plaintiffs. He had not delayed the machine by failing to supply sufficient labour. He had never told Treadway to throw stones into the pan. He had not, as far as he was aware, caused any serious stoppages through insufficient water supply, or shortage of clay. Witness used about 40,000 bricks made by the machine for building his Scotch kilns.

Mr. Gardiner: What is your great complaint about this machine?

Witness: They are talking about having a different pan altogether. In further cross-examination, on his claim in reconvention, witness said that he could not use the Scotch kilns for hand-made bricks. He had credited the plaintiffs with all the bricks made by the machine.

Charles Stotter (called by Mr. Gardiner) said that Mr. Rainer told him that he did not intend the machine to produce 20,000 bricks a day.

This concluded the evidence.

Counsel having been heard in argument on the facts,

Maasdorp, J., said that it was an essential part of the conditions of the contract that plaintiffs should work the machine satisfactorily for at least ten days of ten working hours, turning out a minimum of 20,000 bricks a day, which bricks were to be of good shape and quality, suitable for the best buildings. It was admitted that the machine had not produced that number on any working day. Then the point arose as to whether the failure of the machine to comply with the conditions of the contract was due to the default of the defendant. The default of the defendant was in no way responsible for the failure of the plant. The failure, he considered, was due to the changes which had been made in the gratings in the pan. Another agent of the plaintiffs, on coming to the machine, found that the gratings were of such a nature that they were not suitable for the clay in the condition in which Telford (who



made the contract for plaintiffs) had seen it. The gratings were changed on two occasions, the holes being enlarged. When the holes were enlarged, the effective character of the plates was diminished. The plates were then put into the pan, with large slots, which enabled the clay to pass very freely, and it seemed to him that when that was done the whole nature of the machine was altered. It was then reduced to such a condition that it would not produce the fine bricks which it was intended to produce. He questioned whether with such gratings in the machine it could be made to work successfully. The defendant was entitled to damages. He paid on account of the purchase price £340, and that he was entitled to recover. Then it appeared that he went to the expense of £964 in erecting the premises, which were necessary for the machine. The work upon the erection of the machine itself cost him £63, and the labour of working the machine during the 30 days, when attempts were made to produce 20,000 bricks a day, cost him £315. He (the learned judge) was prepared to allow the whole of these items. With reference to the claim for rent, he was not satisfied, upon the evidence, that a case had been made out upon what should be allowed. He was inclined to think that the damages in that respect would be rather too remote. Then there was a large claim for interest. Defendant said that he incurred damages as far back as two years ago in large amounts, and that he was entitled to claim interest on the damages then suffered by him. He was disinclined to allow that part of the claim, on the ground that a man could not lie by when he had suffered damages, and allow the interest to accrue in that way so as to increase the damages. The claim also for insurance must be disallowed. Then there was a claim in regard to wheel-barrows and hack-boards. Defendant made a claim on that, and he was also prepared to make an allowance. The damages allowed in this case to the defendant would be £1,682, and from that amount must be deducted £223 for bricks made and sold by the defendant, and £100, the estimated value of the material which the defendant still held. Judgment would be given for the defendant on the claim in convention, with costs, and for the plaintiff (Raner) on the claim in reconvention for £1,359, with costs. Bradley and Craven declared to be entitled to possession of the machine.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Dempers and Van Ryneveld.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ESTATE HARTLEY V. MOOLAH ( 1906.  
LAH AND HEYDENRYCH. } Feb. 13th.

Mr. Benjamin was for the plaintiff. Counsel said there were two defendants; the first one, Moollah, failed to enter an appearance, and he applied for judgment under Rule 329d. The second defendant entered an appearance, but now he consented to judgment being entered against him personally. The action was for delivery of a mortgage bond.

Judgment as prayed against the first defendant, and as against the second defendant judgment in terms of the consent paper.

### READ V. ROSSMAN.

Mr. Benjamin mentioned the matter of Read v. Rossman, and asked his lordship to add to an order granted on the previous day by allowing the applicant to sue the respondent by edictal citation and to fix a return day.

Application granted, citation and notice of intendit to be served together personally, return day 28th inst.

### DRUMMOND V. WOOD.

The plaintiff appeared in person, and Mr. Benjamin (with him Mr. W. P. Buchanan) appeared for the defendant. The action was brought by Hildyard Home Drummond, newspaper editor, against John William Wood, a broker and printer, to recover £1,000 damages for an alleged breach of contract in the printing of the paper "South African Truth."

The paper ran to four issues, and publication then ceased. The plaintiff, in his declaration, alleged that the defendant then refused to print any more issues, and that he unlawfully deleted certain matter without the consent of the editor, and declined to print other paragraphs. The defendant admitted the omission of certain matter through lack of space, and the deletion of certain paragraphs, because he thought they were libellous, and in reconvention claimed £83 5s. 5d. for printing and work done.

Mr. Benjamin said, after the pleadings were filed, certain letters were disclosed by the plaintiff to the defendant's attorneys, which were alleged to have been sent by the plaintiff to the defendant, but which the defendant denied ever having received one of these letters. The contract sued upon had been assigned by the plaintiff to a certain Mrs. Leeson, and if that were so the plaintiff had no *locus standi*. Counsel

moved for leave to amend his plea by inserting a plea in abatement, that the plaintiff had duly ceded his interest under the contract to one Mrs. K. T. Leeson, and, therefore, the plaintiff was not the proper party to sue, and the declaration should be quashed.

The plaintiff said the contract had been assigned as was stated, but that it was re-assigned prior to the proceedings. The defendant, his lordship would see, held the plaintiff liable by the whole of the correspondence, and surely, if he was liable, he was the proper party to sue.

[Hopley, J.: Who was interested in the paper?]

Plaintiff: I was the person who entered into the contract, and for certain reasons I temporarily assigned it to Mrs. Leeson in consideration of her promising to advance certain moneys to pay the defendant. The plaintiff was heard at some length on the legal point, and referred his lordship on the question of contract to the case of "*The Topical Times*" v. "*The Mirror of Life*." He further urged that the defendant refused to recognise Mrs. Leeson in any way.

Hopley, J., drew the plaintiff's attention to a letter in which he stated he assigned his interests under the contract to Mrs. Leeson.

The plaintiff said that the defendant replied that he would not accept the assignment. When the plea was filed in July or August no exception was taken. Supposing Mrs. Leeson had sued the defendant he would have turned round, and said that he had no contract with Mrs. Leeson.

[Hopley, J.: How many issues did this paper run?]

Plaintiff: It ran four issues, and then broke down. Producing some of the copies of the paper, the witness remarked to his lordship: "I don't know whether your lordship will be able to read the printing in any of the copies."

The plaintiff then replied to the plea in abatement as follows: Plaintiff says that although the contract was assigned as alleged in the said plea, it was duly re-assigned to the plaintiff by the said Leeson before action, and for a further answer to the plea the plaintiff says that the defendant at all times refused to recognise or be bound by said assignment to the said Leeson, and the defendant is thereby estopped from now setting up the same in abatement to the plaintiff's claim.

The plaintiff, in giving evidence, said he could not give the exact date of the re-assignment. Practically it took place on June 30, the day after the last issue of the paper. The object of the assignment was to enable him to meet a bill, and when the object no longer obtained, the contract was immediately re-assigned. It was re-assigned verbally, when defendant declined to publish any further issues. Plaintiff would like to

call Mrs. Leeson, an old lady of 80, but he thought her evidence would have to be taken on commission.

[Hopley, J.: Well, Mr. Benjamin, what have you to say? Let us get to the common-sense of the matter. Was Mrs. Leeson any more than a dummy?]

Mr. Benjamin submitted that the plaintiff was bound by the assignment, and there was no evidence of any re-assignment.

Hopley, J., said he was prepared to hold that there never was any proper assignment, and that Mrs. Leeson, who was plaintiff's mother-in-law, was simply used as a dummy.

Mr. Benjamin pointed out that a heavy penalty attached to such conduct, and submitted that the plaintiff was only playing fast and loose.

Hopley, J., finally gave leave to examine Mrs. Leeson on commission, and adjourned the case until March 2, the commission also ordered to take the evidence of Prideaux, the manager for the defendant.

#### SWEENEY V. SWEENEY.

This was an action brought by James Sweeney, of 55, Lever-street, Woodstock, a locomotive driver on the C.G.R., against his wife, Bridget Sweeney, of 48, Bromwell-street, Woodstock, for divorce, by reason of her adultery with one Joseph Cooney.

Mr. Lewis was for the plaintiff, and Mr. P. S. T. Jones was for the defendant.

On the application of Mr. Jones, the witnesses on both sides were ordered out of court.

The details of the evidence were unfit for publication.

In the course of the evidence, His Lordship, noticing a couple of ladies in court, said: "Mr. Jones, are these ladies witnesses in this case?"

Mr. Jones: No, my lord.

Hopley, J., remarked that he was not there to look after feelings of modesty or otherwise. The ladies could stay in court if they liked.

The ladies did not move.

Subsequently Mr. Lewis said the evidence would turn out to be of such a revolting character he would ask his lordship to clear the court of the general public.

[Hopley, J.: The general public are entitled to be in court if they like. Women and children are frequently ordered out of court in disgusting cases. Anyone having nothing to do with the case had better leave the court.]

The ladies promptly left the court.

*Postea* (February 19th):

After further evidence, the parties came to a compromise, agreeing to a decree of judicial separation.

Evidence having been called as to the custody of the child,

Hopley, J., said he thought the parties in the case had been wise in coming to a compromise. There would be a decree of judicial separation as from 30th June, 1905, the plaintiff undertaking to pay midwifery expenses incurred by the defendant in August, 1905. There would be no order as to costs, and no order as to maintenance. The plaintiff would have custody of the child.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

CARTER V. CARTER. { 1906.  
Feb. 14th.

This was an action for a decree of divorce brought by the wife against her husband James Thomas Carter, by reason of his adultery, and for an order of maintenance of £2 a month for each of the three children of the marriage. Mr. Alexander was for the plaintiff, and the defendant was in default.

Decree of divorce granted, with costs, the defendant to pay £1 a month for the maintenance of each of the children until they reach the age of sixteen years, the first payment to be made at the 1st March, with leave to the plaintiff to apply for an increase of maintenance, the plaintiff to have custody of the children, and the payment to be made personally or at the office of the plaintiff's attorneys.

HOULDER BROS. V. COLONIAL GOVERNMENT. { 1906.  
Feb. 14th.  
" 26th.  
" 27th.  
Mar. 1st.

Demurrage—Breach of contract  
—Novation.

*The plaintiffs had contracted to supply the defendants with 54,000 tons of coal, to be delivered at Cape Town at £1 16s. 5d. per ton c.i.f., and 60,000 tons to be delivered at Port Elizabeth at £1 17s. 5d. c.i.f., on monthly shipments.*

*Defendants were to accept delivery immediately on arrival of the vessels in Table Bay and Algoa Bay respectively at the rate of 120 tons a day for sailing vessels and 250 for steamers, or to be liable for demurrage at the rate of 4d. per ton for sailing vessels and 6d. for steamers. The coal arrived by 18 sailing ships, but not within the stipulated 6 months: and the quantity received in certain months considerably exceeded that received in others. Eight of these vessels were not discharged within contract time, and in respect of these the plaintiffs now claimed demurrage. The defendants pleaded (1) the irregularity of the shipments and their consequent inability to take delivery as per contract: (2) novation of the original contract, inasmuch as plaintiffs had chartered vessels at a rate of demurrage less than that stipulated for in the contract and that the bills of lading of these vessels, some of them expressly incorporating the conditions of the charter parties, were transferred to, and accepted by the defendants. Held, that the original contract had not been novated.*

*Held further, that plaintiffs were entitled to demurrage, less a certain sum due to defendants as damages by reason of plaintiffs' failure to despatch their vessels within the contract time.*

This was an action to recover from the defendants £10,788 for demurrage in respect of a coal contract.

From the pleadings it appeared that in August, 1901, an agreement was entered into between the Agent-General in London and the plaintiffs for the supply of Welsh coal to the Colonial Government. In all, 54,000 tons were to be supplied at a certain price, c.i.f., in monthly shipments of 9,000 tons, the shipments to commence in February, 1902. The railway authorities were to accept delivery immediately on arrival in Table Bay and Algoa Bay, at the rate of 120 tons per day for sailers and 250 tons per day for steamers, and

the Government was to be liable for demurrage at 4d. per net ton registered for sailers per day, and 6d. for per net registered ton per day for steamers. In the event of Great Britain being engaged in war, except with the Transvaal, or a coal strike, Messrs. Houlder Bros.' liability ceased. Through a strike at Merthyr Colliery, Messrs. Houlder Bros. were unable to despatch the coal in the agreed order, but they despatched it as quickly as possible, and in regard to a number of steamers, the Government, it was alleged, failed to take delivery immediately on arrival, and therefore became liable for demurrage agreed upon. The Government, in their plea, set out that the plaintiffs had broken the contract in regard to the delivery, and as a result, it became impossible for the Government to accept immediate delivery, and they were obliged to take coal from other persons.

Sir H. Juta, K.C. (with him Mr. Close and Mr. Struben), was for the plaintiffs; Mr. Schreiner, K.C. (with him Mr. Searle, K.C., Mr. Howel Jones, and Mr. Burton), was for the defendants.

The evidence for the plaintiffs and part of that for the defendants was taken on commission.

For the defence,

Wm. Sinclair, chief railway storekeeper to the C.S.A.R., stated that during the time the present action related to, he was chief storekeeper in the C.G.R. He had occupied that position since 1886. Witness would receive the coal for the Government, and check the amount received and give a certificate. There was ample time for the contractors to make due provision for the supply. All the coal sent to Cape Town arrived by sailers. There was an agreement between the Harbour Board and the Railway Department by which the former gave the latter preference in discharge up to 500 tons per working day. Witness made up a return showing that the plaintiffs, instead of shipping 9,000 tons per month, only shipped that amount over a period of three months. Cables had to be sent to the Agent-General calling attention to the delay. The delay on the part of the plaintiffs forced the Government to buy coal elsewhere. In May, 11,896, and in June 26,760 tons, were received. Letters were sent to the plaintiffs pointing out the grave situation that would arise if ships were rushed in outside the stipulated time to make up the deficiency. In a certain three weeks the plaintiffs despatched 29,000 tons. Everything was done to meet the discharge; the Harbour Board was actually asked to increase the facilities for discharge.

Cross-examined by Sir H. Juta: It did not matter to the Government when the ships left England, so long as

9,000 tons a month arrived here. Witness could not from memory, but would be able if he got time, give the date of every order of coal which arrived from the months of February to September.

His complaint was that so many ships came in that they could not be discharged. If the Admiral Cecil, instead of arriving on the 27th August, had arrived on September 1, there would have been no complaint. Six ships arrived in August. If Houlder Bros. had shipped according to the contract, the Government would have been satisfied. As against the contractor, it did not matter how the coal arrived. If 20,000 tons were shipped by ships and steamers in different months, and arrived in the same month, the preferent berths could have been of little avail.

Percy John Hart, assistant to the Chief Railway Storekeeper, stated that he was the chief clerk to the last witness on the occasion in question. He prepared the returns produced in collaboration with an official of the Harbour Board.

Mr. Schreiner read a voluminous correspondence.

Sir H. Juta: The Government now claim damages, not because the ships were not sent off in time, but because they did not arrive in time. If they accept coal, which, as they say, has not been shipped in time: If they accept in July coal which should have been sent in April, they cannot claim damages for late despatch. The first question is, "What is the substance of the contract between the parties?" The question is whether the coal was to arrive in reasonable quantities monthly, or whether the whole quantity might be sent at once. Our tender was based upon monthly shipments. What was contemplated there was delivery. All the documents are on the basis of delivery. As to the letters, some might be used for both sides, but what is complained of throughout the correspondence is non-delivery. From May 5th till July 11th we hear no more complaints. The letters of May 5th and August 14th show that the whole complaint of the Government was not about shipment, but delivery. In their letter of May 27th, 1903, the Government offered an inspection, and failure of delivery is still insisted on. The Government has now paid demurrage on a ship which arrived after our vessel. Three ships arrived in July, for which they refuse to pay. The ships loaded for April up to June have been paid on; and also on the Prince Albert, which arrived in August. They have already paid on other ships, but refuse to pay on those which arrived in July. The time occupied by a voyage from England differs very much. On August 3rd they take the Enterprise



into dock. About 13,000 tons of Houlder's coal was ready for delivery in August. If a time condition goes to the root of a contract and the contract is not fulfilled, no doubt the aggrieved party may claim damages. But here no damages are claimed for non-shipment. They accepted delivery of our coal, and after doing so claim damages for late delivery; but they have not shown any damage which we could have prevented. They cannot both take advantage of the contract by acceptance and then sue for breach of contract. There is no evidence that they had to pay more damages by reason of demurrage. The Harbour Board broke their contract by not allowing the ships to be unloaded. The Government should have refused delivery; but now, after paying in respect of some of the ships, they wish to go back and to reclaim the money. Either the £10,000, or, at all events, something is due to us. They cannot accept delivery and then refuse discharge. As to the second defence (p. 7b of the pleadings), I do not understand it. They say that there was a novation of the contract; but it was a very strange novation. The contract provided that we should hand over the bills of lading. Then how have we novated the contract by doing what it bound us to do? There was no intention on the part of the Government to novate, because they knew nothing of the terms of the charter party. Houlder Bros. could not have intended to novate by carrying out the terms of the original contract. The old contract could not stand with the new: under the one the Government was to pay freight; under the other it was not to do so. Then the conditions as to demurrage were different. If the demurrage is high the freight will be proportionately lower. If these contracts do not run side by side we are landed in a mass of absurdities.

Mr. Schreiner: The declaration admits that there must be a regular despatch. No attempt has been made to show that plaintiffs' failure to make regular despatch was owing to circumstances over which they had no control. They were bound to make regular and equal despatch and time was of the essence of the contract. It is a mere fallacy to say that delivery could be given on the last day of one month, and then on the first of the next. We do not mind on what day of the month delivery is given provided that it is given monthly. The months of despatch were fixed, February, March, April, May, June, July; 9,000 tons each month. We have paid certain sums which we ought not to have paid for demurrage, but a man who has paid one pound in mistake cannot for that reason be made to pay another. Plaintiffs have received their £7,000, and

possibly may not be compellable to pay it back; but that does not show that the Government can be made to pay more. In May plaintiffs sent 8,730 tons, and the Government paid demurrage. On May 31st the Clan Buchanan brought 3,165 tons, and the Government refused to pay demurrage. About 29,800 tons were despatched in June. That was not in accordance with the contract. If delivery were not taken within reasonable time the Government was liable for demurrage.

[Buchanan, J.: Demurrage runs only from the arrival of the vessel.]

Yes, but the arrival of a vessel duly despatched. No demurrage was payable save in the case of a ship which started in its month. Possibly they may be entitled to damages for detention, but that is a different matter. Then, again, there is no proof of actual damage sustained by Houlder Bros. The plaintiffs, in order to claim demurrage, should have shown that all conditions of the contract had been fulfilled. They can claim nothing unless they can make good their declaration. Demurrage is payable to a ship. This was a c.i.f. contract, and at once the risk passes to the purchaser, and in this respect it resembles an f.o.b. The consignee has to do with the ship, and can claim at 4d. per ton for sailing vessels and 6d. for steamers; 4d. and 6d. mean up to 4d. and 6d. If they become liable for more that is their affair, but we are bound to pay only up to 4d. and 6d.

[Buchanan, J.: You did not pay the ships.]

The ships never sent in any claims to us. The demurrage notes were sent to Anderson Bros., the agents for the ships. We are ready to account for the demurrage they have paid to each ship, but we cannot allow them to make money on it. Then they have never rendered us an account to show that they have paid any of the ships. If we should have to pay demurrage, we should be paying as agents for Houlder Bros. We would have to pay both Houlder Bros. and the ship, for as we were the holders of the bills of lading the ships would have looked to us. Assuming that the Court holds that we are liable for demurrage at 4d. and 6d., we say that plaintiffs have failed to make due despatch, and therefore cannot claim demurrage, though they may possibly be able to claim damages for detention. Supposing they can do so, to what damage are they entitled? It has been argued as though the onus of showing damages is on us, but it is on the plaintiffs.

[Buchanan, J.: Why do you say that they were bound to equal monthly shipments; why not equal monthly arrivals?]

I do not object to that; all we wanted was the coal. Demurrage under a



contract is one thing; damages for detention is another. They have not satisfied the initial condition of demurrage by giving due despatch. If they claim damages, the question is, "On what scale?"

[Buchanan, J.: How do you make out your damages?]

We had to purchase 17,500 tons of coal. They then came with their coal when we did not require it, and could not rapidly take delivery. If they had sent in coal regularly the difficulty would not have arisen. We say that they have not proved their damages. Let them say on what dates the ships have started. They cannot claim demurrage *stricto sensu*, but only damages. It has been said that the contract with the *Enterpe* was a separate contract. We gave her an extension of time. She began to unload in July 15th and finished on August 11th. We thought that steamers had a preference, but it seems not. If the ships had arrived at the due dates they would have had discharge at once. Counsel has argued that the fact of our having bought coal locally was no reason why we should refuse to pay demurrage. But see *Story* (vol. 2, secs. 971 and 971a, citing *Lucas v. Godwin*). The plaintiffs have not proved what they have paid to the ships, or that they are entitled to recover. As to time being of the essence of the contract see *Leak* (4th edit., p. 598, 599) and "Benjamin on Sales" (4th edit., 572 to 575). For a definition of demurrage see "McLachlan on Shipping" (4th edit., 545), *Carver* (sec. 609), *Scrutton* (5th edit., p. 251), and *Duncan v. Coppen* (8 C.B., 225). Our claim in reconvention is only to show technically that they have damaged us by delay.

Sir H. Juta was heard in reply on various items in account.

*Cur. Adv. Vult.*

*Postea* (March 1st):

Buchanan, J.: The plaintiffs had for some time before the contract sued upon supplied the Government with coal, delivered at the different ports of the Colony. In some of the former agreements between the parties approximate monthly quantities were stipulated for, and delivery was to be made, in some instances, into railway trucks, and in others on the quay. The outbreak of war upset the nominal conditions of our ports, and especially the state of Table Bay. In July, 1901, plaintiffs cabled from England to the Government here an offer to supply coal for a period of one year or of three years. "c.i.f." acceptance on arrival, 120 tons by sailing vessels and 250 tons by steamers daily, monthly aggregate quantities about 10,000 to 20,000 tons, to be delivered at the three Colonial ports. The Government in-

timated to the Agent-General a willingness to accept monthly shipments for six months, whereupon, at the request of the Agent-General, the plaintiffs wrote him the letter of the 7th August, 1901, in which they offered to accept the six months' contract on the following detailed terms set forth in the letter: "(1) That we are to supply 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c.i.f., and 60,000 tons for Port Elizabeth at £1 17s. 5d. per ton c.i.f., on monthly shipments for six months, such shipments to commence to Cape Town in February, 1902, and to Port Elizabeth in October, 1901. (2) That the railway authorities are to accept delivery immediately on arrival in Table Bay and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers, and 6d. per net registered ton per day for steamers. (3) Payment to be made two-thirds in cash by you within seven days of the receipt of policies, etc., and the remainder within seven days after production of the certificate as to delivery. (4) In the event of this country being at war other than with the Transvaal, or other causes, including strikes, beyond our control, our liability to cease." These terms were accepted by the Government, and plaintiffs' letter is annexed to the plea as being the contract between the parties. Before going further, it may be noticed that the case has been complicated by the fact that since this action was brought in this court the defendants have instituted proceedings in England against the present plaintiffs, having reference to demurrage paid under the present as well as under the previous contracts. This subsequent action cannot be held to bar these proceedings, but it renders it all the more necessary to confine the decision of this case strictly to the issues raised on the pleadings. Without going into details on the various points raised in argument for the purposes of this case, I take it as proved that the letter of the 7th August, 1901, is the contract which bound the parties. The plaintiffs shipped the coal contracted for, but not within the six months mentioned in the letter. This coal was sent out in eighteen sailing vessels. The time taken by most of these sailing vessels varied from nine to ten weeks, or thereabouts, though one vessel, which arrived during the month of August, made an exceptionally fast voyage of 52 days. The statement made by one of defendants' witnesses shows that the Government expected the first of the shipments to arrive about May. The amount of coal received under this contract, the plea admits to have been as follows: May, 5,992 tons; June, 9,833 tons; July,

9,787 tons; August, 18,853 tons; October, 7,378 tons; and December, 2,006 tons. As a matter of fact, the plaintiffs despatched only one vessel in February, carrying a little over 3,000 tons of coal, which vessel arrived in April; but a second vessel, which arrived in May with nearly 3,000 tons seems to have been taken together as making up the quantity of coal stated as having been delivered in May. It will be noticed that the contract is indefinite about the amount to be shipped monthly, but from the correspondence, it seems to me fair to assume that the parties understood it was to approximate 9,000 tons per month for the six months. Considerable discussion has taken place whether under the contract the coal should be shipped each month, or should arrive each month in quantities of about 9,000 tons, the latter view being assumed in a number of letters which passed between the parties. But Mr. Schreiner, for the defendants, laid little stress on either contention, the object of the Government being to secure a regular monthly supply. The quantity of coal which the plaintiffs contracted to supply proved clearly insufficient to meet the needs of the railway service, and before any coal at all arrived by any of the plaintiffs' vessels, the Government in April began to order a large additional quantity. In May they gave further orders, and also purchased locally. They also purchased locally some 4,550 tons in June, and 2,835 in September. These purchases and orders altogether amounted to about 33,000 tons. Some of the orders given in April, and those in May, together with the local purchases in May and June, amounting in all to about 18,000 tons, the Government now assign as being coal acquired to supplement shortage caused through the delay in shipments under plaintiffs' contract. The rest of the coal was to meet the additional requirements of the railway. This supply was secured at a lower price than the rate fixed in the contract with plaintiffs. The bills of lading of all the coal shipped by the plaintiffs were handed to defendants, who took delivery of the coal from the vessels and duly paid for it. With the exception of the first arrival, none of the other vessels despatched by plaintiffs were discharged after arrival within contract time, and demurrage was claimed in respect of each ship. Eight vessels had sailed from England between the 31st May and the 25th June, three arriving in July and five in August. On these vessels the Government refused to pay demurrage. Another vessel which had arrived in August foundered when entering Table Bay, and the quantity of coal which she had on board was made up by an arrival in December. The Government paid to the plaintiffs the demurrage claimed on all the vessels which arrived before

as well as after the eight just mentioned, amounting to the sum of £7,360. The claim of the plaintiffs for demurrage in respect of the eight vessels was resisted by the Government, and the plaintiffs in this action now seek to recover the sum of £10,788 14s. 4d. in respect thereof. The plea contains averments which may be grouped under two separate defences, and these averments also form the basis of a claim in reconvention for damages for breach of contract. The first line of defence may be summarised as follows: The defendants allege that, according to the true and proper interpretation of the contract, the plaintiffs were not entitled to claim demurrage thereunder, as it was their duty to despatch the 54,000 tons of coals stipulated for, in monthly shipments of 9,000 tons per month, commencing in February, and continuing in consecutive months until and including July; but in breach of their agreement they shipped deficient quantities in February, March, and April, and shipped excessive quantities in May and June, whereby the defendants were prevented from taking delivery of the coal after its arrival as speedily as they would have taken it if it had been despatched in the manner contemplated by the agreement. There is a further allegation in this part of the plea that in consequence of the breach the Government was obliged to provide for the purchase, and to take delivery of coal from other persons to make good the deficiency of the shipments in February, March, and April. As a price below contract rate was paid for this coal, no specific damage is claimed in respect of such purchases. The only way in which they bear on the issue is that in consequence of the delivery by others to the Government of coal, it is alleged that the defendants had fewer facilities at their disposal to take delivery from the plaintiffs of their coal as it arrived, and therefore should not have to pay the demurrage incurred by the slow discharge of the vessels. The plaintiffs' declaration would imply an admission that there had been some delay on their part, as they rely on the fourth clause of the contract, and say that owing to strikes and other causes, on which they had no control, they had been unable to despatch the coal in the order of shipment for which they had made provision, but had despatched it as regularly as such causes permitted. It does appear that there had been some difficulties at the collieries, but the evidence does not show that these difficulties were insuperable, and I understand this part of the declaration is not now relied upon. There would have been more force in this first defence if the defendants had refused to receive the coal altogether, and had relied on a breach of contract as found-

ing a claim for damages, or as justifying them in securing the quantity at plaintiffs' expense elsewhere. But they accented each cargo as it came to hand. The witnesses for the defence have spent most of their time in building up hypothetical conjectures of what would have been the result if the ships had been despatched regularly month by month from February. Taking the tables they have prepared, and taking the actual length of passages made, of the three vessels, they conjecture would have been despatched in February, one would have arrived in April and two in May. This with the statements made in evidence would justify the assumption that the parties expected that May would be the first month in which the coals under the contract might reasonably have been expected to arrive. As a fact, nearly 6,000 tons were delivered in that month, and even with this smaller quantity the vessels could not be discharged within the lay days contracted for. So in June, a little over 9,000 tons—the amount expected—could not in the instance of any one of the vessels be discharged, without demurrage, and the same in July, and in the same way right on to the last of the cargoes received. These facts go far to show the punctuality of the theory of the problematical result of a strict adherence to the wording of the contract, a theory built entirely on suppositions. Much virtue as there may be in an occasional "if," I am not prepared to take the series of "ifs" put forward as of sufficient force to establish as a fact that less demurrage would have been incurred had the vessels been sent off and more coal been delivered at earlier dates. The congested condition of this port was well known to the parties, and may account for the delivery of the coal being stipulated for in the way it was by the contract. Indefinite as the contract may be in other respects, it is exact in stating the rate at which delivery was to be taken, and what demurrage was to be paid for delay, beyond the time stipulated for. As to the delivery of the coal, the plaintiffs did all they undertook to perform as soon as they had put the coal on board and had despatched the vessels, and had handed the necessary papers over to the plaintiffs to entitle them to receive the coal. When the vessels arrived, it was for the defendants to take delivery, and if they did not do so within the time specified, they contracted to pay demurrage. It was not in the power of the plaintiffs either to facilitate or to delay the discharge of the cargoes. That was a matter for the defendants to see to. In their hypothetical returns they show they could not even then have taken the discharge within the lay days, and this no doubt led them on the 27th May, 1903, to offer to pay in settlement of the

claim sued for, the sum of £2,232 3s. 4d., calculated upon the basis of what they estimated would have happened had the vessels been despatched at earlier dates. But with the condition of the port it is almost impossible to say what could have been done on days other than those on which the vessels arrived. The tender of the £2,232 3s. 4d. has not been pleaded, but the fact that it was made has not unnaturally been relied upon by the plaintiffs as an admission by the Government of liability for some demurrage at least. And another fallacy in the estimate is shown by the fact that even in the cases of the vessels upon which the Government has paid demurrage, the amount ascertained by the actual working is greatly in excess of that by the hypothetical estimates would have been incurred. It is not clear to me why payment should be resisted of the amount actually incurred in respect of at least an approximate 9,000 tons per month. Under these circumstances, I am of opinion that the facts set forth do not discharge the defendants from liability for demurrage on the eight vessels sued for. I have some difficulty, however, in determining the actual amount for which judgment should be given. In their letter of June 3, 1903, the plaintiffs assume, for the sake of argument, although they say the contract does not admit of such construction, that if the Government only had to take delivery of about 9,000 tons per month, as there were only three ships with approximately this amount, arriving in July, and during August six vessels arriving, they offered not to claim any demurrage for three of these vessels, which arrived in August until the 1st September, and consequently to reduce their claim by £309 3s. 8d. This offer was at first made without prejudice. They later, on September 7, repeated the offer without reservation. As the offer was not accepted, the plaintiffs have reverted to their original position. But this offer may well be relied upon by the defendants as an admission that there was an excessive shipment of cargoes arriving in August, and that with the overcrowded state of the port the defendants are entitled to some consideration on that account. The averments of the declaration which was not proved, may here also be brought in to aid the defendants. It is difficult to make any deduction from plaintiffs' claim for this over despatch of vessels on strictly legal grounds but it appears to me it would only be equitable to make some allowance for the double amount of coal which arrived in this one month. The plaintiffs' offer was based on a calculation allowing seven days, three days, and two days respectively, on the three ships, which would place them in the position as if they had all three arrived on the 1st September.

Sitting as a juror, I do not consider the amount offered a sufficient reduction. If any reduction at all is to be made, I think an allowance of about fifteen days on each vessel would be reasonable. This would come as I work it out to about £1,200. Probably the more correct procedure and the one I shall adopt, would be when we come to the claim in re-convention, to allow this sum as damages for breach of contract. But, at any rate, in my opinion, this first defence does not bar the plaintiffs from recovering the demurrage in this action. I find I have omitted to notice the arguments founded on the difficulties caused by the discharge of coal from other vessels. I do not think the plaintiffs should be held liable for any losses caused thereby. The purchase of a very large quantity of this coal cannot possibly be attributed to any default on the part of the plaintiffs, and, moreover, the Government would not be entitled to give preference to their own vessels when any arriving from the plaintiffs were awaiting discharge. The second defence pleaded is that no demurrage is payable to the plaintiffs, because a new contract was entered into. The plea says that in order to carry out their contract the plaintiffs chartered vessels at a rate of demurrage less than the contract provided for; that when these vessels are loaded the plaintiffs transferred to the Government the bills of lading, some of which expressly incorporated the conditions of the vessel charter parties; and that by this procedure new contracts were entered into between the plaintiffs, the defendants and the owners of the respective vessels, whereby it was agreed that the contracts for the carriage of the coal should be between the defendants and the shipowners, and that demurrage should be construed and determined in accordance with the terms of such bills of lading and charter parties, and not otherwise, and that the Government became liable to the shipowners, and not otherwise. The plea goes on to say that the plaintiffs have been paid by the Government in respect of the liability of the Government to the shipowners a sum as large or larger than that represented by the said bills of lading and charter parties. No reason is given why, if there was no liability to the plaintiffs the Government should have paid what they owed the shipowners to the plaintiffs. This plea is also somewhat inconsistent with the first defence, for if new contracts for the payment of demurrage were entered into with the shipowners, such contracts could not be affected by any delay on the part of the plaintiffs in despatching the vessels. And it is common cause that all these vessels earned demurrage. The plea, if it means anything, amounts to a defence of novation, by which the obligations under the contract have been extinguished by new obligations, not only

to the plaintiffs, but to third persons. It is the foundation of a novation that it must be intended by both parties that a new contract is substituted for the old, and the evidence must clearly establish such a novation. Here there were no negotiations or proposals made to cancel the old and enter into a new contract, nor is there anything to show the assent of the plaintiffs to such a course being adopted. The transference of the shipping documents was necessary to enable the Government to obtain delivery of the coal, and was made for that purpose, not to create a new contract. It is, moreover, inconsistent with a novation that the Government should have paid the plaintiffs demurrage on some of the vessels at the rate fixed in the old contract. It was argued that at all events the Government should not pay more for demurrage than was stipulated for on the charter parties, though at the same time it was contended that, had the charter parties been at a higher rate, the liability of the Government would then have been limited to the sum mentioned in the original contract. All this is inconsistent with the idea of a novation. This second defence does not require further consideration. In re-convention, the defendants claim that, should these pleas fail, and the plaintiffs be held to be entitled to claim in terms of the original agreement, the sum of £10,788 14s. 4d., or any part thereof, then that an equal sum has become due and payable to the Government as damages for the default of the plaintiffs, and their breaches of contract, as set forth in the pleas. It is noticeable that no special damages are laid, and the claim has been explained to mean that, if it is held that the plaintiffs are entitled to the demurrage set forth in the contract, then their delay in despatching vessels in good time has resulted in loss to the Government in any sum which may be awarded to the plaintiffs, in so far as it exceeds the £2,232 3s. 4d., which only under the hypothetical returns would have become payable. This, in effect, would be holding that the Government tender, which has not been pleaded, was a sufficient one, which, for the reasons stated, I am not able to find. It is difficult to follow the argument, but this claim in re-convention affords the opportunity of awarding as damages, say, £1,200, which I have estimated would be a fair amount to deduct from the demurrage, on account of the 1,800 tons of coal arriving in August, instead of 9,000 tons in August and in September respectively. The result is that there will be judgment for the plaintiff for the sum claimed, less £1,200, or for £9,588 14s. 4d., and costs, with interest at 6 per cent. *a tempore morae*. I think the date of default should be fixed as the 3rd June, 1903, when the final account was sent



in and formal demand made for payment.

[Plaintiffs' attorneys: Fairbridge, Arderne and Lawton. Defendants' attorneys: Reid and Nephew.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1906.  
Feb. 15th.

Mr. McGregor moved for the admission of Hilligarde Muller Louwrens as an advocate.

Application granted and oath administered.

Mr. McGregor moved for the admission of John Gerhard Keyter as an advocate.

Application granted and oath administered.

Mr. J. E. R. de Villiers moved for the admission of Russell Farquharson MacWilliam as an advocate.

Application granted, oath to be taken before the Registrar of Witwatersrand High Court, Transvaal.

Mr. Bailey moved for the admission of Jacob Johannes van Wyk as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Colesberg.

Mr. Benjamin moved for the admission of Gileam van Niekerk as an attorney and notary.

Application granted and oath administered.

### PROVISIONAL ROLL.

#### MACROBERT V. HIGGO.

Mr. Sutton moved for provisional sentence on a mortgage bond for £700, with interest, less £7 paid on account, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable, and for the rents which

might accrue to be paid into the hands of the Sheriff.

Order granted.

#### FLETCHER V. CUNNINGHAM.

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £10,500, with interest. Counsel also applied for the rents accruing from the property to be declared executable.

Order granted.

#### MALLY V. RUSSELL.

Mr. Bailey moved for provisional sentence on a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### LIPPERT V. ELY.

Mr. Payne moved for provisional sentence on a mortgage bond for £200, with interest, less £3 9s. paid on account, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### PRETORIA MAATSCHAPPY V. REYNOLDS VEHICLE AND HARNESS FACTORY, LTD.

Mr. De Waal moved for provisional sentence on a mortgage bond for £9,000, with interest, the bond having become due by reason of the non-payment of interest.

Mr. Close (for defendants) urged that execution should be suspended so as to enable defendants to meet their obligation. It was stated that the company had several valuable orders and contracts on hand at the present time, from which funds would be derived sufficient to satisfy plaintiff's demand. The property hypothecated had been valued at £160,000.

Mr. De Waal said that he believed the defendant company was in a very bad state, and he was informed that the manager of the company had already approached the manager of a bank for the appointment of a liquidator.

[De Villiers, C. J.: Are you prepared to produce affidavits to that effect?]

Mr. De Waal: Yes, my lord.

De Villiers, C. J.: I do not think the defendant has shown sufficient grounds for suspension of execution. The Court



will make the ordinary order for provisional sentence, and the property will be declared executable.

GOODMAN V. KANTEROWITZ.

Mr. Inghbold moved for provisional sentence on three mortgage bonds of £2,000, £800, and £800 respectively, and for the property hypothecated to be declared executable.

Order granted.

GRAAFF V. WIENTROB AND PENKIN.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £3,500, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DEMPERS V. SNEL.

Mr. De Waal moved for provisional sentence on a mortgage bond for £700, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

COLONIAL GOVERNMENT V. CLAASEN.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £1,164, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

CAMERON V. KAISER.

Mr. Watermeyer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

STAGG V. STUPPEL AND JOWELL.

Mr. Bailey moved for the final adjudication of the defendants' estates.

Order granted.

SLADE AND OTHERS V. PETERSEN.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VICTORIA WEST MAATSCHAPPY V. FAUL.

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VOSPER V. MAY.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BERNSTEIN V. MICHELSON.

Mr. Bailey moved for provisional sentence on two promissory notes for £97 8s. 2d. and £231 16s. 3d., with interest.

Order granted.

ROSEN V. ZIMMER.

Mr. Roux moved for provisional sentence on a Magistrate's Court judgment for £200 5s., less £55 paid off, and for judgment on an agreement for hire of furniture for £50, less £20, paid on account, and for the property attached *ad fundandam jurisdictionem* to be declared executable. Defendant, it was stated, had gone to German South-west Africa, and had not returned.

Order granted.

ROLFES, NEBEL AND CO. V. COHEN AND FORTES.

Mr. Struben moved for provisional sentence on a promissory note for £1,970, with interest due, and for £2 stamps, for £39 8s. interest, between the 31st August and 31st December last, for £8 9s. 6d., interest on advance account between 31st August, 1905, and 22nd January, 1906, and for judgment, under Rule 329d, for £189 13s. 4d., for goods sold and delivered.

Mr. Sutton (for defendants) consented to judgment.

Order granted as prayed.

CROWTHER V. ASH.

Mr. Lewis moved for the final sequestration of the defendant's estate.

Order granted.

PICTON V. MOLLER.

Mr. Lewis moved for provisional sentence on a judgment of the Resident Magistrate's Court, Wynberg, for £15 13s. 6d., and costs, and for certain landed property to be declared executable.

Order granted.

## DEMPERS V. ROMBERG.

Mr. De Waal moved for provisional sentence on a mortgage bond for £85.  
Order granted.

## ILLIQUID ROLL.

VAN DE SANDT PRINTING CO. { 1905.  
V. TIRAN. { Feb. 15th.

Mr. Van Zyl moved for judgment, under Rule 329d, for £12, for stationery and printing.  
Order granted.

## ROBERTSON AND CO. V. SLABBER.

Mr. M. Bisset moved for judgment under Rule 329d, for costs of suit.  
Order granted.

## CENTRAL BRICK AND TILE CO. V. TWISS.

Mr. Pyemont moved for judgment, under Rule 329d, for £402 6s. 5d., purchase price of bricks supplied to defendant.  
Order granted.

## HEYNES, MATHEW AND CO. V. DEYDIER.

Mr. Benjamin moved for judgment, under Rule 329d, for £52 10s., for goods sold and delivered.  
Order granted.

BOEZAAR V. EXECUTOR { 1906.  
ESTATE CALVERT. { Feb. 15th.

Rule 329 (d) — Liquidated demand—Forfeiture of fees by executor.

*A claim for forfeiture of fees against an executor is a liquidated demand in terms of Rule 329 (d).*

Mr. Inchbold moved for judgment under Rule 329d in terms of summons calling upon A. P. de Villiers, in his capacity as executor of the estate of the late Alexander Calvert: (1) to frame and lodge with the Master of the Supreme Court, Cape Town, and at the office of the Resident Magistrate, Uitenhage, a full, true, and final liquidation and distribution account, supported by proper vouchers of the whole administration and distribution of the said estate since the filing of the first ad-

ministration account in 1891; and (2) to show cause why, by reason of his having no lawful and sufficient cause for his failure, to lodge the said account within the time prescribed by law, he shall not be declared to have forfeited all claim to any commission which he would otherwise have been entitled to for the administration of said estate. Counsel called his lordship's attention to a similar case which had been heard in the Eastern Districts Court, where, however, no order was made on the second part of the application, on the ground that it was not a liquidation demand. He asked for a direction that defendant file an account within six weeks.

De Villiers, C. J.: The summons in this case has been served upon De Villiers personally, and he does not appear to object. It calls upon him to show cause why, by reason of his having no lawful or sufficient cause for his failure to lodge the account within the time prescribed by law, he shall not be declared to have forfeited all claim to any commission which he otherwise would have been entitled to for the administration of the estate. Counsel very properly called the attention of the Court to a decision in the Eastern Districts Court, in which it was held that in similar circumstances the Court would not grant the order under Rule 329d, on the ground that a claim for the forfeiture of fees is not a liquidated demand. I confess I cannot agree with that view. This Court has always given a liberal interpretation to Rule 329d, and to ascertain what the fees of the executor would amount to is the simplest possible matter. It is simply calculated upon the basis of the amount distributed by him. That amount appears in his account. It is, therefore, to all intents and purposes, a liquidated demand, and inasmuch as the amount of the fees is a known quantity at the time when the order is asked for, and as the defendant has not come forward to explain why he has not rendered the account, the forfeiture may be declared in this inexpensive form by giving judgment under Rule 329d.

Mr. Inchbold (replying to the Court) said that he could not at present produce the certificate of defendant's appointment.

De Villiers, C. J., said that the order would be granted as prayed, subject to production of certificate.

## REHABILITATION.

Mr. Roux moved for the discharge of John du Plessis from insolvency.  
Discharge granted.

GENERAL MOTIONS.

*Ex parte* ESTATE STRYDOM. { 1906.  
Feb. 15th.

Mr. Bailey said that there appeared to have been a misunderstanding in regard to service in this matter, which was a petition under the Derelict Lands Act.

De Villiers, C. J., granted an order as prayed under the Derelict Lands Act.

ENGELS V. ENGELS.

Mr. J. E. R. de Villiers moved for an order compelling respondent to pass transfer of certain property.

Order granted.

HATSCHER V. HATSCHER.

Mr. Lewis moved on behalf of petitioner for leave to sue her husband *in forma pauperis* for judicial separation. Counsel certified in favour of the application.

Rule granted, calling on respondent to show cause on the 22nd inst.

*Ex parte* WEAKLEY.

Mr. Roux moved for leave to mortgage certain property in the division of Wodehouse.

An order was granted authorising the petitioner to raise money on first mortgage in terms of will.

MOORE V. MOORE.

Mr. Rowson moved, on behalf of Henry G. Moore, for leave to sue his wife by edictal citation for divorce, on the ground of her alleged adultery with one Jack Maybrick in London.

Leave to sue by edictal citation granted, rule to be returnable on the 1st day of May term, to be published once in the "Daily Telegraph" (London), and once in a Cape Town newspaper.

STEVENS V. MCCALLUM. { 1906.  
Feb. 15th.

Document produced as evidence  
—Inspection.

*The plaintiff in an action, having obtained a writ of arrest against the applicant, on the ground that he was making preparations to leave the Colony produced, on the motion to confirm the arrest, the envelope of a letter written to him by*

*the applicant, from the post-mark on which it was argued that it had been posted so as to reach the plaintiff after the applicant had left the Colony. The applicant did not then inspect the envelope minutely, but after the arrest had been confirmed, he applied to the plaintiff for an inspection, who thereupon removed the document from the Registrar's office.*

*Held, that the applicant was entitled to an order that the document be returned by the plaintiff to the Registrar of the Supreme Court, to enable the plaintiff to inspect it.*

This was an application brought by Charles Henry Stevens against A. J. McCallum, attorney, for an order directing respondent to restore an envelope accompanying certain affidavit in insolvency proceedings to the Registrar of the Supreme Court. Mr. W. Porter Buchanan was for applicant; Mr. Douglas Buchanan was for respondent.

Mr. W. P. Buchanan read an affidavit by the applicant, in which he said that on the 1st inst. a writ of personal attachment was granted against him by the Court on the application of Mr. A. J. McCallum. In connection with the proceedings a certain envelope was attached to the affidavit of Mr. McCallum, which would prove to be the main feature on which the question of the confirmation or discharge of the writ centred. As a result of investigations made, he had reason to believe that from an inspection of the said envelope he would gather sufficient evidence to support an application to reopen the proceedings, and have the previous order set aside. The envelope had been attached to records at the Court, but had since been removed by Mr. McCallum, and he had not restored it to the Registrar of the Court. The result was that applicant's attorney could not obtain an inspection of the envelope. A considerable amount of correspondence was attached to the applicant's affidavit. Counsel said that the document was put in as part of the papers with the affidavit of Mr. McCallum only 15 days ago, and now it had been withdrawn, and applicant could not get access to it in any way.

Mr. McCallum's allegation was that Mr. Stevens said that he sent him a letter on the 16th saying he would call upon him next day if he could arrange matters with his creditors.

There was some quibble about this letter, and then the envelope was put in so as to show that the letter was not posted until late on the 17th, with the object of it not reaching the respondent until five or six o'clock on the 17th, when the applicant would have gone away.

[De Villiers, C. J.: Why does the respondent not hand over this document to the Registrar if this man wishes to see the document?]

Mr. D. Buchanan: Apparently it is the property of Mr. McCallum, and the Registrar refuses to ask for it.

[De Villiers, C. J.: Still, if this man, for his own satisfaction, wishes to inspect the document, is it not a reasonable request?]

Mr. D. Buchanan: The applicant believes that there is some intention of further litigation against him. Counsel submitted if there was anything important in the letter the respondent was not bound to give away his evidence. It was more or less of a "fishing" application.

De Villiers, C. J.: The plaintiff's object in producing the envelope, on the motion for the confirmation of the applicant's arrest, was to show, from the postmark, that the letter had been posted by the applicant at a time when he must have known that it would not reach the plaintiff until after the applicant had left by mail steamer. On the hearing of that motion the applicant seems not to have had an opportunity of closely inspecting the envelope, but after the Court had confirmed the arrest with costs, the applicant applied to the plaintiff for an inspection of the document. Instead of complying with this most reasonable request, the plaintiff removed the document, as under ordinary circumstances he would have had the right to do so, from the Registrar's office and refused to give the applicant an opportunity of inspecting it. He must return it to the custody of the Registrar.

#### CARTER V. BLACKER.

Mr. Lewis moved for the extension of the time in order to prosecute an appeal. The respondents agreed, subject to the applicant paying the costs of the application.

Application granted, and time extended until next term.

#### RAUS V. RAUS.

Mr. Benjamin moved for leave to sue the respondent (the husband) by edictal citation for restitution of conjugal rights, failing which a decree of divorce, with the custody of the child of the marriage.

The respondent was believed to be in the Transvaal.

Leave granted to sue by edictal citation, returnable 1st May, personal service, with leave to serve intendit and notice of trial, with the citation.

#### LEVY V. WYNESS.

Mr. Roux moved for the removal of the trial to the Circuit Court at Dordrecht, in order to save expenses in bringing witnesses to Cape Town. The present whereabouts of the defendant was unknown.

Application granted, notice of trial by registered letter to the defendant's last known place of residence—Middelburg, Transvaal.

#### VENTER V. ROTHNER.

Mr. McGregor moved to have the case removed for trial to the Circuit Court of Beaufort West. There was a consent on behalf of the defendant.

Application granted.

#### *Ex parte* JACOBSON.

Mr. Du Toit moved for an order authorising the Registrar of Deeds to amend a certain ante-nuptial contract by inserting the petitioner's correct name.

Order granted.

#### *Ex parte* THE HELENA MATERNITY HOME.

Mr. Searle, K.C., moved for an order authorising the Registrar of Deeds to alter a certain name on a mortgage bond and deed of transfer.

Order granted.

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### REVIEW CASE.

REX V. SWART. { 1906.  
Feb. 15th.

Hopley, J., mentioned a case that came before him as Judge of the week from the Court of the Assistant Resident Magistrate of Bredasdorp. It was the case of Hendrick Swart, who pleaded guilty to contravening sub-section 3 of section 8 of Act 27 of 1882. He was sentenced to imprisonment, with hard labour, for a period of nine months. Under the section, the maximum period

of imprisonment was six months. The case had been remitted by the Attorney-General to the Magistrate, who seemed to be under the impression that his jurisdiction was increased. The Magistrate could not go beyond what was provided by the Act, and the sentence must be reduced to one of six months.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Jury.]

COOK V. ALLEN. { 1906.  
Feb. 16th.

Libel—Public official—Fair comment on matters of public interest.

This was an action brought by John Cook, the Municipal Engineer, against Andrew Allen, late managing director of the B.S.A. Asphalt Company, for £5,000 damages for alleged libel.

When the case was called, defendant had not put in an appearance, and Mr. Searle was proceeding with his opening speech when Mr. Allen arrived in court, accompanied by his attorney. Mr. Allen apologised to his lordship for being late, and explained that he had been misinformed as to the time of the hearing. He also apologised because, owing to an "unfortunate incident," he could not appear by counsel.

[De Villiers, C. J.: You are quite at liberty to appear in person; there is no necessity for an apology.]

The plaintiff's declaration was as follows:

1. The plaintiff is John Cook, of Cape Town, Municipal Engineer to the Corporation of the city of Cape Town.

2. The defendant is Andrew Allen, of Cape Town, managing director of the B.S.A. Asphalt and Manufacturing Company, Limited, carrying on business as manufacturers and contractors for the supply of paving material and the like.

3. For some time prior to March 22, 1905, the said Corporation had taken steps to ascertain what was the most suitable form of pavement to be laid down in the public streets of Cape Town, and various firms of manufacturers or contractors (or their agents) for the supply of paving material had knowledge of the above and were de-

sirous of obtaining the contract for the supply and laying down of such material which the said Corporation contemplated entering into.

4. Prior to the said date a certain company, styled the Neuchatel Asphalt Company, Limited, whereof the defendant was the local agent, obtained permission from the said Corporation to lay down a section of street pavement in a certain part of Cape Town as a test of the qualities of the said Neuchatel Asphalt Company's paving material, with a view to the said company's obtaining the said contract.

5. Shortly after the laying of this section a resolution was passed by the Council of the said Corporation, at the instance of the plaintiff, prohibiting all traction engine traffic from the Docks to Adderley-street passing through certain specified portion of Adderley-street, the effect of the said resolution being to divert such traffic over the said experimental section in order to test its capacity for such traffic.

6. The said section when subjected to the traction engine traffic showed considerable signs of wear and tear, and thereafter the plaintiff recommended to the said Council that if traction engine traffic was to be allowed over the pavement to be laid in the public streets soft wood-blocks should be used, but if not, then Hastings sanitary blocks, a paving material which could only be supplied in South Africa by a certain firm styled E. Nuttall and Company, a firm which was already engaged in a contract with the said Council for certain other work in connection with small streets and side-walks.

7. The said B.S.A. Asphalt Company, Limited, was also desirous of obtaining the contract for the supply and laying of new paving material as aforesaid.

8. Thereafter the defendant falsely and maliciously wrote and published in an issue of the "Cape Argus," a paper widely circulated in Cape Town and in other parts of South Africa, dated March 22, a letter in which the following defamatory words of and concerning the plaintiff occur: "Even our City Engineer" (meaning the plaintiff), "who has certainly (for reasons best known to himself) done his best to smash it" (meaning the experimental section laid by the said Neuchatel Asphalt Company, Limited) "he only says that it has not given the amount of satisfaction anticipated. The treatment meted out to this section of pavement shows either a great want of knowledge of such pavements or it has been premeditated. . . . I am hoping that our City Fathers will institute an inquiry into the reasons why, if we are to accept Mr. Cook's" (meaning the plaintiff's) "statement, it has not given the amount of satisfaction, and also why the foundation was laid at such a level as to suit the wood or



composition blocks. Mr. Cook" (meaning the plaintiff), "in advocating the adoption of the sanitary block, gives copies of South African testimonials supplied to him by the proprietors of this patent block. Why did he not also give the South African testimonials which were supplied to him in favour of the Neuchatel asphalt block? I understand that Mr. Cook" (meaning the plaintiff) "was employed by the Cape Town Corporation and paid by them to look after their interests."

9. The above words were intended to mean and did mean that the plaintiff, as City Engineer, with a view to discrediting the paving material of the Neuchatel Asphalt Company, Limited, both to the members of the said Council and the public, and in order that he might be in a position to report unfavourably upon the said material, and so, if possible, prevent the said company from obtaining the contract for the paving of the said public streets or some of them, and in order to obtain for himself or for some person or persons in whom he was interested some benefit, pecuniary or otherwise, or acting from some other improper motive, caused the said section laid by the said company to be submitted to unusual and unfair tests, and caused the same to be negligently or improperly treated, as a result whereof the said pavement in a short period of time showed signs of serious wear and tear, which it would not otherwise have shown, inducing the opinion that the same was not of an ordinarily durable or lasting character: or, in the alternative, that the plaintiff as City Engineer is incompetent in the performance of his duties and does not possess the requisite knowledge of the qualities and capabilities of asphalt pavement and of the proper treatment of the same, and that he is receiving a salary from the said Corporation for the performance of duties which, either through lack of knowledge or of honesty and principle, he does not properly perform.

10. Thereafter the defendant falsely and maliciously wrote and published to the said Corporation and also caused to be printed and published in the issue of the said newspaper, dated March 23, 1905, another letter, signed "B.S.A. Asphalt Co., Ltd.," wherein the following defamatory words of and concerning the plaintiff occur: "We understand that your Engineer" (meaning the plaintiff) "has recommended a certain composition block be used for paving Adderley-street. . . . We therefore trust that . . . Councillors will see that existing local concerns . . . at least get fair play, and that the Council's officials" (meaning or including the plaintiff) "do not abuse the powers granted to them in using their position to assist any one firm to the detriment

of others, as is evidently at present being done."

11. The said words were intended to mean and did mean that the plaintiff, in the exercise of his duties as City Engineer, was, in recommending to the said Council that Adderley-street be paved with the paving material of a particular manufacturer in preference to the paving materials of other manufacturers, influenced to make such recommendation by favouritism or other improper motive, and not by the merits or demerits or comparative cost of the various paving materials then in competition for the Council's acceptance, and that in making the aforesaid recommendation in paragraph 6 hereof referred to the said plaintiff as City Engineer improperly and unjustly used his powers in order to prevent the acceptance by the Council of a paving material equally or more suitable for the requirements of the city streets than that recommended by him, and was guilty of a breach of duty towards the Council and the ratepayers of the city.

12. By reason of the aforesaid false, malicious, and defamatory statements the plaintiff has been greatly injured in his fair name, fame, and reputation, and has sustained damages amounting to the sum of £5,000.

The plaintiff claims:

- (a) The sum of £5,000 damages;
- (b) Alternative relief;
- (c) Costs of suit.

The defendant's plea was as follows:

1. Paragraphs 1, 2, 3, and 4 of the declaration are admitted.

2. Defendant has no knowledge of the allegations in paragraphs 5 and 6, does not admit these, and puts plaintiff to the proof thereof.

3. Paragraph 7 is admitted.

4. Defendant admits that the words set out in paragraph 8 of the declaration were written by him, and were caused to be published in the "Cape Argus" of the 22nd March, 1905. Such words formed portion of a letter addressed by the defendant to the editor of the "Cape Argus," to the full terms of which the defendant craves leave to refer at the trial.

5. The said words do not mean what the plaintiff alleges them to mean in paragraph 9 of the declaration. They are incapable of any such meanings, or of any defamatory meaning.

6. Save as admitted in paragraphs 4 and 5 hereof, defendant denies paragraphs 8 and 9 of the declaration.

7. Defendant admits that he is responsible for the writing and publication in the "Cape Argus" of the 23rd March, 1905, of the words set out in paragraph 10 of the declaration. Such words formed portion of a letter addressed to the editor of the "Cape Argus," to the full

terms of which the defendant craves leave to refer at the trial.

8. The said words do not mean what the plaintiff alleges them to mean in paragraph 11 of the declaration. They are incapable of any such meanings or of any defamatory meaning.

9. Save as admitted in paragraphs 7 and 8 hereof, defendant denies paragraphs 10 and 11 of the declaration.

10. Defendant says that the words complained of in paragraphs 8, 9, 10, and 11 of the declaration formed portion of letters addressed to the editor of the "Cape Argus," and published in the "Cape Argus," each of which letters, when taken as a whole, was a fair and bona fide comment upon a matter of great public interest, viz., the consideration of the question of what was the most suitable form of pavement to be laid down on the public streets of Cape Town, and were published without any malice towards the plaintiff.

11. Defendant denies that the plaintiff has sustained damages in the sum of £5,000 or in any other sum for which defendant is liable.

Wherefore he prays that plaintiff's claim may be dismissed with costs.

Mr. Searle, K.C. (with him Mr. W. P. Buchanan) for the plaintiff; defendant in person; Mr. Upington for the Neuchatel Company.

Evidence was called by Mr. Searle.

John Cook (the plaintiff) said that he had had close upon 30 years' experience of engineering in England and South Africa. He came out to the Cape in 1902 to take the post of City Engineer, having been appointed in London. The matter of the paving of streets had been going on in the Council since 1902. In November, 1902, a contract was entered into between the Neuchatel Company and the Town Council for the laying of an experimental pavement in Exchange-place. The agreement favoured that the pavement was to be laid for two years and had to carry vehicular traffic, including traction engines and trailers. Before the contract had been entered into the company agreed, after considerable discussion, that the pavement should be subjected to traction-engine traffic. The Standard Company also laid pavements in Lower St. George's-street under similar conditions. On account of Garlick's building operations, the work could not be commenced until March, 1904, and it was not completed till July, 1904. According to the contract, a concrete foundation was to be laid. Witness laid the concrete foundation on behalf of the Standard Company; the pavement did not prove satisfactory, and the company said that the concrete foundation was at fault. Mr. Allen had not commenced his pavement, and in consequence of what had happened with the Standard Company it was arranged that Allen should lay the concrete foundation on his sec-

tion and charge the Council 8s. per yard. In 1902 and 1903 the traction-engine traffic in the city was very heavy, but in 1904 it had very much decreased, until in the latter half of the year it had dropped off very materially. There were three engines, he believed, licensed last year, but he did not believe a single engine had been licensed this year. The number of engines running in the streets about 1903 was between 30 and 40. This pavement having been laid down for the purpose of being tested under traction-engine traffic, witness arranged for the closing of the bottom of Adderley-street. The bulk of the traction-engine traffic would have gone by the bottom of St. George's-street in any event. The pavement began to show signs of wear and to crumble under the influence of the traffic. In February, 1905, the Council instructed witness to go to Johannesburg and Durban and inspect different pavements. On his return he prepared and presented to the Council a report on the whole matter. The company's pavement was not submitted to any unfair conditions; witness denied that he had attempted to smash it up in any way.

Mr. Searle: These remarks in the letters of defendant have caused you great inconvenience?

Witness: I think there is no doubt about that. The papers have continued pegging away through this Ratepayers' Association or Mr. Allen, and I believe he is a member. It is an open secret that they want to get rid of me.

[De Villiers, C. J.: But this is not in consequence of the letter which was addressed to the paper?]

I trace it to the action of the defendant.

Mr. Searle (to witness): You are anxious to have your character cleared?

Witness: That is all I want.

You are not anxious really for any amount of damages?—No, I simply want my character cleared.

You don't press for heavy damages?—No.

Witness (in further evidence) said that in the early part of this month certain correspondence took place between defendant and himself in regard to the action. Witness met defendant a week after receiving the letters, and the latter then asked him what he wanted. Witness replied: "I don't want anything else but my character cleared and costs paid." Defendant said he did not want to grovel, and witness replied that all he wanted was a manly apology and costs. Defendant said that he was prepared to give an apology or withdrawal, and publish it in the "Times" and "Argus," but he said that he could not pay any costs, as he had not the money. Defendant made a suggestion that witness should get someone else to pay the costs, and that he (witness) should hand his cheque to the other party, so that

it would not appear that he (plaintiff) was paying the costs. Witness told him that he was not accustomed to doing business in that roundabout sort of way. Witness commenced an action against the "Argus" and defendant jointly, but the "Argus" published an apology and paid him £10, whereupon he proceeded only against the defendant.

Mr. Searle: Have you ever acted in any way but fairly towards all the pavements?

Witness: I have no interest in any contractor, in any firm, or in any business of any description.

Cross-examined by Defendant: Witness was now 46 years of age. He was not aware that he was appointed City Engineer for any special purpose; witness knew a great deal at that time about different kinds of paving. He did not think it was a remarkable thing that the discussion about paving should have gone on since 1902. Witness made a report to the Council in September, 1902. He had recommended two pavements for adoption, under certain conditions. The defendant's company had not, as far as he knew, given him any reason for objecting to engine traffic going over the pavement they had laid. Witness did not think any asphalt would stand traction-engine traffic; in fact, he did not think granite pavements would stand such traffic. The best pavement to withstand such traffic was soft wood, the reason being that it was springy. Soft wood would stand such traffic for a good many years.

De Villiers, C. J., pointed out to defendant that his company in their contract with the Corporation consented to traction-engine traffic going over their pavement.

Cross-examination continued: Witness had treated the Standard Company in the same way as the defendant's company. The Corporation had not come to terms with the Standard Company in reference to the trial section the latter had laid. Witness's attention was called to the defendant's letter by something that appeared in the "Cape Times." His attention was not drawn by the editor of the "Cape Times" to the letter, because he had never seen the editor of the "Cape Times." There was a letter in the "Cape Times" on the following morning, to which a footnote was subjoined. The substance of the footnote was that the editor had excised some portion of the letter, because he considered it to be libellous.

Defendant: That was the reason why you pricked up your ears?

Witness: Nothing of the kind. The "Argus" has been perpetually pin-pricking, and on two days before your letter appeared in the "Argus," there was an article, and as soon as your letter appeared on that afternoon, I went to take an opinion before the "Times" came out.

Two days before my letter came out there was an editorial in the "Argus"?—Yes.

You went to your solicitor?—No; when that letter appeared, I thought it was time to be stopping this sort of thing. Your friends on the "Argus" had been going at it for some time.

Have I a friend on the "Argus"?—You have.

Who is he?—He is one of the reporters. I know he is a friend on the "Argus," and I know he is a reporter.

Why should he be a friend of mine?—I have seen you a good many times together.

Would you know him if you saw him?—Yes.

Defendant: I will try and have him here after lunch.

De Villiers, C. J., said that the question for the Court was what was the meaning of the words?

Cross-examination continued: Witness saw the footnote to defendant's letter in the "Cape Times." He saw another letter on the following day. He saw the letter which he (defendant) sent to the editor of the "Times" in answer to the footnote, denying that he had any defamatory intention.

Defendant: I suppose the "Cape Times" has got a wide circulation?

Witness: I suppose it has.

The same as the "Argus"?—They may both have a wide circulation.

It is more than likely that people would see that footnote?—There are a good many people who get the "Argus" and don't get the "Times."

Who doesn't get the "Times"?—My neighbour, if you wish to know.

Asked what the Hastings block was made of, witness replied that it was made of stone, Trinidad bitumen, and a patent flux, with the composition of which he was not acquainted.

[De Villiers, C. J. (to defendant): Can you tell me the object of this cross-examination?]

Defendant: My lord, I want to know whether Mr. Cook really knows what pavings are.

Witness: Putting me through a technical examination.

Defendant (to his lordship): I must apologise to your lordship for taking this line of cross-examination.

[De Villiers, C. J.: It might spoil your own case; it will do your own case no good.]

In further cross-examination, witness said that if traction-engines were abolished, he should put down a patent sanitary block. Answering another question, witness, with some feeling, said: You said that I had done my best to smash that paving up when you had distinctly undertaken to put it down under a traction-engine trial, and if I had not asked for traction-engines to be turned over that pavement, I should

not have been doing my duty to the Corporation.

Defendant: You say you have suffered damages to the extent of £5,000 in your claim?

Witness: Yes.

Can you specify details, or is it a mere statement without any truth?—If you are successful with the Ratepayers' Association in getting me removed from my position, I suppose that I shall have sustained damages.

Defendant: I have no connection with the Ratepayers' Association.

In answer to the Court, witness said that he had not sustained any damages yet, except worry and trouble.

Defendant: You have sustained no loss or damage in any shape or form?

Witness: No.

Then why do you bring this action?—There is no telling what might have happened. You have damaged my character in the engineering world. I am looked upon with a certain amount of suspicion. The Institution of Civil Engineers is an English institution, and I have got a certain amount of stigma on my character through you.

Through me?—Through those letters.

You cannot specify any details in connection with the damages?—No; I only want my character cleared.

Your salary has not been reduced?—No, not yet. If the Ratepayers' Association can manage they will.

It is all imaginary damages then?—It must be imaginary, because I have not sustained it yet.

You think you suffered damage?—I have had sufficient worry since this thing started.

Have I worried you, Mr. Cook?—Your action has caused it through your letters.

You have had no trouble before this?—No, not much. A public official generally has trouble all along.

Have you ever been to a debating society?—No.

Have you ever been to the meetings of the Engineers' Society in Cape Town?—No.

[De Villiers, C. J.: Have you been to Parliament?]

Witness: No, my lord.

[De Villiers, C. J.: Probably if you had, you would have heard some stronger language than this.]

Defendant (to witness): Have you read the local engineering papers?

Witness: The Cape Society of Engineers?

Defendant: Yes.

Witness: No, I have not.

Occasionally you are where a number of engineers meet together. They discuss certain matters, say asphalt pavings, for instance?—Yes.

They don't always agree?—No.

You don't often hear an action for libel arising out of that discussion?—That is a matter where they meet to

discuss; it is not a question of giving the information to an authority.

Further cross-examined, witness said that the "Argus" withdrew the imputations against him, and apologised and paid him £10 towards his costs. He believed that his costs amounted to about £19. Witness was satisfied with the apology given by the "Argus," and the present case would not have been in court if the defendant had rendered a similar apology.

Defendant (to witness): Why did you not sue me for half the amount sued for in the joint action?

Witness: Would you have been inclined to pay it if I had?

[De Villiers, C. J.: Have you any relevant questions? This is merely wasting the time of the Court.]

In reply to further questions the plaintiff said he did not bring the action because the defendant was in difficulties.

The defendant put a question with regard to the witness's acquaintance with Messrs. Nuttall and Co.

[De Villiers, C. J.: What's the object of this examination?]

Defendant: I want to—

[De Villiers, C. J.: Do you want to justify your words now in showing that he was in collusion with Messrs Nuttall?]

No, my lord.

What's the object?—I want to see Mr. Cook's object.

I am only advising you that you are spoiling your case. If you had had counsel he would never put such questions.—I must apologise.

I don't want you to apologise. You are spoiling your own case.

The defendant proceeded to put further questions.

[De Villiers, C. J.: We will hear Mr. Searle in re-examination, unless you can put relevant questions.]

The defendant said he had been put off his line. He would go through the papers and find out the questions bearing on the subject.

A few more questions were put by the defendant, when

[De Villiers, C. J.: The Court will hear Mr. Searle in re-examination. That will do, Mr. Allen.]

Re-examined by Mr. Searle: As a fact, the letter in the "Cape Times" contained expressions that the "Argus" letter did not contain, and the letter in the "Argus" contained expressions that the "Times" letter did not contain. He had had the sanitary block under observation ever since he saw it in Washington in 1899. The defendant had applied for a postponement in order to take evidence in America.

Wm. James Jefferies, Assistant City Engineer, said he had to supervise the laying of the trial pavements. There was no unfair treatment to the Neu-



chatel Company or the Standard Company in the laying or the maintaining of the pavements. A few inches higher or lower of the concrete foundation would make no difference to the wearing of the pavement.

Cross-examined: No traction engines were allowed to go over the pavement until some time after the work was completed.

Robert Henry Hammersley-Heenan, general manager of the Harbour Board, said that in 1902-03 the traction engine traffic was very heavy. There was a great decrease in the traffic after 1903. Witness very frequently drove along Exchange Place. Some of the blocks on the left of the road coming from the Docks showed signs of fraying away. So far as he could see there was nothing unfair to the blocks through the traction engine traffic.

This closed the evidence for the plaintiff.

Mr. G. Nicholson, one of the district engineers of the Table Bay Harbour Board, said if a block was broken he would replace it immediately, otherwise the whole pavement would gradually be broken up.

Mr. H. H. Evans, civil engineer, said he would not run traction engines over the pavement until a couple of months after it was laid.

Wilfred Thomas James Johns said he had practical experience of concrete foundations, and he considered two to three months a reasonable time to allow the concrete to consolidate.

Maitland Hall Park, editor of the "Cape Times," said he remembered the letter of March 23, from which he excised certain portions, which he thought had a tendency to damage Mr. Cook. The sentence he excised appeared to him to be a dangerous sentence. It might have been interpreted as libellous.

The witness further stated what he allowed to appear on the paper he took to be fair *bona fide* comment. He merely took out what he considered dangerous. The sentence he excised taken in conjunction with other sentences might have given the letter a very different complexion.

Hon. Edmund Powell, M.L.C., editor, and resident director of the Argus Company, said what he published he took to be fair comment.

This closed the evidence in the case.

Mr. Searle, in argument, urged that plaintiff was entitled to such damages as would mark the Court's disapproval of the defendant's conduct.

Defendant also addressed the Court, and submitted that the letters were fair, *bona fide* comment, and free from malice.

De Villiers, C. J., in summing up, said that the point the jury had to consider was whether defendant had exceeded the bounds of fair criticism in a

matter of public interest. He was not prepared to say that the words were not capable of a libellous meaning, or that they were so capable for that matter.

The jury retired to consider their verdict, and after an absence of about half an hour, returned into court.

The foreman (Mr. T. Vollmer) said: The jury are unanimously of opinion that the defendant has overstepped fair criticism, and find for the plaintiff, but only for 1s. damages.

[De Villiers, C. J. (to Mr. Searle): Do you move for costs?]

Mr. Searle said that he did.

The Foreman: The jury felt that, if possible, the defendant should not pay the costs. That is our feeling.

[De Villiers, C. J.: Ah, that is a question for the Court. The impression on my mind in this case is that it is a very trifling one. There is no serious imputation upon the plaintiff, and I do not think I should order the defendant to pay the costs. I think each party must pay his own costs.]

Judgment was accordingly entered for plaintiff for 1s damages, no order as to costs.

[Plaintiff's attorneys: Tredgold, McIntyre and Bisset.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### TRIAL CAUSES.

BARRY V. BARRY. { 1906.  
Feb. 16th.

This was an action brought by Albert Wm. Barry against his wife, Blanche Barry, for a decree of divorce and custody of the child of the marriage, by reason of the defendant's adultery. Mr. M. Bisset was for the plaintiff, and the defendant was in default.

The plaintiff (Albert Wm. Barry) stated that he married the defendant on the 15th January, 1903, in England. They lived at Bath for six months after the marriage, when the plaintiff came to Cape Town, the defendant going to live with his parents. In August, 1905, he returned to England. Subsequently he brought his wife out to Cape Town. From a remark by the landlady, his suspicions were aroused, and ultimately the defendant confessed her misconduct on several occasions during 1904 and 1905 at Worcester, England. The child of the marriage was left with plaintiff's parents.

Decree of divorce granted, the plaintiff to have custody of the child.



WILKINSON V. WILKINSON.

Mr. Gutsche, for the plaintiff, said that the only means of identifying the defendant was by having her in court. She had been subpoenaed, and attended in court earlier, but had since disappeared. He asked that the matter be allowed to stand over until next Friday.

Ordered to stand over accordingly.

NEUGEBAUER V. SIGNAL HILL QUARRY CO.

Mr. Watermeyer moved for leave to the plaintiff to attach a certain engine, which it was feared would be removed, in satisfaction of a judgment.

A rule nisi was granted, calling on the respondent to show cause why the engine should not be attached in execution, the engine to be attached in the meanwhile, with leave to any interested party to intervene, returnable on Thursday next.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DRUMMOND V. LEZARD. { 1906.  
Feb. 17th.

Remoteness of damages—Exception to declaration.

*The declaration in an action brought by the plaintiff against his attorney for wrongful delivery to a third party of a document delivered to the defendant by the plaintiff, for safe keeping, claimed as damages the loss sustained by the plaintiff by reason of his being subjected to a false prosecution for forgery as a result of the defendant not having retained possession of the document.*

Held, on exception, that in the absence of anything in the declaration to shew that the

*defendant might reasonably have contemplated that the result of parting with the document would be to expose the plaintiff to a false prosecution for forgery, the damages claimed were too remote.*

This was an argument upon an exception taken by defendant to plaintiff's declaration, on the ground that it was bad in law, vague, and embarrassing, and disclosed in law no ground of claim. Mr. Gardiner was for excipient (defendant in the suit); respondent appeared in person.

From the declaration, it appeared that the plaintiff, describing himself as a journalist, of Cape Town, was formerly manager of a hotel at Vryburg, and that certain proceedings were taken against him for alleged forgery of a certain acknowledgment of debt. This document, he said, was formerly deposited by him with defendant, who was an attorney of Kimberley, to be kept pending further instructions. Plaintiff said that he subsequently instructed defendant to send the document to his attorneys at Vryburg, Messrs. Wessels and Sons, but that, instead of doing so, defendant handed it over to Messrs. Rosenblatt and De Beer, the result being that proceedings for forgery were instituted against him (plaintiff). After having been detained for some time, he was acquitted of the said charge. Plaintiff said that, in consequence of defendant's want of faith and breach of contract, he had been subjected to a prosecution for forgery, which terminated in his favour, and had been caused loss and damage and pain of body and mind, whereby he had sustained damages in the sum of £1,500.

Mr. Gardiner stated that should this exception fail, the defendant intended to move the Court for removal of the trial to the High Court, Kimberley. The action had been set down for hearing in this court on Friday next, so that it was of the utmost importance that the exception should be dealt with, as, if the case were taken, the defendant would have to get his witnesses to Cape Town from Kimberley and Vryburg. Counsel then argued that the claim of plaintiff was too remote to ground an action for damages.

Respondent having addressed the Court at some length,

De Villiers, C. J.: The plaintiff is quite right in saying that there is no wrong without a remedy, and, therefore, if there is a wrong in the present case, there will be a remedy, but the remedy should be an appropriate one. The question now is, whether assuming everything to be correctly stated in the declaration, every state-

ment to be correct, has the plaintiff sought the appropriate remedy? The plaintiff does not allege general damage; he alleges only one form of damage as the special damage which he has sustained. In consequence of the defendant's default, and his not retaining his document on the plaintiff's behalf, the plaintiff was subjected to a prosecution for forgery, which terminated in his favour, and caused him loss and damage and pain of body and mind, wherefor the plaintiff claimed £1,500 damages. The only question, therefore, is, can the plaintiff claim damages of that nature? It is quite clear that he cannot. The document is said to have been handed over by the defendant to persons to whom he ought not to have handed it over. The question is, can this prosecution for forgery be said to be the proximate result of defendant's handing it over? It may have been the remote result, but it is such a result as could have been contemplated by the parties as a natural result of this action of defendant? Clearly not. The contract between the parties was that the defendant should safely keep the document, but there is nothing in the declaration to show that he could possibly have contemplated that the effect of his parting with the document would be to expose the plaintiff to a false prosecution for forgery. The alleged cause of the prosecution is too remote to be made the ground for damages, and the exception must therefore be sustained. At the same time, I think leave must be given to the plaintiff to amend his declaration. If he amends it so as to make it clear that he seeks for damages which he is legally entitled to obtain, then there is no objection to the declaration; but the concluding portion of the declaration, in my opinion, is wholly defective, and therefore the exception ought to be allowed, with costs, with leave to plaintiff to amend his declaration.

Mr. Gardiner: I take it that, although leave is given to amend, the set-down is removed?

His Lordship: Oh, yes, of course; there must be a fresh amendment served upon defendant, and you must be allowed to plead to that.

SAPIERO V. FERREIRA AND OTHERS. 1906.  
Feb. 17th.  
" 19th.

Arbitration—Award—Objectionable and separable part.

*A furrow running over the applicant's land, to the use of which the respondents were entitled, having been destroyed*

*by floods, the parties referred the question as to the best mode in which the furrow should be re-constructed and as to the course it should take to an arbitrator who, in his award, directed the course which the new furrow should take, and also increased the maximum width of the furrow from six to nine yards. By a previous contract between the parties the width of the furrow had been fixed at six yards and the terms of the reference did not authorize any widening of the furrow.*

*Held, that the applicant was entitled to set aside the award as it stood, but that, as the objectionable part was separable from the rest of the award and did not affect the validity of the whole award, the award should not be set aside if the respondents would accept the award with the objectionable part expunged.*

This was an application calling upon the respondents to show cause why a certain award of an umpire appointed by arbitrators should not be declared invalid, principally on the ground that the umpire had exceeded the scope of his authority. The matter, it appeared, arose out of a dispute with regard to the course of a certain sluic running into the Oliphant's River. Mr. Burton (with him Mr. Gardiner) was for applicant; Mr. Scarle, K.C. (with him Mr. McGregor), appeared for respondents, Ferreira, Lipsett, Toooh, and King.

Counsel having been heard in argument on the facts, which sufficiently appear from the judgment,

*Cur. Adv. Vult.*

*Postea* (February 19th).

De Villiers, C.J.: This is a motion to set aside an award of an arbitrator on several grounds, the chief grounds being that the arbitrator exceeded his authority, and that there were several irregularities in the course of the proceedings in the arbitration. The first question raised in this case was whether Mulder was really the third arbitrator, or whether he was really the umpire. To my mind, he was neither; he appears to have been the only arbitrator and not an umpire at all. There was no deed of submission. Each of the parties appointed an arbitrator

by power of attorney, giving him certain powers and giving him the power to appoint an umpire in case he could not come to terms with the agent of his opponent, but, ostensibly, each was treated, not as an arbitrator, not as a judge in the cause, but as agent for the man who appointed him. But power was given to these two agents, if they could not agree, to appoint an umpire, or a third man, as he is called, but to my mind the only arbitrator in the case was Mr. Mulder. If the two others were also arbitrators, then, in my opinion, he was the umpire, and not third arbitrator, and he was entitled to enter fully into the case, without reference to co-arbitrators. Well, the irregularities referred to are several, but the chief one is that an opportunity was not given to the applicant to call witnesses upon the question of compensation and upon other matters. Now, upon this point, in my opinion, the applicant fails altogether. Notice had been given to all the parties, they were present when the arbitrator came upon the scene, and they had an opportunity of calling witnesses before the arbitrator. The fact is that it was a case in which personal inspection by him was of more value than the evidence of a host of witnesses, and it is clear that he made a thorough inspection. The important matter was that the arbitrator should be upon the spot, and see for himself the nature of the furrow destroyed, the nature of the land, and also the best place for placing the new furrow in lieu of the old one, which had been washed away. There was no rejection of evidence tendered to be given on behalf of the applicant. No question was raised throughout these proceedings as to any failure on the part of the arbitrator to hear the requisite witnesses, and it was only when the applicant found that the award was against him that he raised all these technical objections as to the improper conduct on the part of the arbitrator. Well, then, in regard to the arbitrator having exceeded his authority, one of the grounds is that he directed the furrow to go over the ground of October and De Beer, and that he had no authority under the deed of submission, so-called to do so. But October and De Beer both have made affidavits from which it is clear that they raise no objection. Even if they were not originally parties to the award, they raise no objection now, and even if they did raise an objection, the confirmation of this award would only be binding upon the parties to the award. But, then, comes to my mind the most important objection of all, and that is that the arbitrator in fixing the width of his new furrow exceeded the limits recognised by the previous arrangement between the parties.

Now upon that point I think that the applicant has made out a good case. There is nothing in this deed of submission to justify the arbitrator in making the width of the furrow 27 feet in lieu of 18 feet. The original contract between the parties was that it was to be 18 feet, and if there was to be a reconstruction of the furrow, there is no reason why that furrow should be three yards wider than the old furrow. There is nothing to show that any of the parties to the deed of submission ever contemplated anything of the kind, and in my opinion the arbitrator had no power to widen the furrow or widen the land to be taken for the furrow beyond what it originally was. A further objection has been raised, and that is that the arbitrator had no power to lead the furrow beyond certain limits, a certain distance from the river. In my opinion, that was one of the matters referred to the arbitrator. It was a matter in dispute between the parties, and the differences were referred to him, and he therefore had authority. In my opinion the arbitrator clearly had a right to direct this furrow to be made where he directed it to be made, subject, of course, to any objection that third parties may make. The result, in my opinion, is that the arbitrator has exceeded his authority in directing the maximum width of the furrow and site to be nine, instead of six, yards. This direction appears to me to be separable from the rest of the award, and not to affect the validity of the whole award. In the case of *Beneke v. Schoeman* (Buch., 1876, p. 137) the Court, under similar circumstances, ordered the award to be made a Rule of Court, subject to the objectionable part being expunged. In the present case great expense has been incurred in this arbitration; the arbitrator himself has taken great pains in the matter, and if I now set aside his award altogether, the result will be that further proceedings will have to be taken, and that enormous expense will have to be incurred over again. Under all the circumstances, I think that the best course would be for me to direct that the award be set aside, unless the respondents will accept a correction thereof. If they do so, the award will not be set aside, and it will be competent for them to apply to have the award made a Rule of Court, subject to a correction which will not in any way affect the rule of Court. The correction is that the maximum width of the furrow and adjoining site mentioned in the award shall be reduced from nine to six yards.

The order will be that the award be set aside unless the respondents shall consent to the correction. The respondents having consented, no order was made on the application, except that

the respondents pay the costs, save the expenses of the affidavits so far as they do not bear on the question of the width of the furrow, which expenses are to be paid by the applicant.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset. Respondent's Attorneys: Michau and De Villiers.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

HAYES V. RHOODIE. { 1905.  
Oct. 24th.  
1906.  
Feb 17th.

Medical practitioner—Fees—Responsibility.

This was an action to recover certain fees for professional services.

Mr. Russell (with him Mr. Benjamin) appeared for the plaintiff, and Mr. Van Zyl appeared for the defendant.

Mr. Van Zyl said that, before the plaintiff proceeded with the case, he wished to make an application to the Court. The case was in the position that the defendant was not present. He had gone on a trading expedition to Namaqualand about a month ago. Everything had been done to communicate with him, but without success. As the amount involved was only a small one (£21), and in order to save any further expenses, counsel was instructed to allow the plaintiff's case to go on, and after the evidence had been taken, the case could be postponed until the defendant came back. Counsel did not think the plaintiff's case would be prejudiced by that course.

Mr. Russell said he could not agree to the course suggested by Mr. Van Zyl. He wished to point out, in the first instance, that there was no affidavit of defendant's absence before the Court.

Mr. Van Zyl: The defendant's wife is present, and she can give evidence.

Christina Rhodie, the defendant's wife stated her husband had gone to Namaqualand on a trading expedition on September 2.

To the Court: He usually stopped away on these expeditions two or three months.

Witness further stated that she had endeavoured to communicate with defendant, but without avail.

To the Court: Her husband dealt in wagons and carts.

Mr. Russell elected to proceed with the case, and asked the Court to decide it on the evidence which would be brought forward. The defendant had deliberately gone away.

[Hopley, J.: I don't know that he has. Is a man to stop all his business because pleadings are closed against him in a paltry case. You know he is away from home, and are you right to try and proceed with the case in his absence?]

Mr. Russell: But he knew this case was coming on, and he goes away.

[Hopley, J.: Did he know; we have no evidence of it?]

But, surely, my lord, it is his business to keep in touch with his attorney. The view of the plaintiff is that he would rather have the whole of the evidence heard altogether.

[Hopley, J.: Well, the chances are that in that case you may be liable for the costs of the postponement.]

I submit that the defendant's application is not a reasonable one.

[Hopley, J.: what is the object of your wishing to have the case heard all in one day? Do you think the Court will forget the evidence that will be given?]

But that is the rule of Court.

[Hopley, J.: Which is sometimes departed from.]

But it will strengthen the defendant's case to know the plaintiff's evidence.

[Hopley, J.: They generally do when they get into the witness-box.]

We had no notice of the postponement, and all our witnesses are here.

[Hopley, J.: I am ready to hear them. You apparently want judgment without hearing the defendant's evidence. What is wrong with his evidence; are you afraid of it?]

I must resist the application of my learned friend.

[Hopley, J.: Let the case go on.]

This action was brought by the plaintiff, Dr. Hayes, of Clanwilliam, against the defendant, for a sum of £21 3s. 6d., being the amount due for certain professional services rendered.

The plaintiff's declaration stated that in April, 1904, plaintiff visited Hex River at the request of the defendant to treat one De Kock. Defendant undertook to defray plaintiff's expenses.

The plea denied that it was at defendant's request that the plaintiff visited De Kock, or that he agreed to defray the plaintiff's charges and expenses.

Alfred Thomas, Hayes, the plaintiff, stated that in April, 1904, he was practising at Clanwilliam. He was out on the day in question, and when he returned found a telegram, which had been sent by "Rhodie" from Modderfontein, and which stated there had been a gun accident at a farm known as Hex River, and asking witness to go there. Witness drove out to Hex River, and on the way he met a Cape-cart, in which the defendant sat. They chatted together for a few minutes, and defendant assumed liability for the fees. Witness went and saw the man, and had

him taken to Clanwilliam next day, where he attended him until he died.

In cross-examination, witness said he had heard that a man named Visser sent the telegram. De Kock was lying in Visser's house.

M. Vorster gave evidence with regard to the conversation that took place between the plaintiff and defendant at the time of De Kock's injury. Rhodie gave witness instructions to get whatever was required, and that he would be responsible for all expenses, because it was his gun that shot De Kock, and that De Kock was in his service. The gun, which was loaded, had been lying in the wagon, and in pulling out another gun, De Kock touched the trigger, and thus caused the accident.

[Hopley, J.: Then it was his own look-out.]

Witness (continuing) stated that the defendant had paid the expenses of the other creditors in De Kock's estate.

Mr. Visser, owner of the farm Hex River, stated that at Rhodie's request he sent the telegram to plaintiff. When De Kock was removed Rhodie asked witness what he owed him for the cart and horses to Modderfontein, and the expenses incurred whilst De Kock was laid up at Hex River.

Mrs. Henrietta Hayes, wife of the plaintiff, testified to having received the telegram, and despatching a telegram in reply. Her husband left the same evening for Hex River.

Mr. Russell closed his case.

David Cornelius Villiers, one time partner with the defendant, stated he was "trekking" with Rhodie when the accident occurred to De Kock. It was at first thought advisable to take De Kock to Clanwilliam, but as the wound was bleeding profusely, he was taken to Hex River, where Visser wired for the doctor. The doctor arrived, and ordered De Kock's removal to Clanwilliam. Witness did not see the defendant and plaintiff talking. Witness did not consider that either he or Rhodie was liable for the doctor's fees.

In cross-examination, witness denied that he told plaintiff he was a partner of Rhodie. Witness and Rhodie paid all the expenses incurred by De Kock, except the doctor's bill.

Mr. Van Zyl applied for a postponement of the case for the attendance of the defendant.

The further hearing of the case was postponed *sine die*.

*Postea* (February 17th, 1906):

Defendant attended and emphatically denied that he ever led the plaintiff to believe that he would be responsible for his charges. All that he did was to send for a doctor, because he was afraid that De Kock would bleed to death if they did not get medical assistance. De Kock

was subsequently removed to Clanwilliam, and expired from the effects of the wound. Witness bore one-half share of the expenses of De Kock being attended while he was lying ill at Clanwilliam.

Hopley, J.: I believe the evidence of plaintiff. I believe that at the time of the accident defendant did assume liability for the fees, and the repentance of his generosity has only come at a later stage, when he is called upon to pay the money for which he made himself liable in his generosity. I am sorry that he has taken this line; I would rather that he had taken the liability, and tried to recover from the estate of the unfortunate De Kock, if he had any estate at all. Judgment will be given for the plaintiff as prayed, with costs.

On the application of Mr. Benjamin, plaintiff was allowed his expenses as a necessary witness.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LUBBE V. COLONIAL GOVERNMENT. (1906. Feb. 19th.)

*Locatio operarum*—Scab inspector—Salary—Pleading—Estoppel—Acquiescence.

*In an action brought by the plaintiff against the Government for his salary for twelve months as scab inspector for the District of C., the plea was that he had been deported from C. under Martial Law, and that he was entitled to salary only until the date of such deportation. The replication was to the effect that the plaintiff was in no way to blame for the deportation, and that he was always ready and willing to perform his duties. The evidence shewed that he was ready to perform his duties,*



*but was prevented by the Military authorities before and after his removal, whilst the Government neither dismissed him nor insisted upon his performance of his duties. Some months afterwards the Government asked him when he would resume his duties, and his answer was that he had lost a leg by an accident, but would be ready to resume work two months afterwards. He was thereupon summarily dismissed.*

*Held, on appeal, that the plaintiff was entitled to his salary for the period of his deportation until he became personally unfit for the performance of his duties.*

*At the trial it was proved that some months before the plaintiff's deportation the Government informed him, by letter, that the payment of his emoluments would be stopped from a certain date, that the plaintiff, in his answer, asked to be paid for the full month within which the notice was given, signing his name as "late inspector," that the Government thereafter tendered payment of salary up to the date of deportation, and that, but for such deportation, the Government would have paid him full salary subsequent thereto notwithstanding the Government letter. The Court below held that the plaintiff was estopped by his acquiescence in the Government notice from claiming salary subsequent thereto.*

*Held, on appeal, that as the defence of estoppel was quite inconsistent with the pleadings and raised a defence which the plaintiff might have been able to meet if pleaded, the evidence as to the Government letter should not prejudice his claim to full salary.*

This was an appeal from a judgment of Mr. Justice Hopley, in an action brought by Franz Jacobus Lubbe, of

Clanwilliam, formerly a sheep inspector employed by the Colonial Government, against the Acting Secretary of Agriculture for salary.

The pleadings were as follows: Plaintiff, in his declaration, said that on February 10, 1901, defendant's predecessor in office engaged his services as an inspector of sheep for wards 1, 2, and 6 of the Clanwilliam division, at a salary of £200 a year. It was agreed that the said agreement of service or engagement should be terminable upon one month's notice. Plaintiff had duly performed his part of the agreement. On August 25, 1902, he received notice from the defendant that his services under the agreement were terminated. He was paid his salary until September 16, 1901. He claimed £207 15s. 7d., as salary from September 17, 1901, to September 30, 1902.

Defendant, in his plea, denied paragraph 3 of the declaration as to the performance of his duties by plaintiff. He said that on January 31, 1902, plaintiff was deported and removed from Clanwilliam to Matjesfontein, in the district of Worcester, by the Imperial military authorities, and was detained until July 4 of the said year. Subsequent to the said date he remained in the district of Worcester and elsewhere, and did not return to Clanwilliam district prior to August 25, 1902. By reason of the said removal and absence of plaintiff from Clanwilliam, he was totally unable to perform any of the duties of his said office. Defendant admitted having given notice to plaintiff, and said that the notice referred to was given to plaintiff in consequence of his breach of contract to perform his said duties. On February 3, 1905, defendant tendered to plaintiff his salary from September 17, 1901, to January 31, 1902, inclusive; but plaintiff refused to accept that tender in settlement of his claim. Defendant repeated the tender (£75), with taxed costs to date of tender, but said that by reason of plaintiff's breach of contract he was disentitled to claim any compensation.

Plaintiff, in his replication, admitted his deportation and retention from January 31, 1902, to July 4, 1902, but said that he was in no way to blame for such deportation, which was made under Martial Law. He held himself in readiness at all times to perform the duties of his office. He said that the contract remained in force during the period of his detention. He denied that the notice was given to him in consequence of his inability to perform any of the said duties, and said that the notice was given to him by reason of a severe accident occurring to him after his release from the said deportation.

Mr. Burton (with him Mr. Douglas Buchanan) was for appellant; Mr.

Searle, K.O. (with him Mr. Morgan Evans), was for respondent.

Mr. Burton: In July, 1902 the plaintiff received notice to resume his duties. He had met with an accident, and asked to be allowed time up to January 1st, 1903. The notice of dismissal was dated August 25th. That was the first intimation he received of his dismissal. He was engaged on a monthly notice. (See the evidence at the trial, the circulars put in, and letters.) The important point is the suspension of salary during the period which elapsed between his deportation and his accident. Hopley, J., set up for the Government a case which they had specifically abandoned. (See the judgment in the Court below—15 C.T.R., 523.) He dismisses the deportation as having nothing to do with the case, and justifies the dismissal on the ground of plaintiff's accident. He takes up the ground of estoppel, but estoppel must be specially pleaded. The Government set up that defence in Van der Merwe's case (21 S.C.R., 520, and 14 C.T.R., 732), but here they abandoned that line. In Van der Merwe's case the notice of suspension had never been received. The Government on discovering this changed their ground. In their letter (at p. 39 of the record) they order payment to be made to one Bailey, but not to Lubbe, and the only difference between the two cases was that Bailey had not been deported and Van der Merwe had. The Government alleged that Van der Merwe had broken his contract by being deported.

[De Villiers, C.J.: Baily was never deported, and therefore was not incapacitated by absence from performing his duties.]

But the Government keep open their contract with Van der Merwe, retain him as a scab inspector, and expect him to be ready to perform his duties at any time. A tender of payment to the end of January cannot stand with a general denial of contract.

[Buchanan, J.: They allege that the deportation was the reason your pay was stopped, but was that so?]

The principles laid down in Van der Merwe's case show that if the contract is kept open the employer is liable. As to deportation, here is a man who, without any fault of his own, is sent away, and is thereby hindered from performing his duties; but neither could Van Willigh, who remained in Clanwilliam, perform his duties either, and yet he gets his pay, and Lubbe does not. In any case, he was entitled to a month's notice.

Mr. Searle: The only contract between the parties was embodied in section 10 of Circular 28 of 1889. The appointment was a monthly one, to do duty within a particular area. The appellant was a monthly servant, and the Government could suspend the pay-

ment of his salary when it became impossible for him to perform his duties.

[De Villiers, C.J.: Is the letter of October 3rd referred to in the plea?]

No, but it is stated that appellant did no work. This is a case of estoppel, and there is no need specially to plead an estoppel *in pais*.

[De Villiers, C.J.: But your tender is inconsistent with the defence of estoppel.]

The appellant was not prejudiced, and had he proposed to produce further evidence, no doubt a postponement would have been granted. He says that the agreement remained in force till October 10th, 1902. We deny that it was in force after September, 1901. The allegations as to deportation are surplusage.

[Maasdorp, J.: In his replication appellant gives his reasons for not doing his work. You should have met these in your rejoinder.]

No, we join issue, and that is a good plea. The plaintiff should either have said, "I will do no more duty," or else have submitted to the conditions laid down by the Government. The plaintiff was not ready and willing to perform his duties after September, 1901. When he claims for the sixteen day of September he gives no hint of a claim for October, November, and December. He acknowledges the notice to stop work. He never from that time tried to do work. The Government knew nothing about his deportation till long after it took place. In Van der Merwe's case, Maasdorp, J. (14 C.T.R., p. 738), bases his judgment on the fact that the Government notice of suspension was never received by the plaintiff. Then, again, Van der Merwe remained in his own district, appellant did not. There may have been no fault on his part, but, as a matter of fact, he was not there. He stopped work on account of the Government letter of October 30th. He says that he was ready and willing to do the work, but he knew that he would not be asked to do it.

[De Villiers, C.J.: He may have been ready and willing to do it.]

After October 30th, 1901, a new contract was entered into. He was to do no work, and to receive no pay.

[Buchanan, J.: Your defence is that on account of his deportation he was not able to do his work.]

Yes, but he was not prejudiced, and we could amend the plea even now.

[De Villiers, C.J.: But you tendered up to a date subsequent to the notice.]

But that was no prejudice to him. See Everest and Strode on Estoppel (p. 402). *Freeman v. Cooke* (2 Exch., 654). He has led us to believe that he would not do work, and would not claim payment after a certain date. As to evidence on the contract, *Levy v. Tillesley* (1 Juta, 228). See also Nathan's Law of South Africa (vol. 2, p. 617), *Claridge v.*

*Kellaway* (8 Juta, 140), *Grobbehaar v. Colonial Government* (15 C.T.R., 591).

Mr. Burton was not heard in reply.

De Villiers, C. J.: The action was brought by the plaintiff to recover his salary as scab inspector from the 17th September, 1901, up to the 30th September, 1902. The plaintiff alleges that he has performed his part of the agreement, and that the agreement remained in force until September, 1902. The plea to the declaration is that on the 31st January, 1902, the plaintiff was deported and removed from Clanwilliam to Matjesfontein, and that by reason of the deportation and the absence of the plaintiff, he was totally unable to perform his duties; and, further, the defendant tenders on and to the 31st January, 1902, to pay the salary up to that date. The replication is that the deportation was entirely beyond the control of the plaintiff or the defendant, and that the plaintiff held himself ready to proceed with his work at any time when the restrictions were removed, and therefore his deportation is no defence at all. That is the simple question raised by the pleadings. In the course of the evidence, however, some evidence was given, upon which the defendant relied, as showing that after the contract had been entered into, there was such conduct on the part of the plaintiff as amounted to a waiver or acquiescence by him in the determination of the Government not to pay him salary. That question is not raised by the pleadings at all, and if it had been raised, it is quite possible the plaintiff might have had a good answer to it. It is a matter that raises an entirely new defence. Now the learned judge found upon this letter that the plaintiff acquiesced by the answer which he wrote, and that if he had not so acquiesced, the Government would have given the plaintiff notice, as the Government had a right to do. But, when I refer to the evidence given by Mr. Currey, it is by no means clear that the Government would have dismissed the plaintiff if he had not acquiesced. Mr. Currey's evidence clearly shows that if the plaintiff had not been deported it would have paid him for the intervening time, in the same way as it paid Van Willigh, to whom a notice of temporary suspension had also been given. Now, the letter written by the Government was an answer to the letter written by the plaintiff. He wrote on the 9th September, 1901: "Enclosed I send you my monthly report for August. It is very small, but I can't help it. I could not get a pass out to-day to fetch some other horses or mules, and perhaps after that I will be able to go out a little again"—showing all through a readiness to do his work. Then come to the letter of the 9th October, 1901. There the Chief

Inspector writes: "With reference to your letter dated 9th ult., advising me that owing to the disturbed state of the country, you were unable to properly perform your duties as sheep inspector, I have the honour to advise you that, in view of this, the Government has decided to temporarily stop payment of your emoluments, and that the Civil Commissioner of your district has been instructed to cease paying you from 1st September, 1901. When again authorised by this office to assume duty, your emoluments will be paid as heretofore." Then comes the plaintiff's letter of the 11th January, 1902, upon which the learned Judge strongly relied. In that letter he asks for payment for the whole of September, and he signs himself "The Late Sheep Inspector." I can quite understand the learned judge and the argument of the learned counsel for the respondents that the original contract had been temporarily suspended after the plaintiff had acquiesced in such suspension. But, not only is there no plea to that effect, but there is a statement by Mr Currey that the salary is withheld for a wholly different reason. Moreover, there is this pregnant fact that the Government in its plea tendered payment until 31st January, 1901, the date of the deportation, and thereby recognised that notwithstanding the letter of the previous year, and the alleged acquiescence of the plaintiff in that letter, they were ready to pay to the 31st January, the date of the deportation. Under the circumstances, it seems to me not just to the plaintiff that the notice of October 9th, 1901, should be made the ground of defence. It is quite possible, and not improbable, that the plaintiff might have had a very good answer to such a defence. Now, that being so, the only question which remains is whether the decision in *Van der Merwe v. Colonial Government* (14 C.T.R., 732), the correctness of which is not impugned on behalf of the respondent, is applicable to the present case. The effect of that decision I take to be that, bearing in mind the special nature of the duties of a sheep inspector, he does not lose the right to his full salary, if during the period of his employment, he is ready and willing to perform his duties but is prevented, not by personal unfitness, but by external circumstances over which he has not control, from actually performing his duties, whilst the Government, on the other hand, neither dismisses him nor insists upon his performing the duties. The only substantial difference between that case and the present is that Van der Merwe had not been deported, but although he had not been deported, it was just as impossible for him to perform his duties as it was for the present

plaintiff after his deportation. Even if the plaintiff had remained in the district of Clanwilliam he would have been prevented by the state of affairs under Martial Law from performing any of his duties. His colleague, Van Weilligh, was not deported, but could not get a pass from the military authorities to enable him to do his work, and yet he was paid his salary. It has not been suggested from the Bar that the plaintiff had been guilty of conduct which justified his removal, and certainly no evidence to that effect was tendered. Mr. Currey, the Under Secretary for Agriculture, in his evidence, assumed that the plaintiff merited his deportation, and relied upon this as a ground for summary dismissal; but this assumption is warranted neither by the evidence in the present case nor by the circumstances known to this Court under which the military authorities under Martial Law deported other loyal and law-abiding subjects. Until the unfortunate accident which deprived the plaintiff of the use of his leg he was personally quite fit for the performance of his duties, and was ready and willing to perform them, and the Government, knowing that he was prevented by external circumstances from performing his duties, neither dismissed him nor requested him to do any work. If he had been dismissed he might have sought some other occupation instead of holding himself in readiness for work, as soon as the removal of Martial Law should permit of his resuming his duties. In July, 1902, the Government asked him whether he could resume his duties, and, if so, when. His answer was that owing to his accident he could not resume before October 1st, and he asked to be excused until January 1st. Thereupon, on August 25th, 1902, he received a notice of summary dismissal. His counsel now does not press for the payment of any salary after he had become incapacitated for work. The result is that the appeal must be allowed and judgment entered for the plaintiff for £174 8s. 11d. with costs in this Court and in the Court below.

Buchanan, J., and Maasdorp, J., concurred.

[Appellant's attorneys: Van Zyl and Buissinne. Respondents' attorneys: Reid and Nephew.]

*Ex parte ROUX.*

{ 1906.  
{ Feb. 19th.

Mr. Burton moved, as a matter of urgency, for a rule attaching certain 200 sheep and lambs pending an action to be brought by petitioner, who is a farmer residing at the Oaks, division of Caledon, against John Jos. Moore,

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as trustee in the insolvent estate of Dow Jenbrand Steyn Weymar. Petitioner's case was, briefly, that he bought the stock from Weymar, that he gave a promissory note and left the stock to be grazed with Weymar, and that they were subsequently removed to another farm. The sheep were brought up in the insolvent's schedule, and were about to be sold by auction on the 22nd inst., by order of the trustee.

Rule granted, calling upon respondent to show cause why he should not be restrained from selling the sheep pending an action to be instituted forthwith, and to be brought to trial next term, the order to be telegraphed to the respondent.

#### REX V. ROOS.

This was an appeal from a judgment of the Resident Magistrate of Barkly East, who had convicted the appellant (Andries G. Roos) of certain stock thefts.

Appellant, it appeared, had been charged with stealing two sheep, the property of Lewis J. Naude, and one ewe, the property of Jacobus Cornelis Vorster. On the former charge, he had been sentenced to six months' imprisonment, with hard labour, and on the latter, to three months' imprisonment, with hard labour. His defence with regard to the first charge was that the sheep were his own property, and with regard to the second, that he had made a *bona fide* mistake.

The ground of the appeal was that the conviction in each case was not supported by the evidence given at the trial, and was contrary to law.

Mr. Roux was for appellant; Mr. Howel Jones was for respondent.

Counsel having been heard in argument on the facts.

De Villiers, C. J.: as to the first of these charges, it is clear that Naude lost his sheep, and that he afterwards found them in the possession of the accused. It is now said that they were really not in the possession of the accused, as he had released them; but I think the evidence established that he was exercising control over these sheep. He claimed them as his own, and before Naude came up, he had an opportunity of seeing whether there were any strange sheep among his stock. He came back and said that there were none, except one of October Nel's. In the course of the trial the native Jim, who was called, and who, it was said, had been in the service of the accused, said that two sheep that were marked "L 3" had come into the possession of the accused, and that he (Jim) pointed this out to the accused, but accused said they were his. That was the identical mark that belonged to Naude, and if his evidence is correct, then



the accused had exercised ownership in respect of these sheep, for although he did not re-mark them, he had them shorn. The appellant's conduct after the sheep had been found, was not that of an innocent man. Instead of giving the explanation which counsel gives to-day, he said: "I will give them up, and you must be lenient with me." It is a question of credibility of evidence, but if the evidence of Jim is to be believed, then I think that the accused is guilty. Then it is said that the age of the sheep does not correspond with Jim's evidence, but a native is more likely to be able to identify a sheep than to remember the year. Under these circumstances, I think that the Court should not interfere with the decision in the case of the theft from Naude. The theft from Vorster seems to me to stand on pretty much the same footing. The accused admitted in his evidence that it was an ewe which belonged to Vorster, but he said it was a mistake. Here also a good deal depends upon the evidence given by accused, and also upon the conduct of the accused himself, and his conduct would appear to show that he was a guilty man. Under all the circumstances, I think that the appeal should be dismissed, and the conviction confirmed.

#### REX V. VAN NIEKERK.

Mr. Howel Jones moved, on the petition of Mr. De Vos, of the Attorney-General's Department, for the removal of the trial of Anna Elizabeth van Niekerk, charged with contraventions of the Medical Ordinance at Stellenbosch and elsewhere, from the Supreme Court to the ensuing Circuit Court at Malmesbury.

Application granted.

#### *In re* ROYAL HOTEL CO.

Mr. Roux moved, as a matter of urgency, for confirmation of the second report of the liquidators of the Royal Hotel Company, Cape Town.

De Villiers, C. J., asked wherein lay the urgency of the application?

Mr. Roux said that the liquidators were carrying on the business at a loss, and there was heavy interest running on the debentures, so that the liquidators desired to get the sale completed as soon as possible.

De Villiers, C. J., asked counsel what was the effect of the report?

Mr. Roux said that the liquidators called for tenders, and the hotel had been sold for £50,000, the amount of the highest tender. The report had

lain for inspection, and no objections had come in.

De Villiers, C. J., said that notice should have been given to the Registrar, but under the circumstances the report would be confirmed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### TRIAL CAUSES.

STYLE V. STYLE. { 1906.  
Feb. 20th.

Mr. D. Buchanan applied on behalf of the plaintiff, Jacobus Johannes Style, for an order for the restitution of conjugal rights, failing which a decree of divorce. The defendant was in default.

The plaintiff's declaration set forth that he and the defendant were married at George in 1881. Plaintiff was engaged in hostilities during the late war, and the defendant went to the Orange River Colony. He had since asked her to return to him, but she had refused to do so.

Mr. Birch, clerk in charge of the Marriage Registry Department, produced a copy of the marriage certificate.

The plaintiff, Jacobus Johannes Style, stated he was married at George in 1881. He resided at Willowmore for ten years, and then went to the Orange River Colony. During the war plaintiff got leave to return to Cape Colony, but his wife could not get the necessary permission to do so, and consequently remained behind. When peace was declared, witness went to the Orange River Colony for her, but she refused to return with him. Witness had written to her offering to defray her expenses but she refused to come back.

A decree of restitution was granted, the defendant being ordered to return to plaintiff on or before March 31, failing which the usual decree of divorce would be granted.

#### DE BEERS CONSOLIDATED MINES, LTD. V. HENDRIKZ.

This was an application for the repeal of letters patent granted to defendant.



Sir H. Juta, K.C. (with him Mr. Searle, K.C.), appeared for plaintiffs. Defendant was in default.

Sir H. Juta explained that the plaintiffs in 1896 secured the rights of a machine, which was patented in that year, and which was used for sorting diamonds. In this machine the material was made to slide down a plane, which was greased, and the diamonds stuck to the grease, whilst garnets and stones of less specific gravity would slide away. In 1905 the defendant took out letters patent for a machine, in which the principle was exactly the same, and this action was brought to repeal the letters patent granted to defendant.

James Steward, manager of the Diamond Sorting Department of the De Beers Consolidated Mines, stated he was acquainted with the patent which De Beers acquired in 1896, and also the patent secured by defendant. The use of grease was not known prior to the rights acquired by De Beers in 1896. The defendant's patent would not be of any use without grease.

To the Court: The machine was so effective that the material was passed over two machines, and rarely one per cent. of diamonds were found in the second machine.

George Bowers put in the specifications and letters patent of the two machines.

Buchanan, J., said there was no doubt but that plaintiffs had priority in this machine, and the defendant appeared to have adopted exactly the same method. No defence had been set up, and judgment would be as prayed, with costs.

#### *In re* ESTATE HEATLIE.

Mr. Upington moved, as a matter of urgency, for the appointment of a curator bonis in the estate of Barry Heatlie. He said the application was an unusual one, but when the petition was read to the Court, he felt sure they would grant the application pending the appointment of a permanent trustee.

The petition of three of the creditors in the estate, viz., Messrs. Marais, Anderson, and Brown, was to the effect that the estate was provisionally adjudicated as insolvent on February 17. As stated in the sequestration petition, a warrant had been issued for the arrest of Heatlie, but his whereabouts could not be ascertained by the police. Heatlie, in his capacity as estate agent and broker, had had control of various trust funds, deeds, securities, and shares, and the fact that there was nobody to take charge of the office and protect these funds, deeds, and shares, was causing great anxiety to petitioners and to other persons who had dealings with Heatlie. In his business a considerable number of payments were being ten-

dered for rents of properties belonging to himself and to other people for whom he was acting, and there was great probability of rent and other amounts due to the estate being lost unless somebody was authorised to receive and collect it. It was moreover said that he was the holder of a considerable amount of mining and other shares, which had been endorsed in blank, and were the property of persons other than Heatlie. For this and other reasons petitioners considered the appointment of a provisional trustee very necessary for the protection of the interests of the petitioners and other creditors. Mr. Harry Gibson, of Cape Town, was acquainted with the character of the business carried on by Heatlie, and was well able to take over the management of Heatlie's affairs, pending the appointment of a permanent trustee.

The application was granted, and Mr. H. Gibson was appointed provisional trustee.

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ORMAND AND CO. v. { 1906.  
BENSIMON. } Feb. 20th.

This was an action brought by Ormand and Co., builders and contractors, Three Anchor Bay, against Abel Samuel Bensimon, broker and agent, Bensimon's Buildings, Sea Point, to recover two sums of £186 and £27 17s. 8d. respectively.

The action arose out of a contract whereby plaintiffs undertook to erect on behalf of defendant certain stores at Sea Point for £930. Plaintiffs said that they had carried out the contract with certain modifications made at the instance and request of defendant; that the building was delivered to defendant on the 13th May, 1905; that defendant had paid £744, and that the balance of £186 was now due, and defendant refused and neglected to pay the same. Defendant was also liable to pay £30 7s. 8d. in respect of other works and materials, less an allowance of £2 10s. Defendant, in his plea, denied that he had accepted delivery of the building on the 13th May last, but said that he took occupation on condition that the contract should be duly completed, and defects then pointed out, and subsequently discovered, should be rectified before the retention money should be paid. He alleged that in several ways, as set out in the plea, plaintiffs had failed to carry out the contract. He said that the building was less in width than specified, and he should be allowed £36 for this defect. As to

the other shortcomings, according to estimate, the cost of duly completing the building would be £131 1s. 6d. As to the claim of £27 17s. 8d., he admitted liability up to £22 7s. 5d. He further said that he was entitled to commission from plaintiffs for work received through his instrumentality of £23 18s. 3d. Against the sums claimed by plaintiffs, defendant said that he was entitled to bring into his account the sums of £36, £131 1s. 6d., and £5 10s. 3d., making a total of £172 11s. 9d. The total amount claimed by plaintiffs was £213 17s. 8d., thus showing a difference in favour of plaintiffs of £17 7s. 8d., which sum defendant tendered. Plaintiffs, in their replication, denied the allegations as to non-completion of contract with the modifications agreed upon, but admitted their liability for the commission claimed by defendant (£23 18s. 3d.), and said that they were willing to set off the same against their claim.

Mr. Benjamin (with him Mr. Sutton) was for plaintiffs; Mr. W. Porter Buchanan (with him Mr. P. S. T. Jones) was for defendant.

Hopley, J., after hearing the pleadings, said that the case was surely one that might be referred to an expert on the spot.

Mr. Benjamin said that his learned friend (Mr. Buchanan) and himself were agreed that the case was essentially one for a referee.

The case was referred by consent to Mr. A. T. Babbs, quantity surveyor, with directions to report to the Court on the matters in dispute between the parties, as set out in the pleadings.

#### ESTATE COWLING V. COWLING.

This was an action brought by Messrs. Currey and Wolf, as executors dative in the estate of the late Charlotte Cowling against John Frederick Cowling, of Claremont, for a statement of account in the joint estate of defendant and his deceased wife.

From the pleadings it appeared that defendant (who is an hotel keeper at Claremont) and his late wife, Charlotte Cowling, were married in community of property, and that the latter died on January 3, 1887, leaving two children, William Charles and Jane Elizabeth, both minors at that time, but at present majors, the daughter being now married to one Preston. Charlotte Cowling died intestate. In 1899 defendant remarried by ante-nuptial contract, the children by the first marriage being still minors. Defendant did not pass a kindeebawys in favour of the children, nor was the value of the estate ascertained, save that defendant made a declaration on oath that the value of the estate was below £100.

Plaintiffs alleged that at the death of the said Charlotte Cowling the joint estate of herself and defendant had a vested interest in an estate of considerable value belonging to defendant's father, subject to a life interest in favour of defendant's mother, who had since died. They said that they had called upon defendant to render a statement of account in the joint estate, in possession of which defendant had remained since his first wife's death. Defendant refused to render any account. By reason of his neglect to cause an inventory of the joint estate to be made, defendant had forfeited his right to share in any of the proceeds of the joint estate. Plaintiffs claimed a statement of account, showing the assets in the joint estate, debate of the account, a declaration that defendant had forfeited all right to share in anything accruing in the joint estate after his first wife's death and payment of such sums as may be found to be due. In the course of their declaration plaintiffs said that defendant had recently filed an inventory purporting to be an inventory of the joint estate, but they denied that it was a true and correct inventory.

Defendant, in his plea, went into the relationships of the joint estate with the hotel at Claremont which he had been carrying on, and he alleged that the assets in the joint estate in question were, after deduction of debts due by his father's estate and himself, under the sum of £100. Defendant had had a lease of the hotel under which he had the option of purchasing the property in 1891 for £1,500. He had carried out alteration and had passed mortgages on the property. Defendant expressed his readiness to file an account of the joint estate as at Mrs. Cowling's death, but plaintiff refused to accept this.

Mr. Searle, K.C. (with him Dr. Greer), for plaintiff; Sir H. Juta, K.C. (with him Mr. Lewis) for defendant.

William Arthur Currey, the secretary of the General Estate and Orphan Chamber, said he was appointed executor dative with Mr. Charles Wolf in August of last year, on the estate of the late Mrs. Charlotte Cowling. The asset in the estate was Cowling's Hotel in Claremont, which was valuable. An inventory was made for the purpose of furnishing security to the Master. It was signed by Mr. Cowling, who, however, denied the principle of the half-share. The hotel was free, but in consequence of what he heard, witness wrote to Mr. Cowling warning him against tying the hotel to Messrs. Ohlsson's or any other firm. Mr. Cowling had never prepared an account.

Cross-examined: The inventory he had prepared did not include stock. By virtue of defendants' failure to file an inventory, they claimed the whole estate.

This was all the evidence called for plaintiffs at the present stage.

John Frederick Cowling (the defendant) also gave evidence. He was cross-examined at considerable length by Mr. Searle as to the position of the joint estate at and subsequent to his first wife's death. A good deal of the cross-examination was directed to the state and progress of the hotel business at Claremont.

Re-examined: Witness knew nothing about being required to file a death notice and make an inventory until he went to Messrs. Van Zyl and Buissinne's last year. The hotel business did not revive until about 1901.

By the Court: Had he made a statement of the affairs of himself and wife in 1887, he should have had to show that they were insolvent. He was virtually insolvent at that time. The matter of making the inventory was first brought under his notice by Mr. Kayser, when he went to Messrs. Van Zyl and Buissinne's in regard to making his will.

Archibald Bultitude, manager for Messrs. Ohlsson's, also spoke to defendant's financial relations with witness's principals. Defendant, he said, continued to borrow from his firm until the end of 1905.

G. H. Moller, valuer, Cape Town, said that he valued the defendant's hotel as it was in 1884 at between £500 and £600. After the new story had been added, he should say the value was £1,500. He should regard £14,000 as a fair valuation for the property, with its licence, at the present day.

Miss Elizabeth Cowling, sister of the defendant, and Mrs. Cowling, the defendant's present wife, having been called,

Hopley, J., said he thought the plaintiffs might very properly consider their position between now and the adjourned hearing. Evidently, as Sir Henry Juta had remarked, they had not "discovered a gold mine."

*Postea* (February 28th).

Mr. Lewis stated that a settlement had been arrived at, and he (counsel) had now to apply for judgment in terms of consent paper.

Judgment entered in terms of consent paper.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### TRIAL CAUSES.

RAY V. RAY. { 1906.  
Feb. 21st.

Mr. Benjamin said that in this case personal service had been effected on the defendant in Australia, and there was an affidavit to that effect, but in returning the affidavit the customary authentication from an official of the Court had not been annexed. The rectification had not yet arrived. The action was for restitution of conjugal rights, failing which a decree of divorce, brought by the husband against his wife.

Reginald Ray stated he was married on the 26th November, 1887, at Islington. At the time of his marriage he was employed by the Bucknall Line of steamers. On account of certain information as to the defendant's misconduct, he had a quarrel in October, 1901. He condoned that offence, and subsequently came out to South Africa to settle down. Several times he had asked his wife to come out, and in reply she sent insulting letters. Recently she wrote wishing him good-bye, and stating that she was going to Australia.

This concluded the evidence, and Maasdorp, J., said the matter could be mentioned again upon the arrival of the papers from Australia.

### KEATING V. KEATING.

This was an action brought by Dennis James Keating against his wife for restitution of conjugal rights, failing which a decree of divorce. Dr. Greer was for the plaintiff. The defendant was in default. The parties were married in Calcutta on March 24, 1902. After a couple of months they went to New York, where they lived for a couple of years. The plaintiff came out to Cape Town, and his wife acquiesced in his departure, the understanding being that he would send for her when his business was fixed up here. Plaintiff had tendered the expenses, but the defendant refused to comply with his request to come out to South Africa.

The defendant was ordered to return by the 14th June, or to show cause on the 28th June, personal service to be effected, plaintiff to tender travelling expenses to the defendant.

**HERRING V. HERRING.**

This was an action brought by Sydney Herring, of Matatiele, for a dissolution of the bonds of marriage with his wife, and forfeiture of all benefits, on the ground of her adultery with one Johnstone. Mr. Sutton was for the plaintiff, and the defendant was in default.

Sydney Herring, plaintiff in the action, stated on the 3rd May last year he was married to the defendant at Port Shepstone, Natal. For about three months they lived happily together, when he objected to the defendant drinking. On the 27th November, Johnstone came in to see witness, and said he had a most serious confession to make, and, in front of his wife, Johnstone admitted having committed adultery with the defendant. The defendant admitted this. Witness told the defendant to stay in the house, and next morning he would send her down to the coast, but she insisted upon leaving with Johnstone, who was living with her at present. Johnstone was a most intimate friend of witness.

Maasdorp, J., said it was a most peculiar case. More evidence would have to be produced that the defendant and Johnstone were living together. It might be all a got up affair.

Mr. Sutton suggested the appointment of a commission to take the evidence of John Hutt, Nat Gould, and Basil Bathurst.

Maasdorp, J., granted the commission, appointing the Magistrate of Matatiele to take the evidence of the three witnesses and any other witnesses, notice of the commission to be given to the defendant.

**KONING V. KONING.**

This was an action brought by Louise Koning against her husband, Dirk Koning, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Sutton was for the plaintiff, and the defendant was in default.

The parties were married in Cape Town in January, 1904. The plaintiff and defendant lived unhappily at Parow, where the defendant several times threatened to take her life. On one occasion the defendant struck her with a chair. In October, 1904, he again threatened her, and she was forced to leave the house for a few days. On her return the house was locked up. The following December the defendant sent her a Christmas card, but it was addressed to her in her maiden name. Subsequently the defendant deserted her, and at present she believed he was in Johannesburg.

The defendant was ordered to return to the plaintiff by April 1, or to show cause by April 17, personal service to

be effected, or registered letter, as before, one publication in a Johannesburg paper.

**GULTIG V. GULTIG.**

This was an action for a decree of restitution of conjugal rights, failing which a decree of divorce. The plaintiff resided at Wynberg, and the defendant was in the district of Uitenhage. The parties were married at Port Elizabeth in 1880, and there were seven children, five of whom were minors. In 1902 the defendant deserted the plaintiff.

Mr. De Waal was for the plaintiff, and the defendant was in default.

Annie Margaret Gultig, plaintiff, stated after her marriage in 1880, at Port Elizabeth, she lived unhappily with her husband. He was a drinker.

Maasdorp, J.: When did this unkindness begin?

Plaintiff: After the marriage.

He has been treating you unkindly for 26 years?—Yes.

Proceeding, witness said there were seven children of the marriage, five of whom were minors. In 1902 the defendant deserted her, alleging that she had chased him away.

The defendant was ordered to return to the plaintiff by April 1, or show cause by April 17 why a decree of divorce should not be granted.

**BRIMACOMBE V. BRIMACOMBE.**

This was an action for a decree of judicial separation, and for maintenance, brought by Annie Brimacombe against her husband, by reason of his drunken and violent habits.

Mr. P. S. T. Jones was for the plaintiff, and the defendant was in default.

The parties were married in October, 1898. There were two children of the marriage. In 1903 the defendant became greatly addicted to drink, and on several occasions he had used violence towards her. The defendant had been dismissed from his employment, and the plaintiff had to retail milk, the money for which the defendant, on one occasion, collected and squandered in drink. In January the defendant kicked her, and ejected her out of the house. He warned her at the same time if she came back he would kill her. Plaintiff asked for maintenance at the rate of £5 a month, and custody of the children.

A decree of judicial separation granted, plaintiff to have custody of the children, defendant to pay maintenance at the rate of £3 a month, and costs, the first payment to be made on March 15.



POOLE V. GARDINER AND CO.

This action was for an account in respect of the sale of certain donkeys, or, in the alternative, a sum of £107 13s. The declaration set out that the plaintiff, Wm. Arthur Poole, was a speculator, of Mafeking, and the defendants, live-stock dealers. About April 19, 1905, at Mafeking, the defendants engaged plaintiff to proceed to Vryburg, and take delivery of twenty donkeys, purchased by defendants, and to pay over a sum of £200, which was handed by the defendants to the plaintiff. On the 20th April plaintiff took delivery of the mules, and paid the £200. Whilst at Vryburg, plaintiff was ordered to buy thirteen other donkeys. He communicated with defendants, and in consequence of instructions, plaintiff purchased ten of the donkeys at £10 each, and paid £100, and also £7 13s. for railage to Cape Town. Plaintiff subsequently found that the defendants had not paid the purchase price to his credit, the defendants saying that some of the donkeys had been rejected at Cape Town. The defendants proposed to the plaintiff that the donkeys should be sold, and the loss, if any, shared, to which plaintiff assented. The defendants refused to render an account of the same.

The plea set out that a certain age and height, along with a veterinary certificate, were stipulated for, and this the plaintiff failed to carry out. The agreement over the loss concerned not only the ten donkeys, but the whole of the thirty. They tendered a true account, with taxed costs, showing a loss of £42, one-half of which they were entitled to claim in reconvention.

Dr. Greer was for the plaintiff, and Mr. Benjamin was for the defendants.

After evidence had been led and counsel had been heard in argument on the facts,

Maasdorp, J., gave judgment for the defendants, with costs, on the claim in convention, and judgment for the defendant in reconvention, with costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

PRINCE V. LOUW. { 1906.  
Feb. 21st.

This was an action brought by Susanna Johanna Prince, widow, Kenilworth, against Jan. P. de Villiers Louw, farmer, division of Stellenbosch, to recover a certain horse, cart, harness, and poultry, or their value, and also damages for wrongful detention.

Plaintiff, in her declaration, said that

defendant had since the 23rd October last been in wrongful and unlawful possession of a certain horse, cart, harness, 25 fowls, and two ducks, belonging to her, and, although called upon to return the same, had neglected and refused to do so. She claimed immediate delivery of the said property, or, alternatively, payment of the sum of £38 15s., and also £25 damages sustained by reason of the wrongful detention.

Defendant, in his plea, denied that the horse, cart, etc., were the property of plaintiff, and that she had sustained any damages. He said that he bought from one Bertram Leather a certain trap, horse, harness, and two ploughs for £22. Leather was held out to the world as the true owner of the property.

Plaintiff, in her replication, denied that the articles were the property of Leather, or that he was authorised to sell the same.

Mr. Burton (with him Mr. Roux) was for plaintiff; Mr. W. Porter Buchanan was for defendant.

Mr. Burton said that Leather had disappeared without any warning, and it was believed had gone to Australia.

Susanna Johanna Prince (the plaintiff) said that she was the owner of a farm called Retroat at Stellenbosch, which formerly belonged to her husband, who died about two years ago. After his death witness removed to Kenilworth. She met Leather and Beard last year, and negotiations took place with a view of the former taking over the farm. Witness entered into a written agreement with Leather and Beard, who described themselves as 'provisional directors of the syndicate about to be formed, and to be known as the Farm Produce and Live-stock Agency, Ltd.' The purchase price of the farm was to be £7,000, payable as to £2,000 in cash, £3,000 in preference shares, and £2,000 in ordinary shares. Witness left the farm on the 2nd June last, and treated Leather and Beard as tenants, pending the formation of the company. The syndicate, however, did not go through. Witness left on the farm some furniture in the house, for which Leather and Beard paid her, and also a horse, cart, and harness, 25 fowls, and two ducks. Leather stayed on the farm. The arrangement was that the horse, cart, harness, etc., were to remain on the farm. If the company should be formed, they were to pay for the things; if not, then the things were to remain here, either on the farm or to be removed to Kenilworth. About the 21st October, she believed she heard that Mr. Leather had left the farm. On going to the farm, she found that it was deserted, nothing remaining except the furniture in the house. She ascertained that the horse, cart, harness, etc., were in the possession of Mr. Louw, who was a neighbouring farmer. She did not



authorise Leather or anyone else to dispose of the property in question.

Cross-examined: Beard had been living at witness's house in Prince's-road, Kenilworth. Beard was her principal witness in the case brought against Mr. Myburgh. He was managing her affairs. Leather came from New Zealand, she believed, about April. She did not know his age.

Mr. Buchanan: He was a young boy, about 21 years of age?

Witness: I don't know his age. He is a young man.

He had some money when you met him?—I suppose he had some money.

You know he spent all his money on that farm?—I don't know. I was never on the farm after Mr. Leather took it over.

Further cross-examined: Witness had also lost a cart and mules under similar circumstances. She had not been able to trace them, but if she found them, she would take steps to recover them. She might have lent money to Leather from time to time. It was not true that Beard originally bought the horse, and that she lent him £10 for that purpose.

Mr. Burton closed his case.

Jan P. de Villiers Louw (the defendant) said that he spoke to the plaintiff about some sand on the farm. Plaintiff replied that she had nothing to do with the farm, and had nothing upon it. Witness knew that the cart, horse, and harness were on the farm at the time. He took it that the things were the property of the syndicate. Leather seemed to be about 20 or 21 years of age. In October Leather left the farm. Witness could see that a lot of money had been spent on it. Leather offered him the mules, cart, harrows, horse, harness, and little gig. Witness wanted the horse, harness and gig, and bought them on the 17th October. They entered into a deed of sale. The purchase price was £20. Witness gave Leather a bill payable at thirty day. The dispute arose before the note was due. Witness had not paid the note.

[Hopley, J.: Then why don't you tear the note up and return the property to these people, instead of bringing the dispute into the Supreme Court? Is it such a good bargain that you don't want to give it up?]

Witness: It was a fair price.

Cross-examined: Witness thought that £20 was a fair price for the horse, cart, and harness, although a few months before Mrs. Prince might have given about £35 for the property. The horse was crippled when he bought it. He paid £1 15s. for the fowls and ducks. These were not included in the bill. He also bought two ploughs from Leather, and gave a bill for £2. The ploughs were not included in the bill of sale. He did not know what the reason of the omission was. If he succeeded in this action, he should pay

the bill, which was due to Bateman, the holder. He did not know whether Bateman had advanced the money.

A. J. van Sittert, of Stellenbosch, having given evidence,

Police-Constable Thomas Gloucester, of Stellenbosch, said that Beard called at the Police Office and laid a complaint as to the property in question having been removed. Beard said that the horse, cart, etc., were his property, that Leather was sub-manager of the farm, and that Mrs. Prince had nothing to do with it.

Mr. Buchanan having been heard in argument on the facts,

Hopley, J.: It is inconceivable to me that if at the time the contract with the proposed syndicate was entered into, and the syndicate had taken over the property in dispute, these things would not have been included in the inventory. We have not only the document, but we have also the oath of the plaintiff herself, whose evidence has not been shaken in cross-examination. The contemporaneous documents absolutely bear out the plaintiff in her contention. I don't lay any stress on the isolated disjointed pieces of conversation which we have had repeated to us without the context. As to the deed of sale, produced by defendant, what does strike one is that the ploughs and certain other articles bought by defendant were not included in the document, although the cart, horse, and harness were included. Mr. Louw seems to me to have been exceedingly rash in dealing with a person who was acting dishonestly. Leather seems to have, perhaps, made a bad bargain, and then dishonestly to have set about raising what he could. If there is any loss to be sustained, it must be sustained by Mr. Louw, who, if he has lost anything at all, it seems to me, has lost the costs of this ill-advised action. Judgment will be for plaintiff as prayed, with costs of suit. No damages will be awarded. Defendant must re-deliver the cart, horse, and harness, 20 fowls, and two ducks. If he is unable to re-deliver the fowls and ducks, he must pay the plaintiff £2 10s.

#### ESTATE FRASER V. KUYZER.

This was an action brought by G. Joppe and J. B. Cleghorn as curators bonis in the estate of Thomas I. Fraser against Arnold Kuyzer, of Cape Town, to recover £28, rent of certain offices in Longmarket-street.

The plaintiff's case was that defendant had occupied certain offices belonging to the estate in Longmarket-street, and that he owed £28, being four months' rent. They said that on November 4, 1904, he secretly, and without the customary or any notice, left and vacated the said offices, and terminated the

contract of hiring and letting. He was at that time owing the rent for September and October. Plaintiffs were entitled to the rent for November, and also the rent for December in lieu of notice.

Defendant, in his plea, admitted the tenancy of the offices, but said that he took the premises for the purpose of starting a photographic studio. The plaintiffs afterwards let a portion of the same building to the Citizens' Employment and Relief Committee, in close proximity to the rooms he had hired, and as a consequence of the crowds of unemployed that used to throng the stairs he was prevented from carrying on his business properly. He said that he gave notice to the plaintiffs in writing on November 4, and enclosed the key. He also said that the plaintiffs should have sued him, if at all, in the Magistrate's Court. He was willing to pay the rent for the months of September and October, but denied liability for any further sum than £14. He also prayed that in the event of judgment going against him the Court should order that the costs of suit should be Magistrate's Court costs.

Mr. Close for plaintiff; defendant in person.

Evidence having been given, and parties heard,

Hopley, J., gave judgment for plaintiffs, as prayed, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CAPE TOWN TOWN COUNCIL { 1906.  
V. COLONIAL GOVERNMENT { Feb. 22nd.  
AND TABLE BAY HARBOUR { " 23rd.  
BOARD.

Private Bill—Interpretation.

*A Bill promoted by the Cape Town Town Council to amend and consolidate its Municipal statutes was duly passed, and by the 110th section of the Act so passed (26 of 1893) the*

*property in the G.P. Common was vested in the Council.*

*Held, that a strip of land which had from the beginning of the century been regarded as part of the Common, but had recently been occupied by the defendant Board, became vested in the Council notwithstanding that the Act originated as a private Bill.*

This was an action brought by the Town Council originally against the Colonial Government, as represented by the Secretary of the Agricultural Department, the Table Bay Harbour Board, and also against Colonel Hoskings, of the Royal Engineers. An exception was taken by the Imperial Government that they could not be sued without leave, and that was upheld, and the case then proceeded against the first two defendants. The Harbour Board had taken possession of an area of land which the Town Council claimed they had rights to. The matter concerned a certain portion of the Green Point Common. In June, 1840, a certain grant of a small site where there was an old building standing on the common was made by the Governor, Sir George Napier, and along with the grant certain clearance rights on the site known as Fort Wynyard, and there was a guarantee given that no building would be put on a wider area. The Town Council had already been established in Cape Town, and they had taken over, under the Ordinance of 1840, all the old rights vested in the Burgher Synod. The municipality took up the position that this land, over which the clearance rights were given, was land vested in them. About eight years ago a certificate of reservation was issued by the Surveyor-General, in favour of the Colonial Government for defence purposes. Some years after that an arrangement was made between the Colonial Government and the Harbour Board, under which the Harbour Board took possession of the land abutting on the sea and below what was known as the Beach-road, and used it for making cement and placing old material there. The Board fenced in the whole of the ground from the Beach-road down to the sea. The Council claimed the land because it was vested in them under different Ordinances and Acts, and also on the ground of prescription.

The plea denied that the ground at Fort Wynyard was vested in the plaintiffs, or that the land was within the municipal area. Defendants also denied the prescriptive rights of the plaintiffs. In case the Court decided in plaintiffs

favour £12,000 was claimed for improvements to the ground.

Mr. Searle, K.C. (with him Mr. McGregor), was for the plaintiffs and Sir H. Juta, K.C. (with him Mr. Nightingale), was for the defendants.

J. R. Finch, Town Clerk of Cape Town, stated that before the war the ground around Fort Wynyard was open. It was used for sporting purposes, and it was the custom for residents to ride round the fort. There was free access to the sea-shore down to the Harbour Board enclosure on the north side of the breakwater.

[De Villiers, C.J.: Do the Council really require this piece of ground?—First of all it is necessary in the interest of the public safety to provide for this road being widened.]

There is an unfortunate bend in the fence, which is represented to us as dangerous. There are no footways there, and the spot is much frequented by pedestrians. A motor-car coming suddenly round the corner would be dangerous. About 1903 the Harbour Board commenced operations on this piece of ground.

Cross-examined by Sir H. Juta: The Ordinance of 1840 vested waste lands, including the portion in question, in the Town Council. It was only within the last couple of years that the Town Council went into the question. Witness could not remember any serious excavations in 1900. If others said that there were considerable excavations in 1900 he would not be prepared to contradict them.

John Garlick, M.L.A., said he had known the land for about thirty years. It was made ground, and was used as a deposit heap for broken bottles, etc. The inhabitants used the part of the foreshore for fishing and bathing. Until the last few years there was no distinction, as far as he could see, made between that part of the ground and the rest of the commonage. In 1900 there was considerable discussion in a committee of Town Council, of which he was then a member, about the high-handed manner with which the Harbour Board was encroaching on municipal ground.

Andrew Peter Holm, who had lived in the neighbourhood all his life, said he knew the commonage fifty years ago. The municipality in those days controlled the whole of the common, and permits were issued to people who required them. As far as he could see, it was all one common.

Wm. James Jefferies, Assistant City Engineer, gave evidence as to the measurement of the road at different parts, and said that the excavations of the Harbour Board would make it dangerous. There were practically no excavations on the ground until the last three years. In 1903 the excavations were pushed on rapidly. The land in

dispute was shown to be waste land on an old plan of 1819.

Cross-examined by Sir H. Juta: In 1897, the City Engineer reported that the Harbour Board were excavating in front of the hospital.

John Cook, City Engineer, said that he did not think there were any excavations in 1902 when he came to Cape Town. A letter was sent to the Harbour Board in 1903, when they commenced encroaching on the hard road. The excavations would be a source of danger to the road.

Further evidence having been called on the question of prescription and correspondence put in, Mr. Searle closed his case.

R. H. Hammersley-Heenan, General Manager of the Harbour Board, stated that when he came here in February, 1900, there were considerable excavations. Not since he had been here were any demands made by the plaintiffs for the excavations on the reserved ground. It was arranged that the Government should have the South Arm elbow in exchange for the ground in dispute. The South Arm cost the Board something between £150,000 and £170,000. He was not aware that the Harbour Board trespassed on the road.

George Nicholson, engineer in the employ of the Table Bay Harbour Board, produced a plan showing the excavations in April, 1899.

The assistant engineer of the Harbour Board, Fairie Burnett, said that there was never any question raised by the Town Council about the excavations in front of Fort Wynyard up to 1903. Altogether £23,000 had been spent on the ground in question.

Sir H. Juta closed his case.

Richard Henry Howard, Municipal Engineer to the Green and Sea Point Municipality, stated that he had examined the Beach-road at the point in question, and found distinct evidence of the Harbour Board's fence having encroached on the macadam roadway.

For the defence, Willem Westhofen, who had examined the road, said that from the growth of vegetation on the sea side of the fence, he should not think there had been an open road three years ago.

Mr. Searle: The question raised in this case is important, inasmuch as it concerns the rights of the Town Council to waste land. The declaration says that by Sec. 110 of Act 26 of 1893 Green Point Common is the property of the Cape Town Municipality. The evidence as to the ownership of the Green Point Common up to 1893 is all one way. It was not till 1900 that any question was raised. If the Government contend that they are entitled to grant away any portion of this Common they should have given evidence to that effect. Sec. 111 was a general vesting clause, and hence no vacant land within the Muni-

cipality could be dealt with under the Crown's Land Act. If we wish to trace back the history of Sec. 111, we must refer to Ord. 3 of 1829; then the Municipal boundaries were practically the same as they are now. Ordinance 1 of 1840 amended the Ordinance of 1829, and is practically the law on which we found our declaration. In order to see what was vested in the Burgher Senate we must go back to Ord. 34 of 1827, Sec. 2. Then the Common extended below the Beach Road down to the foreshore. We cannot find the inventory alluded to in that Ordinance.

[De Villiers, C.J.: Should the Harbour Board have buildings on the Common which are of use to them and of no use to you, would it not be well to give them compensation?]

That point is well worth considering, but the Council make a point of having a road in front of the Somerset Hospital 75 feet broad. It would be impossible to get that unless the Harbour Board have to put back their fence about 10 feet. We say in our declaration that the Harbour Board has encroached on the road. This is not our main point, but it is not a mere afterthought. If the Council can get a 75 feet road they will not insist on the removal of the fence. As to waste land the Common in this case was practically waste land. Ord. 4 of 1839 Sec. 52 shows that Green Point Commonage was common pasture land.

[De Villiers, C.J.: How did the Harbour Board acquire the ground they now claim?]

By purchase from the Town Council.

[De Villiers, C.J.: Then it was recognised as part of the Common.]

Yes.

[De Villiers, C.J.: When did the transfers take place?]

Between 1861 and 1889. The property then acquired is the site of the present Convict Station. Various prices were paid for different parts of this ground.

[De Villiers, C.J.: Would it not be equitable to compensate the Harbour Board?]

Yes, but since 1861 the Town Council has been gradually encroaching by purchasing this land.

[De Villiers, C.J.: If so far back as 1840 the Government marked off a portion of this land it cannot be regarded as waste land.]

I will leave the point of waste land and rights of user for the present, and will come to the question of the road. The correspondence of October, 1903, shows that there has been an encroachment by the Harbour Board on the old hard road. The Government have called no evidence to contradict us on this point. Should the Court declare that the Harbour Board is entitled to this land, surely they should pay for it.

Sir H. Juta: As to the road. If the Town Council are entitled to a 75 foot road, a large part of the excavations which have now been made would have to be filled in. The plaintiffs in their declaration say nothing about the width of the road. They can only claim a road such as that to which the public have acquired a right. The evidence shows that there was formerly a road there from 15 to 20 feet wide. As to the Commonage, up to 1893 the words "Green Point Common" were not used in any Act. The Act of 1893 was a private Act; and in case of any private Act notice must be given to all persons whose rights would be thereby affected. In 1893 the Harbour Board was already at work on this disputed land, and yet the Town Council never set up any claim till 1900, and hence the land on which the Harbour Board works are situated must be deemed to be without the limits of the Green Point Commonage.

[De Villiers, C.J.: Is not the Act of 1893 merely declaratory as to these lands being waste lands?]

No, the gist of the Act is that such portion of land at Green Point as was the derelict should vest in the Municipality. The Legislature would never have countenanced the taking away from the Harbour Board land which they had reclaimed and improved. Cattle could not possibly have been pastured amid the rocks and sand of the foreshore. In 1894 a portion of this very ground was alienated by the Crown to the Cape Canning Co. without any protest from the Town Council. This the Town Council was quite prepared to give up a portion of this very land in dispute in exchange for other land within the Military Reserve. In 1900 the Town Council denied that we had excavated on this land, and yet the excavation had been carried on since 1899.

[De Villiers, C.J.: But was this Bill a private Bill?]

It had to follow all the rules of a private Bill as to notice to persons whose rights were affected, and such notice was never given.

[De Villiers, C.J.: Would it not be better that you should keep the land and pay compensation?]

Probably, but I must consult my clients as to that. As to the road; what is claimed is a servitude in favour of the public; but there is no evidence save as to a road of from 15 to 20 feet wide.

[De Villiers, C.J.: Should I be against you on that point, it will follow that you had no right to place your fence on the road at all?]

The so-called road was so covered over with sand and grass that nobody could say where it was. It was not a straight road, but ran all over the place.



Mr. Searle in reply,

De Villiers, C.J.: The plaintiffs claim the land now in dispute on two grounds. Firstly, they say it forms part of the waste lands within the municipality, which were vested in the municipality even before the Act of 1893 was passed, and the second ground is that the land vests in them as being a portion of the Green Point Common, which was vested in the Town Council by the 110th section of Act 26 of 1893. With regard to the first question, as to whether this land forms part of the waste land, it is an exceedingly difficult question to decide, for the simple reason that the action of the Government, as well as the Town Council, in regard to the land in dispute has been somewhat inconsistent. At one time, the right of the Municipality to transfer a portion of this land was recognised: at another time the right of the Government to deal with this land was acted upon. But it is clear that as far back as the oldest witnesses can recollect, all the land from the cemeteries right down to Green Point and the sea was recognised as land which the inhabitants generally used. In the year 1893 a Bill was introduced into Parliament to consolidate and amend the municipal statutes, and Sir Henry Juta's contention is that the Act thus passed was really a private Act of Parliament, and cannot deprive the Harbour Board of land of which it was then in occupation. The Board may have been in occupation, but as the Government raised no objection to the passing of the Bill it is too late to object to the validity of the section of the Act which vests the property in the Green Point Common in the Town Council. It may have been a matter of doubt up to that time as to whether Green Point Common should be regarded as part of the waste land of the municipality. In order to remove any doubt upon the subject the clause was inserted. At all events, it can fairly be taken for granted that the Government, which had the greatest interest in this land, was aware of the Act, and if no objection was raised by the Government, then I consider that the Government should be bound by that Act. As far back as 1840 an Ordinance was passed vesting the waste lands in the municipality, and down to the year 1893 the municipality did treat portions of the commonage as being waste lands. Whatever doubts may have existed before, in my opinion, the Act of 1893 is conclusive upon the matter, and I have no doubt whatever that the land in question did form part of the Green Point Common from the beginning of the century downwards. This was a well known piece of land extending to the sea. The right of the Council to this land was recognised by

the Government in regard to the land immediately before the New Somerset Hospital, and even in regard to the land on which the Hospital itself stands. The only difference between the two sites is that the site now in question formed part of an extent of land which the Colonial Government granted to the Imperial authorities in 1840 that it should not be built upon. But the existence of that guarantee does not effect the question whether the land forms part of the Green Point Common. The property vests in the Council, but of course subject to the guarantee given to the Imperial Military authorities.

The Town Council is clearly entitled to a declaration to the effect that, with the exception of the laboratory and the small portion of ground surrounding it, which was granted to the Imperial military authorities in 1840, the land is the property of the plaintiffs, subject, however, to the guarantee given by the Colonial Government to the said Imperial authorities in their said grant. An interdict will be granted in terms of prayer 15 (b), unless the second defendants shall undertake within seven days from this date to pay to the said plaintiffs such compensation as shall be awarded to the plaintiffs. In case the second defendants give such undertaking, the value of the said land, excluding any portion reclaimed by the second defendants from the sea, and independently of any improvements made by the second defendants, shall be referred to a referee to be hereafter appointed. The defendants to pay the costs of this action.

[Plaintiffs' Attorneys: Fairbridge, Arderne, and Lawton; Defendants' Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1906.  
{ Feb. 22nd.

Mr. Benjamin moved for the admission of Marthinus Joachim Vermeulen as an attorney and notary.

Application granted and oaths administered.

Mr. Watermeyer moved for the admission of Simon Potgieter Bokker as an attorney.

Application granted, oaths to be taken before the R.M. of Aliwal North.



PROVISIONAL ROLL.

ESTATE PRITCHARD V. FISCHER.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

Mr. W. Porter Buchanan afterwards moved for the appointment of Mr. J. M. Theunissen, attorney, Prince Albert, as a provisional trustee in the estate of Fischer, pending the election of a permanent trustee. It was stated that insolvent was a farmer in the Prince Albert district.

Mr. Theunissen was appointed provisional trustee, costs to come out of the estate.

HERMANN AND CANARD V. ROBERTSON.

Mr. Inchbold moved for a provisional order of sequestration to be superseded.

Provisional order superseded.

DE VILLIERS V. VON HOLDT.

Mr. Rowson moved for provisional sentence on a mortgage bond for £700, due by reason of the non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

DEVENISH V. MOHR.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £800, due by reason of the non-payment of interest; counsel also applied for property hypothecated to be declared executable.

Order granted.

GOURLAY AND CO. V. CUNNINGHAM.

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MAXWELL AND EARP V. MILLIGAN.

Mr. Palmer moved for a provisional order of sequestration to be made final.

Order granted.

WARNER AND CO. AND OTHERS V. BROWN.

Mr. Douglas Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted.

LITHMAN AND CO. V. MILLER

Mr. Buchanan moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

STEYTLER AND CO. V. SIEBERT.

Mr. Bailey moved for provisional sentence on certain promissory notes for £20, £50, £35 12s. 1d., £70, £35 19s. 11d., £41, £10 13s. 5d., and £40 13s., less credits for £33 1s. 11d., £60 3s. 6d., and £29 9s. 8d.

Order granted.

PIENAAR V. DE KLERK AND ANOTHER.

Mr. Bailey moved for provisional sentence on an acknowledgment of debt for £402, with interest and costs.

Order granted.

CAPE TOWN GAS COMPANY V. CAMP AND CO.

Mr. Roux moved for provisional sentence on a Magistrate's Court judgment for £12 15s. 6d. and £2 3s. 1d., costs, and for certain property at Elsie's River Halt to be declared executable and for interest and costs.

Order granted as prayed.

VOS V. ANDRIES.

Mr. Rowson moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LAWSON V. EIDELBERG.

Mr. Bailey moved for provisional sentence on a mortgage bond for £750, with interest, bond having become due by reason of the non-payment of interest; counsel also applied for property hypothecated to be declared executable.

Order granted.

NEVILLE V. ANDERSON.

Mr. M. Bisset was for plaintiff; Mr. Douglas Buchanan was for Mr. Robert Heddle, as next friend of defendant.

This was an application for provisional sentence on a broker's note for £1,000, in respect of certain property at Glen-gariff-road, at Three Anchor Bay, plaintiff tendering transfer.

Mr. Buchanan read an affidavit by Mr. Heddle, who stated that defendant had received unexpected orders to sail on Government service to the Ichaboe Islands, and that, owing to the urgency of matters connected with his official duties, he had not been able to attend to this business. Deponent said that Captain Andersson would be absent from Cape Town about two months.

Mr. Bisset read an affidavit by John Neville, builder, Woodstock, who said that defendant before he went away expressed a wish not to proceed further with the sale, as he would be put to certain expense through lifting his money, which was on fixed deposit. Mr. Bisset also read an affidavit by Wm. Kerr, broker, who said the arrangement was that defendant should pay cash, the price being in consideration thereof reduced from £1,100 to £1,000.

Mr. Buchanan urged that the matter should be postponed until his client could communicate with Captain Andersson. There were funds available.

Mr. Bisset submitted that plaintiff was clearly entitled to judgment and execution. All the facts went to show that defendant intended to break this contract.

Provisional sentence was granted, as prayed, with costs, execution to be stayed until the 12th March.

#### THESEN AND CO. V. GAUCHE.

Mr. Gutsche moved for provisional sentence on a promissory note for £93 19s. 6d., with interest.

Order granted.

#### S.A. ASSOCIATION AND OTHERS V. KAISER BROS.

Mr. Gardiner moved for the final sequestration of the defendants' estate as insolvent.

Mr. Upington opposed the application.

Buchanan, J., said that the 30th section of the Insolvent Ordinance required that "any creditor who shall hold a preferable security or lien upon any part of the insolvent estate shall, when he is the petitioning creditor, be obliged upon oath in the affidavit accompanying the petition . . . to put a value upon such security, so far as his debt may hereby be covered, and to deduct such value from the debt proved by him." His Lordship added that on the authority of the case of *Roberts v. Standard Bank*, which was heard in appeal in the Eastern Districts Court, the order for provisional sequestration must be set aside. The provisional order granted in this case would be discharged, with costs.

#### ILLIQUID ROLL.

BERNSTEIN V. MICHELSEN. { 1906.  
{ Feb. 22nd.

Mr. Bailey moved for judgment, under Rule 329d, for £140 odd, balance of account for goods sold and delivered, with interest *a tempore morae* and costs. Order granted.

#### FRIEDLANDER AND DU TOIT V. STEPHAN.

Dr. Rainsford moved for judgment under Rule 329d for £40 4s., balance of account for professional services and money disbursed, with interest *a tempore morae* and costs. Order granted.

#### CAPE TOWN TOWN COUNCIL V. ZIMMER.

Mr. Gutsche moved for judgment under Rule 329d for £8 8s. 5d., £9 13s. 6d., and two amounts of £2 5s., for water supplied during 1904 and 1905.

Order granted.

#### HOHN V. LEIBBRANDT.

Mr. Benjamin was for applicant (defendant in the suit); Mr. Roux was for respondent (plaintiff in the suit).

Mr. Benjamin moved under Rule 12 for leave to sign judgment against respondent for not proceeding with his action. Counsel read an affidavit by Joseph Buirski, attorney, who said that respondent had instituted an action against applicant for £1,000 damages for slander, that he (respondent) had not filed his declaration within the specified time, and that he had therefore been barred.

Mr. Roux read an affidavit by the respondent, Johan D. Liebbrandt, who said that he had received a letter written by or on behalf of defendant in the suit hoping that "all members of this wide-spreading family will live in love and harmony." Defendant was his brother-in-law, and had practically apologised. Unless a settlement were arrived at, deponent intended to proceed with his action, and if necessary commence proceedings *again de novo*. He tendered costs of the motion.

Mr. Benjamin read an affidavit by William Bunting Shaw, agent.

Buchanan, J.: This is a family dispute, some wrangle between members of the family, and slanderous words are alleged to have been uttered as far back as July last year, whereupon an action was entered, but no further proceedings have been taken. Defendant is quite within his rights in asking for judgment to be signed against the plain-

tiff, and plaintiff has shown no ground why he has not proceeded with his action during all the time. This is a family dispute, and the applicant does not press his claim for costs. The application will be granted and judgment signed against plaintiff for not proceeding with his action. While saying that no order will now be made for costs, it is understood that it is only in case plaintiff proceeds no further, in which case there will be an order that he must first pay the costs of this application.

CAPE TOWN TOWN COUNCIL V. MELMAN.

Mr. Schreiner, K.C., moved for judgment under Rule 319 for £26 0s. 11d. and £90 6s. 3d. rates and water charges. Order granted.

RANSOME V. MULVIHAL.

Mr. Van Zyl moved for judgment under Rule 319 in terms of declaration for delivery of a certain share in the Board of Executors or in default £200 damages.

Buchanan, J., said that the matter must take the form of a trial unless the claim for damages were made "as and for value."

E. A. Buyskes, of Kempton, Jones and Co. (called by Mr. Van Zyl) said that he sold the share on behalf of Mulvihall to plaintiff, but Mulvihall then refused delivery. Witness afterwards tried to get a share elsewhere, but was unable to find a seller. He estimated the plaintiff had sustained damages in the sum of £200.

Buchanan, J., ordered that the matter be set down for trial on March 8.

MARAIS V. FERNANDES (TRADING AS THE CONTINENTAL CAFE).

Mr. P. S. T. Jones moved for judgment under Rule 329d for £70, rent of certain premises in Long-street, Cape Town.

Order granted.

IMPERIAL COLD STORAGE V. DE VILLIERS.

Mr. Lewis moved for judgment under Rule 329d for £80 16s., goods sold and delivered.

Order granted.

WRIGHT V. MEKENI.

Mr. De Waal moved for judgment under Rule 329d for £16 4s. 7d., goods sold and delivered, for £4 money lent,

and for the attachment of certain moneys in the hands of the High Sheriff. Order granted.

FERGUSON V. RONDINOTTI.

Mr. Sutton moved for judgment under Rule 329d for £52 10s., rent due, with interest *a tempore morae* and costs. Order granted.

GENERAL MOTIONS.

*Ex parte* HENNESSY. } 1906.  
 } Feb. 22nd.

Mr. Upington moved, upon notice to Hildyard Home Drummond, for an order restraining him from proceeding to collect debts due to Charles Edward McIntosh, or directing that all moneys so collected shall be paid to the petitioner, as curator bonis in the insolvent estate of the said McIntosh, pending the appointment of a trustee or trustees, or such other order as the Court may direct.

It was stated that debts to the amount of £153 10s. had been ceded to Drummond in his capacity as manager of the Assets Realisation Company.

Respondent applied for a postponement until the 28th inst., to enable him to set the facts of the case, so far as he was concerned, before the Court. In answer to the Court, respondent said that he would give an undertaking not to collect any further debts due to the estate in the meantime.

The matter was ordered to stand over until the 28th inst., respondent being interdicted from collecting any further debts in the estate in the meantime.

HALLER AND OTHERS V. MULLER.

This was an application, calling upon Christina Muller to show cause why she should not be arrested and imprisoned for contempt of an order granted by the Court on November 17, 1903, in an action between the two first-named applicants and respondent.

Mr. Upington was for applicants; Mr. M. Bisset was for respondent.

The matter arose out of an action brought by the estate of Kathrina Juliana Haller against respondent, who had taken out letters of administration as executrix testamentary, under a document purporting to be the will of her mother, the said K. J. Haller.

The Court set aside the alleged will, declared Mrs. Haller to have died intestate, and cancelled the appointment of respondent as executrix testamentary, and directed her to furnish a full account of the estate. Mr. John Thomas

Love had since been appointed executor dative, and he was the principal mover in the present proceedings.

Applicants now alleged that respondent had utterly failed to supply a proper and sufficient account of the estate, which consisted of a trading station and certain orchard and garden at St. Mark's, Tembuland; respondent's position was that she had a counter-claim for £50, value of certain forage wrongfully taken, that she had rendered a true and correct account before the A.R.M. of Cofimvaba on March 14, 1905, and had deposited £8 8s. for mealies, poultry, etc., and that the executor dative did not appear. She had no other moneys to account for as derived from the property, nor had she any assets to account for to the estate.

Mr. Upington having been heard in argument,

Buchanan, J.: Respondent is the daughter of the late Mrs. Haller, and produced a will which gave her the management of Mrs. Haller's estate. The estate is apparently a very small one, and there does not appear to be much left. The will was afterwards set aside by an order of Court for having been improperly executed, and the respondent was ordered to account to such person as might be appointed executor dative of the estate for the value thereof and pay him so much as might be due. Extensive correspondence took place between the applicant and the respondent and her agent, and respondent has, according to that correspondence, endeavoured in every way possible to supply all the information that she possibly could give to the executor dative. She is an ignorant woman, and can neither read nor write, and she has clearly endeavoured to do all she could to supply all the information necessary and to comply with the order of the Court. He now applies for a writ of arrest and imprisonment against her for not obeying a judgment of the Court. It is an extreme measure to apply to the Court for a commitment for contempt, and such an order is only granted where there is a wilful disregard of the order of the Court. It has been shown that in this case there has been no such wilful disregard of the Court's order. If she cannot satisfy the executor dative it is her misfortune. Under these circumstances there is no justification at all for an order of Court or any ground for committing the respondent. The application will be refused with costs.

Mr. Bisset said that respondent had incurred expense in journeying to Cape Town in connection with this matter, and he asked whether her expenses would be included in the costs.

Buchanan, J., said that the expenses of respondent would form no part of the costs.

Mr. Upington: I take it that the costs will come out of the estate?

[Buchanan, J.: No, I think this is a personal application on the part of the applicant and that the costs ought to be borne by the applicant *de bonis propriis*.]

#### PRICE V. BRIDGMAN.

This was an application for an interdict restraining the respondent from practising as a dentist or dental surgeon in Cape Town or any part of the Cape Division without first obtaining the consent of the applicant. Mr. M. Bisset was for applicant, Joseph R. Price; Mr. Benjamin was for respondent, Henry M. Bridgman.

The ground of the application was that the parties had been practising in Cape Town in partnership; that at the dissolution of the partnership in 1900 they entered into a deed setting out that £2,000 was to be paid to respondent in consideration of his share in the assets, goodwill, and so forth, and the restraint was placed upon his opening a rival practice in Cape Town or the Cape Division; and that, in defiance of this restraint, respondent had commenced practice in Church-square, Cape Town. It was also provided in the deed that respondent should pay £1,000 to applicant if he infringed the clause.

Respondent's position was that, although applicant agreed to pay him £2,000, he (Bridgman) had only received £300; that, in consequence, the agreement had become void, and that applicant had also failed to carry out a promise to sell the practice to respondent.

Applicant, in a replying affidavit, said that the sum of £2,000 was set out in the deed simply for the purposes of the sale of the practice, and that he had paid respondent the sum of £300, which was agreed upon between them.

Buchanan, J., said that the matter in dispute could not be decided upon motion. An interdict would be granted, pending an action to be instituted by applicant forthwith, operation of interdict to be suspended on respondent undertaking to keep a true and correct account of all his earnings until the decision of the action, costs to abide result.

#### DONNELLY V. DONNELLY.

Dr. Greer moved for an order requiring respondent to pay to applicant £50 to enable her to institute proceedings for divorce by reason of his malicious desertion, and for payment of alimony pending the suit.

Buchanan, J., said that the Magistrate had made an order for maintenance.

That order would not be interfered with. Respondent would be ordered to pay £15 to enable applicant to bring her action—£5 on issue of summons and £10 when the case is set down for trial.

*Ex parte* THE ESTATE LATE KRUGER.

Mr. Van Zyl moved for a rule *nisi* authorising the removal of a certain executor to be made absolute.

Rule made absolute, costs to come out of the estate.

*Ex parte* GIORKE.

Mr. Watermeyer said that this matter, which was an application for correction of petitioner's name in certain title deeds, had been standing over for a report of the Registrar of Deeds, King William's Town. This report counsel now produced and read.

Order granted as prayed.

MLONDLEMI V. PAMLA.

Mr. W. Porter Buchanan moved for a rule *nisi* attaching certain money in the hands of the Rev. Edward Barrett to be made absolute.

Rule made absolute.

*Ex parte* MABAI.

Mr. Benjamin moved, on the petition of the tutor of Wilhelm Stellenberg Marais, of Britstown, for leave to pass transfer of certain property expropriated by the Railway Department.

Order granted.

*Ex parte* COULTER.

Mr. Roux moved for leave of absence of petitioner's minor son, who was articulated to an attorney at Kokstad, without prejudice to the validity of his articles of clerkship. It was proposed that the petitioner's son should pay a visit to England extending over six months.

Mr. Burton appeared for the Incorporated Law Society, but did not oppose the application.

Buchanan, J., directed that the term of three years' service should commence from the return from Europe of the petitioner's son, the present articles of clerkship to stand.

MOHR AND OTHERS V. MOHR AND OTHERS.

Mr. Struben moved for an interdict restraining respondents from dealing

with or alienating a certain bond passed in favour of the second named respondent, on the 24th January last, and from transferring or in any encumbering certain farm pending an action to be brought by applicants for re-transfer of the farm.

Mr. Burton, for respondent, said he did not see that, in view of recent developments, an action would be necessary.

Mr. Struben acquiesced.

Interdict granted against second respondent, pending a settlement of the dispute between the parties, or, failing such a settlement being arrived at, pending an action to be brought by applicant, action to be brought within three months, and costs to abide result.

*Ex parte* THE ESTATE LATE CAROLUS.

Mr. Swift moved for leave to sell certain property for a sum of £300.

Buchanan, J., said that he did not see any reason why the executors had brought this matter into court. No order would be made.

PITKETHLEY V. PIKETHLEY.

Mr. Inchbold moved upon notice of motion, calling upon respondent to show cause why Mr. Alfred Newton Foot should not be appointed as receiver of the business carried on in partnership between applicant and respondent, pending an action for dissolution of the partnership, liquidation of the partnership estate and damages for breach of contract.

Buchanan, J., said that no order would be granted, as there was a defect in service.

BRUNT V. BRUNT.

Mr. Benjamin moved, on behalf of petitioner, who resides at Somerset Strand, for leave to sue her husband, Wm. Henry Brunt, for divorce. Petitioner said that her husband had left her about two years ago, and had gone to England, and not returned. She was informed that he was presumably living in adultery at Henley, Staffs.

Leave to sue granted, citation to be returnable on May 1 next, with leave to serve intendit, and notice of trial at the same time as citation.

O'BRIEN V. ODENDAL,

Dr. Rainsford moved for the removal of the trial to the ensuing Circuit Court at Oudtshoorn.

Application granted, costs to be costs in the cause.



*Ex parte HURFURD.*

Mr. Lewis moved for the attachment of certain property at Green Point *ad fundandam jurisdictionem*, and for an order authorising applicant to sue one John Leonard Constantine Dow by edictal citation.

Ordered to stand over for information as to respondent's whereabouts, etc.

**REYNOLDS V. REYNOLDS VEHICLE AND HARNESS FACTORY, LTD.**

This was an application brought by Isaac Benjamin Reynolds, the original vendor of the business for a winding up order under the Companies Act, and for the appointment of an official liquidator.

The applicant's affidavit stated that an official inspection of the company's business, made by Mr. E. R. Syfret recently, revealed the fact that certain irregularities had been committed, and that the position of the company was not financially sound. Certain judgments had been given against the company, and certain claims were being pressed for payment. The result of the legal proceedings would be to absorb the entire assets. The company had no cash, either in hand or at the bank, to meet the said claims, or any part thereof. The company was indebted to applicant in the sum of £1,370, and to his sons in various amounts for wages. Applicant prayed for an order for the winding up of the company, and the appointment of Mr. E. R. Syfret as official liquidator. An affidavit read from another petitioner, suggesting that Mr. Alex. J. Chiappini be appointed co-liquidator. Mr. Gardiner said that his client would not object to the appointment of Messrs. Syfret and Chiappini as co-liquidators.

The affidavit of C. W. A. Coulter, of the firm of Zietsman and Bosman, attorneys of respondent company, stated that only 24 hours notice of the application had been given. The chairman of the company was away in England, and it was desirable that he should be first communicated with. Deponent urged that there was no urgency in the matter, and he submitted that no final order should be made at the present stage, but that a rule should be granted to enable respondents to put their position before the Court.

Mr. Gardiner was for applicant; Mr. Roux was for respondents.

A provisional order of sequestration was granted, rule to issue calling upon all interested to show cause on the 17th April why the company should not be placed under compulsory liquidation, and why official liquidators should not be appointed, rule to be published once in the "Government Gazette," and once in the "Cape Times."

*Ex parte WOOD.*

Mr. Benjamin moved, as a matter of urgency, on the petition of Robert Wood, a member of the firm of Omand and Co., builders and contractors, Three Anchor Bay, for an interdict against one Bensimon, of Bensimon's Buildings, Sea Point. Petitioner's firm had commenced an action against Bensimon for balance of moneys due upon a building contract, with the result that the subject matters in dispute had been referred to Mr. A. T. Babbs for inspection of the building, and report. Deponent alleged that, since the reference by the Court, Bensimon had had men on the premises knocking off plaster and otherwise damaging the building preparatory to the visit and inspection by the referee. Petitioner prayed for an interdict against Bensimon, as he feared that otherwise there was a danger of his firm's claim being prejudiced by reason of the acts of defendant.

Buchanan, J., said that if the allegations in the petition were true, then there had been unwarrantable interference with the property by respondent. A rule *nisi* would be granted, to operate as an interim interdict, restraining respondent from mutilating or otherwise interfering with the present condition of the building, pending further hearing of the case, with leave to respondent to move to set aside the order. question of costs to stand over pending presentation of referee's report.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

**WILKINSON V. WILKINSON** ( 1906.  
AND ANOTHER. ( Feb. 23rd.

This was an action brought by Arthur Wilkinson, of Cape Town, of no settled occupation, against his wife, Mary Wilkinson, for divorce, by reason of her alleged adultery with one Alfred Beale, sanitary inspector, against whom £100 damages were claimed. Mr. Gutsche was for plaintiff; the first defendant had been barred from pleading; the second defendant appeared in person.

Plaintiff, in his evidence, said that he was married to the first defendant in March, 1903. There was one child living, issue of the marriage. He had

had quarrels with his wife, and ultimately she left him, and went to live with her mother. Subsequently, in consequence of information received from Mrs. Bursleman, of Woodstock, he commenced the present proceedings. He did not know whether Beale had any reason to know whether the woman he was with was his (witness's) wife. He was not acquainted with Beale.

Cross-examined by Beale: Witness's wife had left him; they had been continually quarrelling. After the quarrels, his wife went to live with her mother in St. Leger-street. The child was about five months old when his wife last left him. There was an occasion in the early part of last year when his wife passed him in Cape Town. She was walking arm in arm with a tall gentleman; he did not know who her companion was. He did not go up to the pair and tell the gentleman that the woman accompanying him was his (witness's) wife.

Mrs. Annie Bursleman said that in May, 1906, she was living in Woodstock, and used to let furnished rooms. She remembered Mr. Beale calling in answer to an advertisement. He said that he wanted rooms for himself and wife, and that his wife would call later on. The first defendant called later on. The two defendants lived together at her house in one room for four weeks.

Mrs. Lena Elizabeth Sarels, cleaner, employed at the City Hall, spoke to a visit paid by the defendants to her home. Mrs. Wilkinson said that Beale was paying her £1 a month.

Mr. Gutsche closed his case.

Alfred Beale, co-defendant, gave evidence. He said that he was a sanitary inspector, employed by the Cape Town Corporation at £118 per annum. When he first met defendant, she was employed as a domestic servant at the Johannesburg Hotel. He had no idea that she was a married woman. She told him that her name was Mary Lincoln. After they had been living together at Woodstock for a few weeks, he discovered that the first defendant was in a certain condition, and he left her. The first defendant then told him that she was a married woman. He had had nothing to do with her since that time. He had heard that she gave birth to a child a little while after he left her; witness was not the father of that child. The child had died.

Mary Wilkinson (the first defendant) said that the evidence given by the second defendant was quite correct.

[Hopley, J. (to witness): Why didn't you tell Beale that you were a married woman?]

Witness: I wanted to get rid of my husband, because he was a beast to me, and, therefore, I did not care what I did.

Mr. Gutsche (in answer to the Court), said that he did not press the claim for

damages, but he thought his client was entitled to costs against Beale.

Plaintiff applied for custody of the child of the marriage, and said that Mrs. Burslamen would be prepared to take charge of the child.

The first defendant said that she was strongly opposed to plaintiff having custody of the child.

Decree of divorce granted, custody of the child to remain with the mother for the present, with leave to plaintiff to move for a variation of the order as to custody, with the right to plaintiff to have access at all reasonable times, the second defendant (Beale) to pay costs of suit. No order as to damages.

HODGSON V. MCKAY AND CO. } 1906.  
Feb. 23rd.  
Mar. 1st.

### Landlord and tenant—Defective premises.

This was an action brought by Charles Hunter Hodgson, of Claremont, against McKay and Co., music sellers, Cape Town, for rent of certain premises, in Church-street.

There were two cases between the parties, but, by consent, the actions had been consolidated.

Plaintiff, in his declaration in the first case, said that the defendants had tenanted premises under lease belonging to him at 6 and 8, Church-street, Cape Town. Defendants had fallen into arrear with their rent. In April last year the parties came to a mutual agreement that defendant should pay a rent of £60 per month. Plaintiff prayed for judgment for £365 arrear rent up to the end of September last, with interest and costs, including costs of interdict which he had obtained against defendants restraining them from removing their goods from the shop.

Defendants, in their plea, said that in April last the rent was reduced to £60 per month. They admitted that on the 1st January, 1906, certain arrears of rent had accrued amounting to £440. In April, 1906, when the agreement to reduce the rent was made, plaintiff agreed that the said arrears should be liquidated by payment of monthly instalments of £10, until the full amount had been paid off, and that the arrears then owing should be discharged in consideration of the payment of such instalments. Defendants said that they had regularly paid the instalments of £10 per month, and that there was a balance still owing of £355, but subject to the payment of the monthly instalments, the amount claimed by plaintiff or any part thereof was not due. They prayed that the claim should be dismissed, with costs. For a claim in reconvention defendants (now plaintiffs) said that the plaintiff

(now defendant) unlawfully and without good and proper reason applied for and by misrepresentation obtained from this Court an interdict prohibiting defendants from removing their goods. They said that through plaintiff's act they had suffered loss and damage to the amount of £250, through not being able to deal with their goods. Furthermore, they said that for some time the premises had been in a bad and unsatisfactory state, whereby the stock of defendants had been depreciated in value. Half the premises were occupied by plaintiff's workmen, as the floor had had to be taken up, and that part of the premises had been utterly useless to the defendants for six weeks. They said that on that account they had suffered loss, and damage in the sum of £500. They claimed in reconvention two sums of £250 and £500.

Plaintiff, in his replication, admitted that he had received a further sum of £20, reducing the arrear rent to £345. As to the claim in re-convention, he specially denied having obtained the interdict by misrepresentation, and he said that with regard to the other part of the claim he had the work of the putting the premises into repair carried out expeditiously and he denied that the defendants had suffered damages in £500 or any other sum.

Plaintiff, in his declaration in the second case, said that the defendants owed rent for November and December last at £60 per month, and he prayed for judgment for £120.

Defendants, in their plea, said that they had not had beneficial occupation of the premises during the months in question and a large portion of their stock was wholly or partially destroyed. They also said that they had lodged a sum of £120 in court.

Mr. Close (with him Mr. J. E. R. de Villiers) for plaintiff. Dr. Greer for defendant.

Mr. Close submitted that the onus was upon the defendants to open the case.

Dr. Greer acquiesced in this view.

Mr. Close mentioned that the amount of the arrear rent was now £335, a further sum of £10 having been paid by defendants.

Dr. Greer said that security had been given or payments made by defendants in two sums of £120 and £60.

Jan Louis Akkersdyk, photographer, produced a photo of the interior of McKay and Co.'s premises as at the 9th December, 1905, showing the removal of the floor.

John Affleck Robertson, public accountant and auditor, and manager of the International Correspondence School, said that he had held defendant's power of attorney since January 17, 1905, witness having supervised the business at the request of the two partners. On April 10, 1905, he explained the de-

fendant's position to plaintiffs, and pointed out that McKay and Co. had paid him £4,385 in rent since 1898, asked him to meet them and Mr. Hodgson agreed to a reduction of the rent to £60 as from the 1st January, and said that as long as the current rent was paid and £10 was paid off the old rent each month he should be perfectly satisfied. Witness had taken out an abstract of the takings of the defendants in the six months ending January, 1906, which showed that in the three months ended October last the takings were about £1,115, and in the three months ending January about £626, equivalent to a falling off of £488 13s. 4d. The decrease he attributed to the repairs to the premises.

By the Court: The firm's takings in October, November, and December, 1904, were £1,064, as compared with £1,285 in the previous quarter. In November and December, 1904, the takings were £513, and in November and December, 1905, £470 10s. 4d. In January, 1906, the takings were £156 3s. 8d., as compared with £263 in January, 1905.

Mr. Close said that defendants did not have possession during last month.

Witness (continuing his evidence) said that the removal of defendants' business would seriously affect their takings. In regard to the interdict, he was sure that the publication of the interdict would be injurious to the business. He was satisfied that defendants had no intention of removing the stock surreptitiously.

Cross-examined by Mr. Close: Witness was not aware that a letter was written on behalf of plaintiff saying that the arrangement as to the payment of £10 per month arrear rent could be terminated at any time as he (plaintiff) should think fit.

John P. Bischoff, defendants' manager, said that the sum of £10 over and above current rent which they agreed to pay plaintiff had been paid regularly up to the end of January. They ceased to pay the current rent of £60 per month in November because they did not have beneficial occupation of the premises. They claimed damages for the interdict, and said that the interdict was wrongly obtained. He considered that they had suffered in business in consequence of the disturbance of the flooring. They found that there was a growth of fungus under the floor of the saloon. They had called the landlord's attention to the fact that there was no ventilation of the floor two years earlier. The damage done to the stock was assessed by witness with the assistance of Messrs. Darters' manager. He considered that the damage to stock amounted to about £110. They suffered loss of trade through not being able to find their goods, as all the stock had to be crowded into one shop

during the repairs. This he estimated at £64. They had to buy articles from other firms to supply customers, because they could not reach the goods in their shops. The fixtures had also been damaged by the fungus. They had paid £7 10s. for new fixtures. In all their actual loss amounted to just over £500. They estimated that their loss of trade during the six weeks when the alterations were being carried out was £250.

By the Court: They had been placed under some difficulty from the beginning, because the debt commenced in 1898, and was left over to them by the late Mr. McKay.

*Postea* (March 1st).

Dr. Greer said that certain proposals were made and certain negotiations had taken place, but, he was sorry to say, without effect.

For the defence.

N. Owens, builder and contractor, of Cape Town, said he examined the defendants' premises in the middle of November, and found fungus over the shelves as a result of dampness. There was no ventilation. To put the place in proper order, the floors would require to be excavated, and proper ventilation provided.

Eliza McKay, partner in the firm of McKay and Co., stated that ever since she had been in the shop, she had to complain of the state of the premises. On a visit of the landlord, he went through the floor, and then the plaintiff said he would call for tenders. Three tenders came in, but the plaintiff said they were too expensive. The plaintiff sent a man to do the work, but it was a very indifferent class of work. About October last year she discovered that considerable damage had been done to the goods. The damage to stock amounted to £109; there was also damage to the fixtures and a falling off in trade.

Cross-examined by Mr. De Villiers: When the floor was being relaid, she told the workman that it was not being done properly. It would have been difficult for witness to find suitable premises. The interdict which the plaintiff obtained had done the trade a deal of harm.

Charles Friedlander, of the firm of Friedlander and Du Toit, said he saw a growth of fungus underneath the fixtures. Witness then suggested to Mr. Bischoff that photographs should be taken, in order that the Court could see the proper state of affairs. The stock appeared to him to very much damaged.

D. Patterson, manager of the musical department of Messrs. Darter's, said that at the request of Mr. Darter, he examined McKay's premises towards the end of last year. Witness checked with Mr. Bischoff, and made a list of the damaged goods. The stock could

not have been sold by Messrs. McKay and Co.; it might have been disposed of to a second-hand dealer.

This closed the evidence for the defendant, and Mr. J. E. R. de Villiers moved for absolution from the instance in reconvention, and for judgment in convention.

Counsel having been heard in argument on the facts,

Hopley, J.: Unfortunately the tenants have not strictly adhered to the agreement made with the landlord through their agent, Mr. Robertson, in April last. The tenants have again fallen into arrears, and the landlord is justified in enforcing his legal rights. They did not keep the agreement made by Mr. Robertson, and they must suffer the consequences. The defendants had a better chance of having a knowledge of the defects of the premises, and it was their duty to acquaint the landlord. It was certainly negligent on the part of the defendants to continue to store valuable goods in the shop. There will be judgment for the plaintiff as prayed on the claim in convention, and absolution from the instance on the claim in reconvention, the defendants to pay the costs.

[Plaintiff's Attorney: G. J. O'Reilly. Defendant's Attorneys: Friedlander and Du Toit.]

## SUPREME COURT

VAN DER VYVER V. VAN DER VYVER AND CURATOR *ad litem*. 1906. Feb. 26th.

Mr. Roux said that when this matter was last before the Court no direction was given with regard to prayer 5 of the application, wherein it was asked that the curator be authorised to release the lunatic's money, and re-invest it as he might think fit, and apply a certain portion towards maintenance.

Hopley, J., remarked that it was extremely inconvenient to have to take a matter up again in this fashion after it had been disposed of, when he had all the facts of the case well before his mind. The curator would be authorised to re-invest the money of the lunatic, with the consent of the Master.



## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. TROTT. { 1906.  
Feb. 26th.

Mr. Nightingale, on behalf of the Attorney-General, moved for the removal of the trial of Frederick Wm. Trott, railway guard, C.G.R., charged with the crime of theft, to the ensuing Circuit Court at Beaufort West. Application granted.

REX V. DIESEL AND ANOTHER.

Accomplice's evidence — Corroboration — Act 35 of 1893, Sec. 7.

This was an appeal from a judgment of the Resident Magistrate of Maclear. The appellants were father and son (Joseph Anthony Diesel and George Daniel Diesel), who had been convicted in the Court below of the crime of stock theft by contravening section 7, Act 35, 1893, as amended by Proclamation 109 of 1900. to wit, that at or near Stellenberg they did steal a certain goat, the property of one January, a native peasant.

The accused were sentenced—Joseph to nine months' imprisonment, with hard labour, and the other to four months', with hard labour. Judgment was also given in favour of January for 30s., compensation for loss of the goat.

The grounds of appeal were: "(1) That the verdict was not supported and justified by the evidence given before the said Court, and was contrary to law, and (2) that certain evidence adduced at the trial and recorded by the Magistrate was not admissible in law, and was to the prejudice of accused." The evidence objected to was that of one Gert de Bruyn, who, it was alleged, had, in consideration of giving his testimony against accused, been allowed to go free of a charge of theft of a hammer.

Mr. Upington for appellants; Mr. Nightingale for the Crown.

Mr. Upington submitted that the case for the Crown practically depended upon the evidence of De Bruyn, a dishonest person on his own admission, and one who acknowledged that he took part in the theft of January's goat. The uncorroborated evidence of such a witness should, he urged, be very carefully scrutinised. It was clear that inducements were held out to De Bruyn, not in the way of money, but of a favour being done him in not prosecuting him on the other charge. Again there was the fact that a little while before one of

the accused had got De Bruyn into trouble. Counsel also submitted that there was no statutory offence laid down in the section under which accused were charged.

Mr. Nightingale admitted that there had been an irregularity in charging accused under section 7, but submitted that no such gross irregularity had been committed as would invalidate the proceedings.

Maasdorp, J.: The ground of appeal in this case is that the verdict was not supported and justified by the evidence given before the Court, and is contrary to law. It seems to me from the argument of Mr. Upington that the objection which is involved in the ground here given is that the Magistrate founded his verdict mainly upon the evidence of De Bruyn, and that De Bruyn was an accomplice and also that certain improper inducements were held out to him to give the evidence which he has given in this case. Now, the Magistrate says that he was prepared to scrutinise his evidence very closely. The fact that De Bruyn was an accomplice did not render his evidence inadmissible, but certainly his evidence, if unsupported in many respects, would have been insufficient for the purpose of conviction. That evidence is largely corroborated by other witnesses. A portion of the carcass was found in front of accused's premises on the pumpkin patch where De Bruyn said it was. A further objection is raised that certain inducements were held out to De Bruyn. The Magistrate has regarded De Bruyn's evidence with the necessary caution and suspicion, and he does not seem to think that any serious inducements were held out. Under the circumstances, as far as the ground of appeal given on the record is concerned, I think that the Magistrate is correct in his finding. Mr. Upington has pointed out an irregularity upon the proceedings, which is not made one of the grounds of appeal. The accused are charged with stock theft in contravention of section 7, Act 35, 1893, in that they stole a certain goat. Now that is not quite the correct form the charge should take. The theft committed is not in contravention—in this case certainly—of any particular section, but the theft of stock is a substantive crime; but the proceedings were taken under Act 35, 1893. Now that is not an irregularity which prejudices the prisoners and would render the proceedings void. In the charge all the words after "theft of stock" to "in that they stole" should be omitted. The proceedings having been taken under this Act, that sentence passed by the Magistrate after the conviction of accused was quite within his jurisdiction. The appeal must, therefore, be dismissed.



REX V. MYERS.

This was an appeal from a judgment of the Resident Magistrate of Piquetberg who had convicted the appellant (Herman Myers) of contravening Regulation 15, framed by the Village Management Board of Piquetberg, under the provisions of Act 29, 1881, "by tampering and interfering with the watercourse and appliances relative to the town system of waterworks by opening the main pipe and attaching a pipe thereto, and other wrongs and injuries then and there done." The Magistrate found Myers guilty and sentenced him to a fine of £1 10s.

Mr. Alexander was for appellant; Mr. McGregor was for respondents, the Piquetberg Municipality, successors of the Village Management Board. Appellant is a member of the respondent Council.

Counsel having been heard in argument on the facts,

Maasdorp, J.: It appears that the 15th regulation of the Village Management Board, Piquetberg, provides that "any person tampering or interfering with any of the appliances relative to the town system of waterworks, "shall be liable to a penalty not exceeding £5 sterling. In this case the defendant is charged with having contravened this regulation by "tampering and interfering with the watercourse and appliances relative to the town system of waterworks by opening the main pipe and attaching a pipe thereto, and other ways and injuries he then and there did." Now, it would appear, from the evidence given that the manner in which he is alleged to have tampered with the appliances of the waterworks is not correctly set forth, as will appear when I refer to the other parts of the case. It would seem that all the appliances for the waterworks referred to in this case are placed, by the 10th regulation, in charge of the secretary of the Village Management Board, who shall be the superintendent of waterworks ex officio. Then it appears that under regulation 13 in case any one of the inhabitants wishes to be supplied with water by means of a pipe, the application would be acceded to, and a pipe laid down, furnished with what is called a regulating cock. It seems that some little while ago the defendant was supplied with water by means of a pipe, and at that time the regulating cock was not insisted upon by the Village Management Board. Lately, the Municipality, who succeeded the Village Management Board, have decided that these regulating cocks shall be fixed up on all the properties to which water is supplied by means of pipes. A resolution was passed on the 15th November, 1905, from which it appears that the contract for fixing these pipes was given to the Deep Boring Syndicate, at Piquetberg, they undertaking to put up

these regulating cocks at £1 5s. 6d. apiece, but, at the same time, it was left open to the inhabitants to fix the regulating cocks themselves. The contract that was obtained in this way by the Deep Boring Syndicate was to be carried out by a manager of theirs, called Liebenberg. The connection, therefore, between Liebenberg and the present Municipality, is this, that he is the contractor to fix up these regulating cocks upon the properties of the inhabitants, who are being supplied with water. That is the only relation between him and the Municipality. In order to carry out his contract, he went to the defendant, and proposed to fix up this kind of cock for him, but the defendant refused to allow him to do so. Liebenberg then says: "I warned him that I should have to cut off his water." On a subsequent occasion Liebenberg again proposed to fix this cock, and, upon the defendant again refusing, he proceeded to cut the pipe leading the water to the defendant's property. There is no evidence in all the proceedings to show that the Municipality gave any authority to Liebenberg to interfere with the pipes of the defendant, or that the secretary, who seems to have had control of these matters, under the Village Management Board, authorised him to cut this pipe. One would have imagined that, when the defendant refused to allow Liebenberg to go upon his property for the purpose specified, the Municipality would have taken steps to enforce their resolution, and to have communicated with him what they intended doing. I do not for a moment now find what the powers of the Municipality might have been in case they had taken up this matter, and I do not know now that it would have been beyond the powers of the Municipality to cut off the water leading under these circumstances. It is unnecessary, in the view I take of the case now, to decide that point, but I do find this, that Liebenberg had not the slightest right to interfere with this pipe leading to the defendant's property against his will, except under special instructions as to his action received from the Municipality. Without receiving these instructions, he cut this pipe, and I am of opinion that his action was wrongful and unlawful. Thereupon the defendant set about to repair the damage that had been done by Liebenberg, and I find that he was perfectly entitled to regard the action of Liebenberg as a wrongful act, and to repair the injury that had been done by Liebenberg. The Municipality regarded this repair to the pipe leading to the defendant's property as a fit subject for prosecution, and they said that the infringement took place by "opening the main pipe and attaching a pipe thereto, and other wrongs, and the injuries then and there done." I find that the allegation has not been

proved. The Municipality had no right to rectify, and had no right to adopt the wrongful act of trespass on the part of Liebenberg. Under the circumstances, I find that there was not a wrongful tampering with the appliances of the waterworks of the village, but that, in the action adopted by the defendant, he was justified in repairing an injury which had been done by Liebenberg personally. In this finding, I do not at all decide any of the more general rights of the Municipality in enforcing compliance with their resolution, nor do I decide now whether the resolution which they passed was *ultra vires* or not. It is unnecessary to go into that part of the case at present. All I say is this, that the parties are now put back to the position they occupied before Liebenberg cut the pipe, and they can exercise all the rights which they are legally entitled to in that position of affairs. The appeal must be allowed, and the conviction and sentence quashed.

Having heard counsel on the question of costs,

Maasdorp, J.: The ordinary rule is that in criminal proceedings costs are not allowed. Then an exception was introduced in some cases where costs were allowed to the appellant, and where the prosecution was at the instance of the municipality, and it was generally based upon the ground that the municipality became entitled to payment of certain fines, and that, consequently, if they were successful in securing those fines, an order might be granted against them for the payment of costs. Now, in this particular case, I do not think the Court will exercise its discretion under these exceptions, and order the costs to be paid by the Municipality. It does appear that the reason for the rule has largely been removed by the repeal of the section which assigns these fines to the municipalities. In this case, undoubtedly the question was raised upon what I would call obstruction on the part of the defendants in not complying with municipal regulations and resolutions, and although it has been found that the Municipality was not quite correct in the course which it adopted, the rights of the parties have not been decided, and a rather important question was raised for decision in this particular case. Under the circumstances, the Court will make no order as to costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SINGER V. VAN GERWE. } 1906.  
} Feb. 27th.

Purchase and sale of house—  
Tender of transfer—Tender  
of price.

*In an action for the price of a house sold to the defendant, the plaintiff tendered transfer on the payment of such price. The plea was to the effect that there were mortgages on the house and that the plaintiff was consequently unable to pass transfer. The evidence showed that, although there were mortgages on the property, the plaintiff would, on payment of the price, be in a position to pay the bonds and pass transfer and that the defendant had never tendered the price; or even expressed his willingness to pay the price on receiving transfer.*

*Held, that the plaintiff was entitled to judgment for the price which was to be paid on his giving transfer.*

This was an action brought by Louis Singer, of Hopefield, division of Malmesbury, against Leendert Christian van Gerwe, also of Hopefield, for specific performance of an agreement of purchase and sale of certain licensed property.

Plaintiff, in his declaration, said that on the 10th June, 1905, he and defendant executed a certain agreement of sale and purchase, whereby defendant purchased for £4,225 certain land and buildings at Hopefield known as the Spes Bona Hotel, as bought by plaintiff at a certain public sale, on the 6th June, 1905, nothing added and nothing deducted. Plaintiff had duly carried out his part of the contract, and defendant had taken possession of the said property, but refused, after lawful demand duly made, to otherwise carry out his part of the said contract, to pay the purchase price, or take transfer in terms of the agreement, which

had been duly tendered, and was again tendered. Plaintiff prayed for judgment for specific performance of the agreement, or in the alternative cancellation of the agreement and £500 damages.

Defendant, in his plea, admitted having taken possession and not having paid the purchase price, but said that he had always been, and still was, ready and willing to accept transfer, and to pay the purchase price on transfer being given. Plaintiff had failed and neglected to release the property from certain mortgages, with which it was burdened, and plaintiff was, and is, unable to pass transfer.

The replication was general.

Mr. Upington (with him Mr. Struben) for plaintiff; Mr. De Waal for defendant.

Louis Singer (the plaintiff) said that he bought the property in question at public auction on the 6th June, 1905, the purchase price being £4,025. On the 10th June he sold the property to the defendant for £4,225. At the time he purchased defendant was aware that witness had not received transfer from Stiglingh. Defendant had not paid any portion of the purchase price, and until the plea he had not tendered to pay, though at the time the agreement was entered into he said he would pay in three weeks. Witness was now prepared to give transfer, the papers between Stiglingh and himself being in the possession of Mr. Kotze, of the Board of Executors. There were two bonds on the property in favour of the Board of Executors, which had been marked for cancellation. He put the rental value of the property at £25 per month. Witness had lost the rent during defendant's occupation, and all the time the house was neglected and the furniture had deteriorated. He thought he could have made £300 or £400 profit during the eight months defendant had had possession.

Cross-examined: Witness paid the transfer expenses to Mr. Kotze last week. He could have paid the expenses long ago if defendant had paid the purchase-price according to his agreement.

De Villiers, C.J., pointed out to defendant's counsel that it was his client's duty to offer the purchase price to the plaintiff against transfer.

Witness (further cross-examined) said that he had offered Van Gerwe transfer some time ago. He had heard that defendant's attorneys had tried to settle the matter. He had not refused to have anything to do with Van Gerwe on the ground that he was an uncertificated insolvent. Witness handed the matter over to Mr. Kotze, who acted for him.

De Villiers, C.J., intimated that he did not want to hear any more witnesses for the plaintiff at the present stage.

Mr. De Waal said that he would call the defendant.

L. C. van Gerwe (defendant) said the arrangement was that he should pay the transfer between himself and plaintiff and between plaintiff and Stiglingh. He had been prepared to pay the purchase price if plaintiff gave him transfer, and he made arrangements in July to carry out his part of the agreement, but a letter was afterwards received from the other side saying they would have nothing more to do with him because he was an uncertificated insolvent. He went and saw Singer, and would have paid him, but he was afraid that Singer could not give him transfer.

Mr. De Waal closed his case, and having been heard in argument on the facts,

De Villiers, C.J.: Defendant is quite right in saying that he is not bound to pay the purchase price unless and until the plaintiff is prepared to give transfer. But the plaintiff, in his declaration, tenders transfer. It is said, however, that there was a bond on the property, and the plaintiff could not give transfer. It does not follow that because there was a bond on the property he may not have made arrangements with the bondholder that the transfer should be passed as soon as the price was paid. The defendant never seems to have been ready with his money himself, and he has never offered to pay the money. The plaintiff now says that he is prepared to give transfer and in his declaration he tenders transfer. The defendant, on the other hand, has never tendered the price nor even expressed his willingness to pay the price on receiving transfer. The Court must order that the amount be paid, but not until the plaintiff is prepared to give transfer. Plaintiff tenders it and the defendant, therefore, must pay the money upon the transfer being given. The order of the Court will be that there will be judgment for the plaintiff for £4,225, with interest *a tempore morae*, to be paid upon transfer by the plaintiff to the defendant of the land mentioned in the declaration. Failing compliance with the said judgment, it is ordered that the sale be cancelled and £500 be paid to the plaintiff as damages, costs to be paid by the defendant.

[Plaintiff's Attorneys: Berrangé and Son. Defendant's Attorneys: Friedlander and Du Toit.]

SCHMIDT V. SCOTT. { 1906.  
{ Feb. 27th.

Trespass—Right of road—Mistake in laying out a road—Road of necessity.

*In an action for trespass in breaking a fence on the plain-*

*tiff's land, the defendant, whose land adjoined the plaintiff's, pleaded that he had broken the fence at a point where it crossed a roadway made by him to give him access to a main road recently constructed by the Government on the boundary of his land. The evidence, however, shewed that although the Government had intended to make the main road on his boundary, the main road, as actually constructed, was well within the plaintiff's land, and that the alleged trespass had been committed where the defendant's roadway crossed the plaintiff's land.*

*Held, that so long as the main road remains in its present position, the plaintiff is entitled to an interdict restraining the defendant from trespassing for the purpose of reaching the main road by a roadway on the plaintiff's land to which the defendant had no right from necessity or otherwise.*

This was an action brought by Wilhelm Schmidt, farmer, Cape Flats, against John Scott, Junior, tailor, Cape Town, for an interdict restraining him from trespassing on plaintiff's land, and for £50 damages.

Plaintiff, in his declaration, said that he was the registered owner of certain land, situate in the field-cornetcy of the Downs, Cape division, and the defendant was the registered owner of certain land adjoining. In February and March, 1905, defendant himself, or his agents authorised by him, broke into and entered upon the land of the plaintiff. Defendant destroyed a fence, and had made roadways and tracks upon plaintiff's land, and continued to drive vehicles thereon against the will of the plaintiff, who had frequently requested him to desist. Plaintiff had been damaged in his property, and put to expense in herding his cattle. He prayed for a perpetual interdict restraining defendant from trespassing on his property, £50 damages and costs of suit. Defendant, in his plea, admitted the formal allegations, but said that plaintiff's title was subject to a qualification that the land therein referred to was granted to the plaintiff's predecessor-in-title by His Excellency the Governor upon condition, *inter alia*, that all roads and thoroughfares over the said land, whether described in the diagrams or not, should

remain free and uninterrupted, and he said that such condition was still binding upon the plaintiff. He further said that, although the land of which he was registered owner, formerly adjoined the plaintiff's land, it was now separated by a certain road, to wit, the Lansdowne-road, and the land adjacent thereto was taken by the Colonial Government in or about the year 1899 out of plaintiff's property under powers reserved to them by the law commonly known as Sir John Cradock's Proclamation, of the 6th August, 1813, for the purpose of road-making. At the time of the grant referred to there existed a road or thoroughfare over the land taken by the Colonial Government, which gave access to the land now the property of the defendant, which road the defendant was entitled to use. Plaintiff at some time, the exact date whereof was not material hereto, wrongfully and unlawfully blocked the road mentioned in the preceding paragraph, and thereby deprived the defendant's land of its only means of entrance to and exit from to the Lansdowne-road, which obstruction plaintiff refused to remove, though requested to do so. Defendant admitted that he broke a certain fence, and that he made a track, but he said that the said fence stood upon and the said track was made over the land appurtenant to the Lansdowne-road taken by the Colonial Government as aforesaid, and that he did so in order to obtain an entrance to and exit from his own land. He denied that plaintiff had suffered damages in £50, or any other sum for which he (defendant) was liable, and prayed that the claim be dismissed with costs. For a claim in reconvention, defendant (now plaintiff) said that by reason of the wrongful and unlawful acts of the plaintiff (now defendant), he had suffered damages in the sum of £100, for which amount he prayed judgment.

Plaintiff, in his replication, craved leave to refer to the original grant to his predecessor in title. He said that the Lansdowne-road, which ran across his land, at no point touched the boundary between his and defendant's land. He said further, that defendant and his predecessor-in-title had at no time been entitled to claim access to the Lansdowne-road by going across his (plaintiff's) land, which ran between the said road and the land of the defendant. In his plea to the claim in reconvention, he denied that he had wrongfully and unlawfully deprived the defendant of his only means of access to the Lansdowne-road, and he prayed that the claim be dismissed.

Mr. Upington was for plaintiff; Mr. Benjamin was for defendant.

Evidence having been led on both sides.

Mr. Benjamin, in argument, said that defendant no doubt had made a mistake



as to his rights, but the plaintiff had taken up an unreasonable attitude. Defendant had committed a technical offence. He had attempted to ascertain what his rights were, but owing to a mistake of the Government he had infringed the rights of another, but he had infringed these rights in such a way as really to have done no damage.

Without calling upon Mr. Upington,

De Villiers, C.J.: For the purposes of this case, it may be taken for granted that when the Government made the new Lansdowne-road, they intended to make that road on the boundary between the plaintiff's and defendant's land; but, in point of fact, this intention was not carried out, for some reason or another. Whether it was through some mistake in the beacons, or for some other reason, the road went right through the plaintiff's land, and left a strip of land between the road and defendant's boundary, and it is upon this strip of land that the defendant came for the purpose of destroying a fence which had been placed there by the plaintiff before he became the owner. Now the Court cannot at this stage inquire what the intentions were, but what was actually done. The road, when it was made, was entirely upon the plaintiff's land, and his transfer deed, which has been put in, clearly shows that. The road at no point touches the boundary at all. There was always this strip of land between the road and the boundary. It is clear that the defendant, by coming upon this land and removing the fence, committed a trespass. It is impossible to avoid that conclusion. It is, no doubt, not an aggravated trespass, because the defendant himself was under a mistaken notion as to his rights, but he committed it at his own risk. When it was afterwards found that he had no right to destroy the fence, it would have been wiser for him to have paid some nominal damages for his trespass, and he ought to have consented not to go upon this road; but throughout he insisted upon using this road. It is said, however, that there was another road—an old road—which, after running over the defendant's land, ultimately comes into the Lansdowne-road at a point considerably to the east, and it is said that that road had been encroached upon by the plaintiff, and the plaintiff had refused to allow the tenants of the defendant to use the road. I do not see that that question can now be inquired into. There is no claim in re-convention for that road to be opened, and there has been no evidence given in regard to that road, because it does not enter into the case. But, assuming for the purposes of this case, that the defendant has a right of road over that road, that would not give him the right to make another road, which

the plaintiff objects to. The road which he has now made is entirely new. It has not been contended that the new roadway on the plaintiff's land is a road to which the defendant is entitled, from necessity or otherwise. The sole ground on which the trespass is sought to be justified is that the defendant believed the land to be his, but this belief now proves to be mistaken. It is impossible for the Court now, upon the pleadings, to enter into the question whether the defendant is entitled to the use of the road to the east. I can only say this much, even assuming that he is entitled to that road, it does not follow that he is entitled also to make the new roadway, merely because he has been deprived of the right to the other road. He might either have removed the fence in the other road, or he might have brought an action. To my mind, it is always wiser to bring an action, because the Court can never regard with approval the act of a man who takes the law into his own hands. It is a mitigating circumstance in the present case that the defendant believed that the Lansdowne-road was on his boundary. If he had not entertained this belief heavy damages would have been awarded. It seems to me that he was under an erroneous impression, and that £5 damages will be sufficient to meet the case. The Court will interdict the defendant from trespassing upon the plaintiff's land, and give judgment for plaintiff for £5 damages and costs.

[Plaintiff's Attorney: P. A. M. Cloete; Defendant's Attorney: D. Tenant, jun.]

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1906.  
Feb. 28th.

Mr. Bailey moved for the admission of Jacobus Willem L. Krige as an attorney and notary.

Application granted and oaths administered.

## PROVISIONAL ROLL.

VAN DER SPUY V. LA GRANGE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £200,



due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### FORREST V. LOURENS.

Mr. Sutton moved for provisional sentence on a mortgage bond for £875, with interest, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ESTATE STANFORD V. COHEN.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,500, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Mr. Alexander (for respondent) opposed the application, and read an affidavit by Cohen, setting out that a fire had occurred at his premises in January, 1906; that he made an arrangement with Mr. Gibson, agent of the bondholder (to whom the insurance policy had been ceded) as to the payment of insurance money to him and deduction of the sum of £45 due by way of interest, and that it was arranged that deponent should reinstate the property. Deponent had reinstated the premises to the satisfaction of the municipal authorities.

Mr. Jones read a replying affidavit by Mr. Gibson, who said that the policy was made out to him as agent of the estate Stanford. Witness had had certain work carried out at the premises, and he had a sum of £150 odd, which he was prepared to place to defendant's credit in reduction of the bond. A further affidavit by an architect was read, in which he said that the work done by defendant was unsatisfactory, and that the value of the property was less by £100 since the so-called repairs.

Mr. Jones argued that defendant was not entitled to have the balance of the insurance money remaining after expenditure on the repairs utilised for payment of interest on bond. The company paid over a sum of about £200, to be spent in reinstating the property, and unless the money were so expended the insurance company would be entitled to recover the balance from Mr. Gibson.

Hopley, J., observed that he should want some good authority for such a proposition. He was not aware of any case where an insurance company had sought to recover money paid under a policy that had not been spent upon restoring the property.

Mr. Jones (continuing) argued that the mortgagee was entitled to have the property placed in the same condition as it was in prior to the fire. Mr. Gibson would have this done, but defendant had refused permission to his workmen to come on the building after only £60 worth of work had been carried out. He had demanded that £45 should be deducted for the interest and payment of the balance.

Hopley, J., said it did not seem to him that this was a case in which provisional sentence should be given. The parties might, if they thought fit, go into the principal case. Provisional sentence would be refused, with costs.

#### HAMMOND AND CO. V. MACKINTOSH.

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent. Counsel said the debt alleged was that a certain sum of money, over £300, the property of the plaintiff's, had been embezzled by defendant. Plaintiffs alleged that he was insolvent, and that it would be to the benefit of his creditors if his estate were sequestrated. Defendant had been committed for trial on the charge of embezzlement, and he had filed an affidavit setting forth, among other things, that his criminal trial would be prejudiced if an order were now given. Plaintiff would be quite willing to let the matter stand over until the first day of next term.

Defendant consented to this course.

The matter was ordered to stand over until the 17th April, provisional order of sequestration to continue.

#### SMIT AND SCHULTZ V. THOMSON.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### WHITE, RYAN AND CO. V. COHEN.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### COETSEE V. GOLDBERG.

Mr. Inghbold moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### JUNKER V. SLAMANY.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond

for £500, with interest; counsel also applied for the property specially hypothecated to be declared executable, and for attachment of rents accruing by the High Sheriff.

Ordered to stand over pending application by executors of Junker, who had died since issue of summons.

CHRISTIE V. WOOD.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £350, with interest and costs, and that the property be declared executable.

The defendant appeared in person and said that the plaintiff agreed to wait on the interest and then suddenly came down upon him for the money. He was now prepared to pay the interest.

Hopley, J., ordered the matter to stand over until March 12.

ALING V. DE VRIES.

Mr. De Waal moved for provisional sentence for £5 and costs on a magistrate's judgment, and to attach certain property.

Mr. D. Buchanan appeared on behalf of a creditor of De Vries, who had bought the property, which it was sought to attach.

On the application of Mr. De Waal the case was postponed until March 12, in the meantime the Magistrate's Court judgment made a judgment of the Supreme Court, with costs.

VORSTER V. VORSTER.

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ODTSHOORN MUNICIPALITY V. DEY.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WAKELIN AND ANOTHER V. ROMAIN.

Mr. Inchbold moved for provisional sentence on an account under certain conditions of sale for £11 16s., balance of purchase price of certain property, with interest and costs.

Order granted.

ILLIQUID ROLL.

INSOLVENT ESTATE STEPHAN } 1906.  
V. PARTRIDGE. { Feb 28th.

Mr. W. P. Buchanan moved for judgment under Rule 319 in default of plea. Certain property was sold to the defendant, and he had not paid any of the instalments. Counsel moved alternatively for the cancellation of the sale.

[Hopley, J.: Is the defendant the man who vanished?]

Mr. Buchanan: Yes, my lord.

An order was granted cancelling the sale.

BLEIBERG AND OTHERS V. ABEL.

Dr. Greer moved for judgment under Rule 329d for £13 17s. 5d., less £5 paid on account, balance of account, and costs.

Order granted.

ALLAN AND SHAW V. TWISS.

Mr. Bailey moved for judgment under Rule 329d for £295 5s. 9d., balance of an account for goods sold and delivered, with interest and costs.

Order granted.

DREYER AND PEARL V. SHUTTE.

Mr. Roux moved for judgment under Rule 329d calling on the defendant to restore a certain promissory note.

Order granted, calling on the defendant to return the note.

REHABILITATION.

Mr. Douglas Buchanan moved for the release of Johannes H. van Roojen's estate from sequestration.

Application granted.

GENERAL MOTIONS.

*Ex parte* ESTATE SNYMAN. { 1906.  
{ Feb. 28th.

Mr. McGregor moved for an order authorising the Registrar of Deeds to cancel a certain mortgage bond.

Order granted.

*Ex parte* CONGO.

Mr. J. E. R. de Villiers moved to make absolute a rule authorising the Registrar of Deeds to pass transfer.

Rule made absolute.

*Ex parte* THE INSOLVENT ESTATE  
HARTZ.

Mr. De Waal moved for an order authorising the Master to amend insolvent's name to Nicholas Herman Johannes Hartz on certain documents.

Order granted.

*Ex parte* LESTER.

Mr. Watermeyer moved to amend a certain order of Court by extending the return day for a period of six months. Petitioner's husband was last heard of in Wellington, New Zealand, and as he was moving from place to place, counsel asked for substituted service by publication in a Wellington paper.

Return day extended for six months, and publication ordered in a Wellington paper.

## MILLS V. MACDONALD.

Mr. Sutton moved for the final adjudication of the defendants' estate as insolvent, and for the appointment of a provisional trustee in the estate.

Application granted, Mr. H. Lewis appointed provisional trustee, with power to sell perishables and the horse, the only live-stock in the estate.

*Ex parte* GRAY.

Mr. Gutsche moved for an order authorising the amendment of petitioner's name in a bond.

Application granted.

*Ex parte* KRUGER.

Mr. Gardiner moved for leave to the petitioner to raise money on mortgage. There was a consent paper by the heirs of the estate.

Leave granted to raise a mortgage of £1,500, money to be applied to releasing present mortgage, and the remainder to be used for educational purposes.

*Ex parte* ESTATE LATE SNYMAN.

Mr. Howse moved to have a certain compromise authorised.

Leave granted to enter into compromise as prayed.

## MOSTERT V. BURMAN.

Mr. Roux moved for leave to sue respondent, now of Johannesburg, by edictal citation, in respect of a certain debt, and for attachment of certain land at Camp's Bay *ad fundandam jurisdictionem*.

Leave to sue granted, and property attached as prayed, citation to be returnable on the first day of next term, personal service.

*Ex parte* VAN HEERDEN.

Mr. Rowson moved for an order authorising the transfer of certain property, to certain minors, and the appointment of petitioner as guardian to assist the minors so far as might be necessary. Property had been bequeathed to the children by the joint will of their parents. As the children attained the age of majority they were paid out. Two minors now remained and the surviving parent now wished to transfer to each of them a farm valued at £1,000. The Master's report was favourable.

Order granted as prayed.

*Ex parte* ELLUS.

Mr. Van Zyl moved for the appointment of a curator to represent petitioner's minor child in the partition of a certain farm, Buffelsfontein, division of Ladismith, her husband having died intestate. Petitioner suggested the appointment of Edward Willem Cornelis Ellus, uncle of the minor.

Order granted appointing Mr. Ellus curator *ad litem* of the minor for the purposes of the arbitration, costs of this application to be borne by the minor and petitioner, as well as pro rata share of the arbitration expenses.

*Ex parte* GELDERBLUM.

Mr. Van Zyl moved for the appointment of petitioner as curator *ad litem* of his minor children in the partition of the farm Buffelsfontein.

Order granted appointing petitioner curator *ad litem*, majors and minors to share costs of application and expenses of division.

*Ex parte* VAN WYK.

Mr. Van Zyl moved for the appointment of petitioner as curator *ad litem* of his minor children in the partition of the farm Buffelsfontein.

Order granted as prayed, minors to pay all expenses.

*Ex parte* VAN WYK AND OTHERS.

Mr. Van Zyl moved for the appointment of Roelof Jacobus van Wyk as curator *ad litem* of certain minors in the partition of the farm Buffelsfontein.

Order granted as prayed, costs of application and partition to be borne by beneficiaries *pro rata* according to their beneficiaries *pro rata*.

*Ex parte* VAN TONDER.

Mr. Van Zyl made a similar application for the appointment of Johannes Petrus Jacobus van Tonder, J.P.J. son, to represent petitioner and his co-heirs.

Order granted as prayed, costs of application and partition to be borne by beneficiaries *pro rata*.

*Ex parte* VAN WYK.

Mr. Van Zyl made a similar application for the appointment of petitioner to represent certain minors.

Similar order as in preceding cases.

*Ex parte* ROSSER.

Mr. Van Zyl moved for the appointment of Isaac Johannes Marais, attorney, Ladismith, to represent petitioner's minor children in the passing of the partition transfers of certain farm, and for leave to sell the minors' shares and invest the proceeds in immovable property in the village of Ladismith.

Order granted in terms of Master's report.

BERLYN V. BERLYN.

Mr. J. E. R. de Villiers moved on behalf of petitioner for leave to sue his wife for restitution of conjugal rights, failing which a divorce. Respondent had left her husband, and was now believed to be residing in Johannesburg. Attached to the petition was a letter from defendant to petitioner saying: "I am dead to you now; I am no longer a wife to you."

Leave to sue granted, citation to be returnable on the first day of next term, personal service to be effected.

*In re* THE CAPE CANNING CO., LTD.  
(IN LIQUIDATION).

Mr. Van Zyl presented the official liquidators' report. The statement of the financial position showed assets amounting to £6,456 9s. 6d., and liabilities amounting to £30,436 4s. 0½d., disclosing a loss of £23,979 5s. 6d., during a period of nine years. It was proposed to sell the property, the creditors being anxious to have a speedy liquidation.

The report was ordered to lie for inspection for a fortnight, one publication in the "Cape Times."

*Ex parte* COUSINS.

Mr. Roux moved for the amendment of petitioner's name in certain mortgage bond, in which he was described as Arthur Henry Vallentine Cousins.

Order granted as prayed.

PITKETHLEY V. PITKETHLEY.

Mr. Inchbold moved, on the petition of John Pitkethley, of Salt River, trading with the respondent, G. Pitkethley, as Shaw's Stores and J. and G. Pitkethley, for the appointment of a receiver pending liquidation of the partnership estate. Petitioner suggested that Mr. Alfred Newton Foot should be appointed receiver.

Mr. Russell read a replying affidavit by respondent, who denied several allegations made by his brother. Respondent suggested the name of Mr. John M. Shaw as receiver.

Mr. Inchbold read an answering affidavit by applicant, who strongly objected to the appointment of Mr. Shaw as receiver.

Mr. Russell suggested as an alternative the appointment of the Board of Executors.

Mr. Inchbold said he thought the Court might very properly appoint Mr. Foot as co-receiver.

The Court appointed Mr. Roos, secretary of the Board of Executors, as receiver of the partnership, pending an action to be brought by applicant, question of costs to stand over.

Hopley, J., remarked that it seemed to him that the dispute between the parties might be very well settled without further proceedings in that court.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. LE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* LEVY.

1906.  
Mar. 1st.

This was an application upon notice to the Colonial Government for an order permitting the applicant to land in Cape Town from the steamer Surrey, and for costs of the application.

The affidavit of the applicant stated that he was a partner in the

firm of Goldsmith and Levy, carrying on business in Cape Town. He had been purchasing extensively in horses, cattle, and mules in the Argentine. He was domiciled here before he went to the Argentine to purchase stock. He had been travelling to and fro between Cape Town and the Argentine four times during the past eighteen months, and had never previously had any difficulty in landing. He had resided in South Africa for a period of five years, and was a naturalised British subject, having been granted papers in 1904. He had ample means, and had never been convicted of any crime. He arrived in Cape Town from the Argentine on Wednesday by the steamship Surrey. He had been informed that he would not be allowed to land, and no reason had been given for this prohibition. He had come over from the Argentine in order to settle different matters with his partner. The steamship Surrey might at any moment leave the Docks.

The affidavit of Samuel Davis, detective head-constable in the urban police, Cape Town, stated that he knew one Harris Levy, alias Harris Plessner, who was at one time in Cape Town. He had known Levy for about two years. Levy was the associate of pimps and prostitutes while in Cape Town, and a frequenter of gambling houses and the like. One Sarah Goldberg, a convicted prostitute, was an associate with Levy. Witness had seen the photograph produced of a man and woman, and recognised the figures as Harris and Goldberg. The affidavit of C. W. Cousins, of the Immigration Department, stated that he had prohibited applicant from landing in this port as being a prohibited immigrant within the meanings of sections A and E of clause 2, Act 47, 1902, the applicant being unable to write and also known as a man of most undesirable character. Although applicant was in possession of letters of naturalisation, dated April, 1904, deponent had been unable to recognise his claim to exemption as being domiciled in this country, as he had established a business in Buenos Ayres, and he had made that place his residence during the period that had elapsed since he took out letters of naturalisation.

Mr. Burton for applicant. Mr. Nightingale for the Colonial Secretary.

Mr. Burton having been heard in argument,

De Villiers, C.J., said that he would require fuller information than appeared in applicant's affidavit.

Mr. Burton said that the steamer was expected to leave Table Bay this (Thursday) afternoon.

De Villiers, C.J., said that the matter might be mentioned again later in the day, when counsel was in possession of

more definite information as to applicant's domicile and partnership.

The matter therefore stood over until a later stage.

De Villiers, C.J. (before rising later in the day) inquired if counsel was ready with the further affidavits which it was understood would be produced.

The Assistant Registrar said that no further affidavits had been produced, and the applicant apparently was not ready to proceed at present.

BERGL V. COLONIAL GOVERNMENT. } 1906.  
MENT. } Mar. 1st.

Contract of sale — Estoppel —  
Novation.

*The plaintiff sold to the defendant, for future delivery, certain sleepers of different kinds of Australian wood, including red mahogany. Before the arrival of the sleepers, the defendant, on discovering that the plaintiff intended to deliver white instead of red mahogany sleepers, gave notice to the plaintiff that the former could only be accepted at a reduced price. The plaintiff raised no objection beyond asking the defendant to reconsider the matter, and thereafter not only delivered the white mahogany sleepers, but received the reduced price and signed vouchers prepared on behalf of the defendant, which showed the deduction on the face of the account.*

*Held in an action for payment of the balance of the price originally agreed upon, that, although there was no express contract for a reduction of price, the conduct of the plaintiff amounted to an acceptance of the terms on which the defendant had consented to accept white instead of red mahogany sleepers.*

This was an action brought by Alexander Balfour Wright Bergl, formerly of Cape Town, against the Colonial Government, to recover certain sums alleged to be due upon a sleeper contract.

It appeared that the plaintiff sought to recover certain three sums alleged to be due under



a contract to supply sleepers to the Railway Department, entered into in February, 1903. The three sums in question were respectively £2,889 4s., £112 7s., and £101 6s. 10d. As to the largest sum, this was claimed as owing on account of 1½d. per sleeper deducted by the Government by reason of the sleepers being hewn instead of sawn sleepers. As to the amount of £112 7s., this represented in some cases 1s. per sleeper, and in other cases 6d. per sleeper, deducted by the Government in respect of certain white mahogany sleepers being supplied, which the Government said were not in accordance with the contract. The third item referred to certain sleepers which had been rejected, but which the Government said they would take at a reduction. As to the third branch of the case, defendants in their plea tendered to pay the amount claimed. The plaintiff in his declaration said that the contract was entered into in February, and March, 1903, that the sleepers had to be according to contract, and that the form of tender sent said that the sleepers should be sawn on both sides, and they had to be inspected, approved, and branded by an official of the New South Wales Government. Plaintiff said that the sleepers came from time to time, and the contract was executed. Defendants, in their plea, said that there were two contracts, one for the delivery of sleepers at East London, and the other for delivery at Port Elizabeth. They said that plaintiff continued to supply hewn instead of sawn sleepers referred to in the tender; that there was a separate agreement entered into in August between plaintiff and the Government, whereby the sleepers were taken at a reduction of 1½d.; that there was another agreement entered into between the parties in September that the white mahogany sleepers should be taken at a reduction of price, because red mahogany should have been supplied; and that they accepted the sleepers under those two agreements. The defendants tendered the amount claimed by plaintiff under the third head.

Mr. Searle, K.C. (with him Mr. Close), was for plaintiff; Sir H. Juta, K.C. (with him Mr. Howel Jones), was for defendants.

Evidence having been led on both sides,

Counsel were heard in argument on the facts.

De Villiers, C.J.: The contract between the parties was for the delivery by the plaintiff to the Government of sleepers, sawn on both sides, and cut from New South Wales timber, viz., black butt, grey box, brush box, and red mahogany in about equal proportions of each kind. It is not disputed that the sleepers which were actually delivered had not

been sawn on both sides, but were hewn, and that, as to some of them, they were of white mahogany instead of red mahogany. It is clear from the evidence that some short time after delivery had commenced of the first load the Government objected to receiving sleepers hewn on both sides, on the ground that they required sleepers which had been sawn. Then there was some communication between the parties. Either Mr. Bergl or Mr. Buckley (his manager at that time) met Mr. Sinclair (the Government's representative)—I am inclined to think that it was Mr. Buckley—and what took place on that occasion is of some importance, although Mr. Sinclair's memory may not have been quite fixed as to which of the two it was, yet I am satisfied as to the substantial accuracy of the evidence given by him, and that is that it was understood between them that the Government was to deduct 1½d. in respect of each sleeper. It is quite possible that it may have been added, in the course of the conversation, that Mr. Buckley trusted to the Government thereafter reconsidering the matter, but a vague trusting of that kind could not affect the agreement which was actually arrived at. It is said that a contract of this kind, ought to be as clearly proved as the original contract. I quite agree, and to my mind it has been as clearly proved. As to the white mahogany sleepers, it is clearly proved that there was an agreement between the parties. All their actions in the matter amounted to an arrangement that the Government were to be entitled to make these deductions in respect to the white mahogany sleepers. There is one other remark which I wish to make in regard to the objection as to the sleepers being hewn, instead of being sawn. I find on the vouchers these words are added: "Deducted off each sleeper, owing to being hewn instead of sawn." Clear notice is given to the plaintiff as to the reason why the deduction is made. There is an unconditional acceptance of this deduction on behalf of Bergl, where he says, "Received that amount in part payment of account." Then Mr. Searle lays great stress upon the fact that a considerable proportion of the sleepers had already been accepted by the Government before the arrangement was made for the deduction of 1½d. per sleeper. In my opinion, however, the arrangement between the parties was intended to refer to all sleepers—sleepers already delivered as well as sleepers afterwards to be delivered, and the consideration for this agreement was that the Government thereafter should accept the sleepers. The Government thereafter consented to receive such sleepers, on condition that 1½d. was deducted. In my opinion, the parties intended to leave it entirely to the Government

to consider at the end of the contract whether they would waive their right to a reduction. The Government, on completion of the contract, did not consider that they were bound to waive their rights. Therefore the contract remains, and they have a right to the deduction. For these reasons, I am of opinion that the plaintiff is not entitled to recover in respect of claims 1 and 2, but in regard to claim 3, I understand that there is a tender. The judgment of the Court will be for the plaintiff for £101 6s. 10d., with costs to date of tender, but the costs subsequent to date of tender must be paid by the plaintiff.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Reid and Nephew.]

#### *Ex parte* DREYER.

Mr. McGregor moved, on the petition of Jacob Dreyer, produce merchant, district of Hay, for a temporary interdict restraining George Parker, transport rider, Prieska, from making use of a certain wagon and three donkeys pending an action instituted by applicant to recover the said property.

Rule granted, returnable on the 17th April, calling on defendant to show cause why the interdict should not be granted as prayed, with costs, rule to operate as an interim interdict, and to be served on defendant's attorneys in Cape Town, with leave reserved to defendant to apply for discharge of the interdict..

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

#### PROVISIONAL CASE.

KOCH V. MARAIS. { 1906.  
Mar. 1st.

Mr. Gutsche moved for provisional sentence on a mortgage bond, and the balance of interest, and that the property be declared executable.

Order granted.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

JURITZ V. KALK BAY MUNICIPALITY. { 1906.  
Mar. 2nd.  
" 5th.  
" 6th.

#### Municipality—Interference with natural flow of water — Damage to property.

This was an action brought by Chas. Frederick Juritz, of Cape Town, against the Kalk Bay Municipality, to recover £200 damages for the flooding of his property near Muizenberg, in consequence of defendants' alleged negligence.

The land on which Mr. Juritz's house stood was sold by the Municipality in 1900 to Mr. Wood, and the Council, in their advertisement of the sale, set out that these were choice building lots on the "Riviera of South Africa." Mr. Wood bought the ground, built a house on it, and subsequently this house was bought from him by Mr. Juritz. Between 1903 and 1905 the Municipality made a road between Mr. Juritz's house and the vlei, the road being composed of sand, with a coating of gravel on the top, so that water could soak through without any difficulty. Last May the Municipality, wanting to lay certain pipes in connection with their drainage system on the sea side of the road—desired to divert all the water in the vlei, and they thereupon proceeded to place a lot of sand bags, about 10 feet high, right across the vlei mouth, and made a dam. They made a small opening, which was not wide enough to allow the water to escape. The fall from the railway culvert, which was about a mile and a quarter from the bridge, was only 2 ft. 4 in., the result being that water came down through a culvert which was four times as big as the opening made by the Municipality. The Municipality took no steps to prevent a catastrophe. On the 7th June the water began to show itself round the corner of Mr. Juritz's house, which was being occupied by Mr. Kingon. On the 8th, things became worse, and on the 9th, Mr. Kingon, seeing the water all round the house, and hearing several loud reports, thought it wiser to clear out of the house. On the 10th the house was flooded all round. The Municipality tried to cut away below the bridge, so as to let the water out of the vlei, but so strong was the rush of water that the dam broke, although the bridge it-

self received only a shock. After the dam had broken, the vlei began to sink, and by the afternoon at three o'clock the water had almost gone down. The plaintiff's property was, in consequence of the flooding, damaged in several ways, and had suffered depreciation. The defendants' case was that, whatever flooding took place, the damage to Mr. Juritz's house was not caused by the vlei; that the plaintiff's land was waterlogged, and was always liable to flooding; that they (defendants) took all precautions which they could reasonably be expected to take, and that they were not liable to any damages. The defendants also said that the rainfall about the time of the flooding was excessive.

Sir H. Juta, K.C. (with him Mr. Upington), was for plaintiff; Mr. Searle, K.C. (with him Mr. Swift), was for defendants.

Thomas Wilson Cairncross, civil engineer, formerly engineer of the Cape Town Municipality, said that he saw the spot in question about the beginning of June. Formerly there was no bridge at the vlei mouth, but simply a broad opening to the sea. The bridge was built about nine or ten years ago. In May last the municipality began to make a coffer dam so as to enable them to lay certain pipes in connection with their drainage. The area which drained into the vlei was the slopes of Tokai and below. A great part of the water passed under the railway. The railway culvert had an opening of about 200 square feet, while the new exit made by the municipality at their bridge was 49½ square feet, whereas the bridge was about 290 square feet. The fall from the railway culvert to the municipal bridge was about two feet, the distance being about a quarter of a mile. Witness described the results of his observations of the flooding from the 8th June. On the Friday the water was going through the new exit at the rate of nearly a mile an hour. The opening in the railway culvert being four times the size of the exit in the bridge, the inevitable result was that the water in the vlei must rise. There was no way of avoiding that. The exit was nothing like sufficient to carry away the rainfall. Witness saw the vlei after the dam had broken. The water carried the sand embankment away, but the bridge remained. After this had happened, the water fell a good deal, although the rain had not ceased.

Cross-examined by Mr. Searle: Witness took observations on the instruction of Attorney Steer, who, he believed, was acting for Mr. Van Reenen, a farmer. A case came on in the Magistrate's Court, in which Mr. Van Reenen sued the municipality. He believed the Magistrate decided in favour of the municipality. The rainfall during the week previous to the 10th June was

exceptional, and there were several instances of damage done by the storm in the Peninsula.

Hugh Stewart Kingon, a former tenant of the plaintiff's house, said that about the end of May he noticed that the water was beginning to rise, and he saw that the municipality had adopted a foolish move. The only conclusion he could come to was that the water was running through the sand road from the vlei. Three or four days before witness's home was flooded, his neighbour, Norman, had had to vacate his house. On the 8th June the water had reached the foundations of his house. On the 9th it had got to the steps. He went to town, and when he returned in the evening the water was about three-quarters way round the steps. On making an examination, he found that there were two cracks in the stoep and that the front door had jammed. While they were at tea they heard several booms, and afterwards found cracks in the yard. He then left the house. On the 10th the front of the house was completely isolated. The rental of the house was £6, the rent having been reduced on account of the winter months. Witness occupied the house two months.

Cross-examined: There had been heavy rains extending over about ten days before the dam broke.

By the jury: The water about the house had not subsided when he left on the Saturday afternoon, after the sand-bag wall had broken. He did not know whether any change had taken place.

William Westhofen said that he had considerable experience of bridges and waterways. He subsequently corroborated the evidence given by Mr. Cairncross.

John Henry Wood, the first owner of the building, said that prior to June last he never saw water standing on the ground.

Cross-examined: Witness was Mayor of the Kalk Bay Municipality when he purchased the ground. He acquired the ground because there was a frontage for boating on the lake and a view of the mountain.

Mr. Searle: I believe you bought more ground near the vlei?

I am sorry to say I did.

Further cross-examined: He bought the ground for about £86, the extent being 50 ft. by 100 ft. The builder (Pinker) he believed was the architect of the house. The ground was part of a sandhill, high and dry. The contract price for the building was about £435, and there were extras which brought the cost to £501. Witness sold the ground and building to Mr. Juritz for about £800 two years ago.

John Augustus Simon, of Lakeside; Mr. Aurret, another resident in the locality; Frederick William Fischer, of

Retreat; William Fischer (son of the previous witness); Everett White, building and quantity surveyor; and E. J. Sherwood, of Cape Town, also gave evidence for plaintiff.

Alfred Tier, builder and contractor, Retreat, described the damage done to Mr. Juritz's property by the flooding in the early part of June last.

The plaintiff, Charles Frederick Juritz stated when he saw the house in March last before the flood there was no crack in the stoep.

Sir H. Juta closed his case.

Herbert Wallace, Assistant Engineer of Muizenberg, stated the level of the temporary outlet originally was practically the same as that at the bridge, but the rush of water underneath the bridge had scoured out the ground to a further depth of from four to five feet. He did not think it possible for water to percolate from the vlei through the road towards the plaintiff's house, because the sand had consolidated, and there was a mixture of clay in the road.

Cross-examined by Sir H. Juta: If the road were taken away the ground would be just below the high flood level of the vlei.

On the 8th June the Engineer reported that the channel would carry a normal overflow, but not the abnormal overflow then prevailing. On the 8th June both you and the engineer agreed that the exit was not sufficient to carry off the abnormal flow. What did you do?—The rain was so abnormal no one could do anything. It would have been a silly thing to attempt anything. He found the intake more than twice as large as the exit, but the intake might have been too large for its purpose.

Thos. Bennett, engineer to the defendant Municipality, stated the drainage work was commenced about May, and it was to be completed about November, although it was not yet finished. It was necessary that the main drainage should pass at the mouth of the vlei, in order to reach the outfall. Under the Act 26 of 1897, the work could not have been commenced in summer, and so it was commenced in May. But for the heavy rains early in June, the work at the vlei would have been finished at the end of that month. Every precaution was taken to prevent flooding. A channel 10 feet wide was constructed down to the sea to carry off flood water. During the period of five days, taking the drainage area of 23 miles, eleven times the quantity of water fell than was contained in the whole of the reservoirs on the mountain. Though the sand on the road was very fine, when it consolidated, it became very dense, and it was almost impossible for the water to get through.

S. Kendal, partner in the firm of Baker and Masey, said the foundations of the house were put in very irregularly. He would not consider the founda-

tions sufficiently good for a house like the one in question. A house with such foundations was extremely likely to crack. Precautions ought to have been taken to provide against possible flooding.

Ernest Baker, who was Municipal Superintendent of Works at the time of the flooding, said he remembered the building of the house. Water was always lying about the house in the winter time. The stoep had been cracked for the past two years, and there was a crack from the top to the bottom of the wall.

George Powell, a member of the Kalk Bay Municipality at the time in question, said that he visited the neighbourhood the Monday after the flood. In his opinion, water could not have percolated through the road. He had seen the cracks in the house, and attributed them to the loose soil of the foundation.

Cross-examined by Sir H. Juta: The site was a choice building lot, as was stated by the advertisement of 1900, when witness was a member of the Council.

A. H. Barnes, Municipal Clerk, stated that during May and June he was constantly along the road. Part of the road was practically solid, and the remainder of it was a sand embankment, with a couple of layers of clay, with one each of stone and gravel. Witness would have taken the house previous to the accident, but for cracks in the stoep and the walls. There were no visible signs of the water having percolated through the road towards the plaintiff's house.

Albert Edward Gower, who had kept the rain gauge at Tokai, stated during his eleven years' experience there had never been such a heavy rainfall as that which took place early in June. On the 5th June, there was a fall of 3.80.

Wm. Thos. Olive, Civil Engineer, of Cape Town, stated that last year he acted for a time as engineer at Muizenberg, during Mr. Bennett's absence. The site in question he had visited several times, and had made levels of the place. It was impossible that levels could be taken inside the house. At the back of the house there was no guttering, and the down-spouts did not carry the water away from the walls of the house outwards. There was a crack in the wall at the back of the house.

Charles Stewart produced the rainfalls over a long period, and said the one in June was unequalled in his time.

Mr. Searle closed his case, and counsel having addressed the jury on the facts,

Maasdorp, J., said the broad legal principle was that no man had a right to interfere with the natural flow of water for his own benefit in such a manner as to pen it back

on to the land of another, and if he did so he was liable for any damages which might be incurred. The plaintiff said that the defendant had penned back the water and interfered with the natural flow of the water, and if the defendant had left it to its natural flow it would not have reached his ground. Supposing a man had penned back water in a reasonable manner so that it could not be expected to go on to the land of another and then by some extraordinary natural convulsion an accident happened, the jury would always in such a case give a reasonable benefit of consideration that such a thing could not have been foreseen. But in the present case it was not a sudden flood; it was a large flow of water, and the question would be, could the further rising of the water have been prevented? There was a road with rising water on the one side above the level of the plaintiff's ground on the other. The plaintiff said that the result was that the water from the vlei came on to his land. The defendant denied this, and said that the water came from the culverts up above. If the water came from above the culverts and did the damage, it was a matter for which the jury could not hold the defendant responsible in this case. If the jury held that the water came from the vlei and caused the damage the question would be the amount of damages. The witnesses for the plaintiff put the damages at the highest at £150 and some others put it at £120.

The jury, after about thirty minutes' retirement, returned a verdict for the plaintiff for £125 damages.

Judgment was entered for that amount with costs, the costs of preparing three plans to be allowed by the taxing officer.

[Plaintiff's Attorneys: Van Zyl and Buissinné. Defendant's Attorney: D. Tenant.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

### TRIAL CASE.

DRUMMOND V. WOOD. { 1906.  
Mar. 2n.  
" 23rd.  
Apr 3rd.

#### Breach of contract—Damages.

The hearing was continued in the action instituted by Hildyard Home Drummond, who claimed £1,000 by way of damages in respect of a breach of

agreement between the defendant's foreman and plaintiff in reference to the printing of a paper called "South African Truth."

At the last hearing his lordship adjourned the case in order that the plaintiff might reply to a plea in abatement, and put in the evidence of Mrs. Leeson.

The evidence of Mrs. Leeson, the plaintiff's mother-in-law, taken on commission, was read, and it set out that the plaintiff asked her for £50 to pay the printer's bill, and he said that he would register the paper in her name as security. On July 1 the plaintiff told her that he did not require the money, as the defendant had broken his agreement. Deponent verbally re-assigned the paper to the plaintiff on July 1.

The plaintiff conducted his case, and Mr. Benjamin (with him Mr. W. P. Buchanan) was for the defendant.

Mr. Benjamin submitted that the defendant was clearly entitled to absolution from the instance unless the plaintiff could clearly prove the re-assignment. Counsel having been heard in argument,

Hopley, J., said he thought there had been a re-assignment, and ordered the case to proceed on its merits.

The plaintiff, in the course of his evidence, said that the machinery of the defendant was so old and antiquated that the work was not completed in time. Apart from that, the defendant had not enough paper to print the whole issue. On June 9 he met the defendant for the first time, and drew his attention to the atrociously bad printing, and pointed out that it was useless going on if the paper did not come out to time. There was scarcely a word correctly spelt in the proofs. In a letter to the defendant witness pointed out that the publication was causing him loss instead of paying handsomely. The second issue was printed on different paper from that of the first. The defendant mutilated the paper, sub-edited it, and turned it out just as he liked. It was stipulated that the contents bill should be printed on yellow paper, but the defendant printed it on salmon colour. In the exhibits put in his lordship would see an advertisement from the Ocean Guarantee Association, along with which was a plate of a burglar and a safe. It could not be said whether the man was a burglar or not, and a copy of the "Owl" showed how it should have appeared. Witness, in a letter, pointed out to the defendant that he was splitting up the leading articles, doing what he liked, and making witness's position a perfect sinecure.

Advertisements were withdrawn on account of bad printing. The defendant conducted the paper as if he were owner, proprietor, and everything else; in fact, he turned it out how and when he liked.



Cross-examined by Mr. Benjamin: He put a proposition to Mr. Wood to rent the place, as the defendant was totally incompetent to carry on his business.

Samuel McKeag, of the "South African News," stated his firm estimated for the production of the "South African Truth." The first issue of the paper he did not consider properly printed. In his opinion there had been a bad distribution of ink, and the machine should have printed better. His experience was that small suburban printers wanted to do the work cheaper and superior to the "South African News."

Alfred da Costa, of Da Costa, Jacobs and Co., stated it would require £40 or £50 to pay for 5,000 copies of the paper of six pages. Another couple of pages would bring the cost to between £50 and £60. The paper was badly printed, and the client would be a good one that would be satisfied with the paper. There was no question that the paper was badly got up. In his twenty-two years' experience he had never seen proofs such as those produced.

Portas Moses, manager of the Cape Town "Argus," said his firm would charge about £6 a page to print the paper of 3,000 copies. The printing was not satisfactory in the first issue, but some of the copies were fairly well printed.

David M. Smaile, assistant general manager of the Cape Times, Ltd., stated that the paper was badly printed; it was a poor production. For 5,000 copies of eight pages he thought the cost would be about £60. The printing press had been in the hands of Messrs. Richards for a good many years.

By Mr. Benjamin: The defendant must have lost on the contract.

The plaintiff (recalled) said he did not see the machine until after the failure of the defendants.

Mr. Benjamin produced a medical certificate in reference to the condition of Mr. A. E. R. Wood, son of the defendant, whom it had been intended to call in support of defendant's case. Mr. Wood, jun., had been ordered away for a complete rest on account of ill-health.

William Henry Stokes, advertisement canvasser and contractor, said that he should give about £40 a week for the advertising rights of a paper like the first copy of "South African Truth," dated 3rd June last. About a year ago he should have given an additional £10 for the space, because advertising was then very much better.

Cross-examined: Witness was proprietor of the "Silver Leaves Annual."

[Hopley, J.: What is the "Silver Leaves Annual"?]

It is a pictorial annual got up for sending to people at Home, printed in the style of "Country Life." For the last issue I got £850 out of it for advertisements in South Africa and England. He had canvassed for

the "South African Guide." He had also canvassed for a monthly called the "Property Register." He had not canvassed for any newspaper in this country of the class of "South African Truth."

By the Court: He had not gone to any newspaper in Cape Town and offered a price for space. He did not offer anything for space in "South African Truth" when it was first published.

Re-examined: Witness claimed to be an expert in advertising.

Plaintiff said he claimed that "South African Truth" was a journal, not a newspaper; it was not devoted to news.

[Hopley, J.: I am looking at your contract with Prideau, which is for getting out a "newspaper."]

It is wrongly described there.

[Hopley, J.: Well, it is in your own handwriting.]

Edward Milton Gardener said that he was employed by defendant as canvasser for his printing business when the "South African Truth" was produced.

[Hopley, J.: What are you now, Mr. Gardener?]

Witness: Canvasser for a monumental mason. He was introduced to plaintiff as a canvasser for "South African Truth." He got several advertisements, in the first instance, providing that the paper was brought out all right. He got 20 or 30 advertisements, all of which appeared in the first number. Two or three were paid for. The paper when produced was the laughing-stock of the advertising community; after that they would have nothing more to do with it. The first number was delivered in town by motor-car. Some of the copies were folded and others not.

Cross-examined: Witness was employed at the Progressive Works, after he had left Mr. Wood's employ. When he left Mr. Wood's employ there was no suggestion of shortness in his accounts. Mr. Wood gave him an excellent testimonial. He received three weeks' imprisonment for defalcations while he was employed at the Progressive Works. Witness got an advertisement from Mr. Hartley, but he did not tell him that the charge was to be £2. The arrangement was that the first advertisement was to be gratuitous, and that the advertisement was to be continued if he (Mr. Hartley) liked the paper after the first issue. He also canvassed Dalton and Reid and the Ratner Safe Company, the arrangement being the same as in the case of Mr. Hartley. He could not explain why the charges in the plaintiff's books against various people should appear.

Re-examined: Witness was engaged as canvasser for "South African Truth," and the defendant's printing business, and he was recommended to witness by defendant or his agent,

Prideau. The conviction referred to was in relation to a sum of 2s. which he claimed was commission due to him. Plaintiff closed his case.

John Wm. Wood (defendant) said that he was some years ago Mayor of Claremont, and had resided at the Cape about 20 years.

Mr. Benjamin: You are owner of the Peninsula Printing Works?

Witness: I am. The contract with plaintiff was entered into while he (Mr. Wood) was on his way back from Graham's Town. Prideau, who was managing his business, acting during his absence. The only other paper that he had produced on his press was the "S.A. Spectator," which he printed for about six months. He did not at first undertake supervision of the publication of "Truth," but, after the second issue, he found that plaintiff had made his way into the composing-room and had introduced whisky there, generally creating pandemonium and making the men "tight," so that imperfect work, and only imperfect work, could be turned out. Witness spoke to certain three paragraphs which he had to exclude from the paper on the ground that they were defamatory. If there was any delay in the production of the paper, it was not due to any fault on his part or his workmen's part.

By the Court: He did not know of his own knowledge that plaintiff introduced whisky into the composing-room.

Witness (in further evidence) said that he thought the paper was printed as well as the "S.A. Spectator." He thought it was as well printed as a paper like the "Midland News." He did not think there were many papers in the country that were better printed than the "S.A. Truth."

Cross-examined by Plaintiff: The defendant employed men at lower wages than are recognised by the Typographical Society.

[Hopley, J.: Did you have a competent staff?]

Witness: We had a competent staff and competently paid.

[Hopley, J.: Why didn't you repudiate the contract when you came back?]

I wish I had done.

Cross-examination continued: Witness endeavoured to carry out the contract to the best of his ability. He was not a practical printer.

Cross-examination continued: Witness refused to have his dispute with plaintiff referred to an arbitration of printers. He meant to come to the Court rather than a "tickey" should go out of his pocket to plaintiff.

Plaintiff: You had a conscientious objection to this matter going before arbitrators?

Witness: I had a conscientious objection to pay you £50 to clear out. There were a number of issues of the "S.A. Spectator" that witness had not yet

been paid for. Mr. Peregrino did not refuse to pay because of the "diabolical printing" of his paper; Mr. Peregrino had given him promissory notes, and he excused himself from paying on the ground that he had not got the money. Witness considered that he would have lost very little on the plaintiff's contract if it had been continued, running the contract in conjunction with the jobbing work. He would not be willing to enter into a contract again for the publication of a weekly paper, and watching against libels even at £100 a week. He got out of the contract when he discovered that it was not in the name of H. Home Drummond, but in the name of Mrs. Leeson, whose address was given under another name from plaintiff's house.

Plaintiff: You thought it was a "fishy" thing that a man should live in the same house as his mother-in-law?

Witness: Not at all—a splendid thing. I thought it was a curious thing to have one house registered in two names.

[Hopley, J.: Do I understand that your ground for giving up the contract was that there was a conspiracy?]

I carried on the contract, and fulfilled my portion of it, as I consider, the applicant failing to carry out his part by failing to pay moneys when they were due. I got tired of watching against libels.

[Hopley, J.: The reason was that he had not paid the money?]

And I had no expectation, because I never knew anybody that he did pay. He wanted to get out of the contract, because he knew plaintiff was an absolutely worthless fellow.

I suppose you admit that the printing of this paper is about as beautiful a mess anybody could possibly make of it?—No, I do not.

Henry John Cannon, compositor, said that the hands employed by defendant were competent to bring out the plaintiff's paper. The machinery was good. Witness considered that plaintiff had put in as exhibits some discarded copies of the paper. It seemed to him that the plaintiff had picked out some of the worst copies. He regarded the paper as up to the average of the "Peninsula Herald," and the "Free Press." He should not consider the paper of the same standard as the Cape Town dailies, but he certainly thought it was equal to the average country paper in this colony. Plaintiff came to the composing-room with a bottle of whisky on two occasions, and handed it to the men.

Plaintiff objected to Mr. Buchanan putting leading questions to the witness.

Thomas Scragg, compositor; James H. Hartley, provision merchant, Observatory; Charles H. Kinsley, law-agent; Arthur E. Rowse; Frederick Dalton, of Dalton and Reid; Archibald P. Mummery, confidential clerk to the South African manager of the Rock Life As-

insurance Co.; William Cooper, advertising manager for Cleghorn and Harris; Harold R. Peck, of Aitken and Peck, chemists; John Forsyth, of Forsyth and Co., art dealers; and Thomas Smith, printing works manager, Wynberg, also gave evidence to the effect that they had not engaged to pay for advertisements in the plaintiff's paper.

Albert Wm. Bowers, stationmaster, Claremont, said that they received a batch of copies of "S.A. Truth" to be forwarded up-country. The papers were despatched, but plaintiff did not pay the charges. They declined to send a second consignment.

The witness Smith said he considered that "S.A. Truth" was up to the standard of the generality of newspapers in this country, which was bad. Smith added he used to run the "Suburban Herald" for about five months. He used to lose a minimum of £40 a month.

A good deal of the evidence was directed to showing that various amounts had been debited against advertisers in plaintiff's books, while, as a matter of fact, no agreement was made to pay for the advertisements, and it was understood that they were to be inserted gratis.

Mr. Benjamin said that, in view of the fact that his lordship would be absent from Cape Town for a considerable time, he would not apply for a postponement of the case to enable the evidence of A. E. R. Wood to be taken on commission.

Mr. Buchanan read the evidence, taken on commission, of James Arthur Prideau, formerly works manager for defendant, who said that, after a time, plaintiff became very confidential with him. Plaintiff suggested that he should put into the paper a libel on some friend of his. He asked whether defendant was a man of property or means. Plaintiff seemed very anxious to get hold of the works. Witness communicated this conversation to Mr. Wood and his son. Witness complained of plaintiff's interference with the compositors. Robert Greening made an offer of money to witness, to enable him to go up-country, provided he would swear an affidavit for plaintiff. Witness made a declaration (annexed), at Greening's dictation. Witness was hard-up at the time, and the offer of money tempted him to make the declaration. He was offered £50 in cash, his fare up-country, and one-third of the damages when the case was decided. Having been duped by plaintiff, he communicated with Mr. Wood from Bloemfontein, and informed him of the circumstances under which he had made the declaration. Witness was very hard-up when he was prepared to sell his evidence.

Plaintiff, in his address to the Court, submitted that, owing to the acts of defendant, he had been deprived of a handsome profit from the paper. The

paper was badly printed, it was delivered late, and nothing like the number of copies contracted for was issued. He contended that defendant really had no claim in reconvention, because he (plaintiff) had had no profit from the work he had done.

Mr. Benjamin having been heard in argument, and

Plaintiff having replied,

*Cur. Adv. Vult.*

*Postea* (April 4th.)

Hopley, J.: On May 5, 1905, the contract annexed to the declaration was entered into between the plaintiff and one Prideaux, the agent of the defendant, whereby the latter undertook to print and supply a newspaper of six pages of a specified size for £10 for 1,500 copies, £12 for 3,000 copies, and £15 for 5,000 copies, per issue, and the plaintiff, as owner of the said paper, undertook to pay on the first day of every month for the work done during the preceding month, including any extras during the month. The paper was published on the 3rd, 10th, 17th, and 24th of June, under the name of "South African Truth," and a further issue was printed, but never accepted or sold. There was during the short existence of the paper a considerable amount of correspondence between the parties, from which it might be at any stage have been surmised that their differences would end in a law-suit. Now, though there was considerable grumbling by the plaintiff at the way in which the paper was turned out, and at the delay or unpunctuality in its appearances (to which complaints the defendant retorted that they arose mainly, in so far as he admitted them, through the acts of the plaintiff himself). Yet it appears to me that the plaintiff did accept the newspapers as tendered to him weekly, and that he cannot now claim large damages by reason of the class of work which was turned out by the defendant. On the other hand, the defendant became alarmed when he found that he had entered into a contract with a man of no means, who, as experience proved, was not averse to incurring the risk of an action for libel by reason of defamatory matter published or attempted to be published in the newspaper. In case of such libel action the defendant rightly feared that the loss would fall upon himself, though the plaintiff had given his personal guarantee for £500 to meet anything of the kind, since such guarantee was in the circumstances worthless. The defendant for these reasons grew anxious to get out of the contract, and on the last day of June prepared his account for the work alleged by him to have been done under the contract, including the work for the issue of the paper of July 1, about

which issue the parties were in dispute at the time. The account amounted to £98 5s. 5d., of which £15 was for the issue of July 1. This account, with letter of demand for its payment, the defendant caused to be delivered at plaintiff's office on July 1, and it appears that it reached plaintiff on Monday, July 3. On the evening of July 1, however, the defendant wrote a letter, putting an end to the contract, alleging as his reason the non-payment on that date of the amount due according to the amount sent in. The defendant gave an additional reason for putting an end to the contract, which was that the plaintiff had unlawfully assigned the paper to Mrs. Leeson, and he proceeded to give some irrelevant reasons for being not sorry that the contract was at an end. These reasons affect the past life of the plaintiff, and the reference to them was couched in such terms as to indicate that the plaintiff would get into trouble if he should endeavour to assert his rights in any action founded on the contract. I think that such portions of the defendant's letter were intended to frighten the plaintiff from seeking a legal remedy for the breach of contract, and that they were a somewhat unworthy or dangerous weapon to employ. They have failed to accomplish their purpose, and seem to prove that the defendant knew that on strictly legal grounds he was in the wrong. In my opinion, neither of the grounds given by the defendant justified him in putting an end to the contract. I see nothing in the assignment of the undertaking to Mrs. Leeson which is contrary to the terms or the spirit of the contract, and as to the non-payment of the amount demanded, even the defendant now admits that the account forwarded contained an overcharge, or at all events an item which was not due until August 1, and which has since been taken out of the account. Even if the proper amount had been demanded, and not promptly paid on the due date, I do not think that the defendant had the right immediately, and without any further steps or inquiry, to declare the contract at an end. Since I hold the view that the defendant acted arbitrarily and wrongly, there must be judgment in convention for the plaintiff, but a somewhat difficult question arises as to the measure of damages to be awarded to him. No evidence has been led to convince me either that the newspaper would have been a great financial success, or that the plaintiff would in the first six months of its existence (if, indeed, it would in any case have lasted so long), have drawn considerable profits from it. It is true that it had space for advertisements; but no profitable contracts to fill that space had been entered into, except to an extent which

in the circumstances is negligible. At the same time I cannot but feel that the actual results of the first few issues of a new journal, before it has had time to become known as a medium for news and advertisements, would afford a fallacious test by which to be guided. The contract when broken had still five months to run, and in that time the fruits might have begun to be reaped; while there is evidence to show that at the cheap rate at which the defendant had contracted to produce the paper, there was small risk of loss to the plaintiff. On the whole, I am of opinion that the plaintiff should have more than nominal damages, and I think the sum of £60 should be awarded to him for the breach of the contract. With regard to the claim in reconvention, the defendant thereto sets up as defences the allegations which appear in paragraphs 5 and 6 of his declaration, and in the first paragraph of the plea in reconvention. As to the last-mentioned, it is wholly unsupported by credible evidence, and as to the matters originally set forth in the declaration, I am of opinion that after acceptance of the papers from week to week at such times as they were tendered and in such conditions as they came from the defendant's works, it is not open to the plaintiff to say in defence on the reconventional claim for the work and labour done under the contract that he is not liable therefor. As to the manner in which the contract was carried out the evidence is conflicting, and while the preponderance thereof tends to show that the work was not of the highest class, still I hold that the work, considering the whole nature and terms of the contract, was reasonably done. The highest class of work could not have been expected at the price agreed upon, and at the place where it was to be performed, and I am of opinion that the defendant, in reconvention, received as regards quality very much what he bargained for, and ought to have expected. But he also asserts that there was short delivery, and on this point I am inclined to think that the evidence for the plaintiff in reconvention is not very strong. Everything seems to have been done in a hurried and unbusinesslike way, and no exact tallies were kept of the numbers of papers actually delivered to the defendant in reconvention, or, if any were kept, they were not produced in evidence. Such as they were they were received and disposed of by him. As far as I can follow the evidence, the four issues delivered to defendant in reconvention or placed at his disposal were respectively about 3,000, 3,000, 4,000, and 3,000. Each of the first two issues had two extra pages. As I can find no evidence to satisfy me that there was a special contract as to the additional sheets, I must take a *pro rata* figure as representing the



with leave given to the receiver, if so advised, to leave the property in the hands of the respondent, upon payment by the respondent to applicant of her half-share of the due valuation of the joint estate. No order as to maintenance.

#### SCHLAG V. BARRY.

This was an application brought by Christian John Schlag, of Montagu, calling upon George Joseph Barry, to show cause why he should not be declared to be disqualified from holding office as a Councillor, or as Mayor of the Municipality of Montagu, and to declare his election as such null and void.

From the affidavits, it appeared that the ground of the application was that the firm of Barry Bros., trading at Montagu and Cape Town, of which respondent was a member, had entered into contracts for the supply to the Council of forage, tools, water, plant, etc., the applicant annexing a list of items abstracted from the Municipal books of account, which showed that the Council had purchased from Barry Bros. goods to the amount of £118. The respondent's case was that his firm had not entered into any contracts with the Municipal Council for the supply of goods, and that he had not used his position either as Mayor or Councillor in order to influence business in favour of his firm. The secretary of the Council said that he had instructions from the Council to purchase goods in the village of Montagu at places where the best article was procurable at the lowest possible price, and that he had purchased goods from Barry Bros., but only in cases where they alone stocked the articles required or the prices they quoted were decidedly lower than the prices of any other people.

Applicant, in his replying affidavit, called attention to an entry in the minutes of the Council for the 10th January, 1904, from which it appeared that the Council had accepted a tender of Barry Bros. for the supply of cement.

Mr. Watermeyer was for the applicant; Mr. W. Porter Buchanan was for respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said that he must have some information on the point as to when Mr. Barry was elected, and whether he had been re-elected since he was first elected in 1903. It was quite consistent with the application that Mr. Barry might have been re-elected after these contracts were entered into. Therefore, he should like to have information as to whether there had been any election—whether the respondent had been re-elected since the date of the contracts complained of, and at the same time an opportunity ought to be given to Mr. Barry to meet

the statement made in the replying affidavit of applicant as to the tender for cement, because, whatever might be said upon the other facts, he (the learned Judge) had no doubt whatever, he might say, that if it were proved that during the term of office of Mr. Barry a tender was accepted from his firm for the supply of cement that would be such a contract as was contemplated by the section of the Act, and it would incapacitate him from continuing in office in the Municipal Council of the village, for which he had been elected. Therefore, if that tender were accepted during the period and that period had not yet expired, there would be no doubt whatever that Mr. Barry would be declared to be disqualified. The matter would stand over for further information on the point named.

#### MCCALLUM V. STEVENS.

This was an application by Alexander John McCallum, attorney, Cape Town, to make absolute a rule nisi restraining Charles Henry Stevens from parting with certain 45,000 shares in Sacco, Limited, and a sum of £150. Mr. Burton was for applicant; Mr. W. Porter Buchanan was for respondent.

Mr. Buchanan read an affidavit by Mr. James Smith Howard, of the firm of Gilchrist and Purcell, who said that his principals were the holders of the shares.

Mr. Burton read an affidavit by the trustee in the insolvent estate of Stevens, and added that he had also an affidavit by insolvent, who said that he was the owner of the shares.

Rule made absolute.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### GREEFF V. AHMED.

1906.  
Mar. 6th.

This was an action brought by Henry G. Greeff, a farmer, to recover from Shaik Ahmed, of Wale-street, Cape Town, £51 15s., for 45 sheep sold and delivered. The defendant, in his plea, denied that he purchased the



sheep, and that they were purchased by one Abdurahman.

Abdurahman, in his evidence for the defence, said he purchased the sheep, and that he would be responsible.

Mr. Douglas Buchanan was for the plaintiff, and Mr. Lewis was for the defendant.

Maasdorp, J., said he believed that Abdurahman came forward to save the defendant in the case, and he gave judgment for the plaintiff for the amount claimed, with costs, the plaintiff declared a necessary witness.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. } 1906.  
Mar. 6th.

Mr. Alexander moved for the admission of Charles Kramer as an attorney and notary.

Application granted and oath administered.

KOCK V. THERON. } 1906.  
Mar. 6th.  
" 7th.  
" 8th.  
" 9th.  
" 12th.  
" 13th.  
" 14th.

Water—Perennial stream—Boundary — Prescription — *Aqua erumpens in suo*—Servitude.

*Plaintiff was the proprietor of a farm situate on the Ongars River. Defendant was the proprietor of a farm situate higher up the river. It had been held by a Circuit Court that at a certain upper part of its course the river was a public perennial stream, but it was shown that as far as the portion in dispute was concerned, the "river" consisted merely of certain pools fed by springs which originated on various private properties, the water of which the owners of such properties had used as their own beyond the term of prescription. There was no continuous flow in the river save after heavy rains, and then only for a few days.*

*Held, that the portion of the Ongars River in question was not a public perennial stream.*

*Held further, that the evidence did not disclose that the plaintiff had any servitude or prescriptive right in virtue of which he could claim any portion of the water of the river.*

This was an action brought by Frans Willem Kock, of the farm Jan de Langes Fontein, division of Richmond, against Johannes Frederick Theron, also of Richmond, for a declaration of rights.

Plaintiff's declaration was as follows:

1. The plaintiff is Frans Willem Kock, a farmer, residing on the farm Jan de Langes Fontein, in the division of Richmond; the defendant is Johannes Frederick Theron, residing in the village of Richmond.

2. The plaintiff is the registered owner of the said farm Jan de Langes Fontein, and the defendant is the registered owner of the farms Bethel and Vernietwerk, being sub-divided portions of the farm Gegundefontein, in the said division.

3. Portions of defendant's aforesaid farms adjoin plaintiff's farm, and the Orange River, a perennial stream, flows through part and past the farms of plaintiff and defendant, the bed of the said river being the boundary between plaintiff's and defendant's properties for a considerable distance.

4. In the original diagram of the plaintiff's said farm, which was granted to one G. G. van Niekerk in the year 1846, the said river is shown as being the boundary between it and the portion of Gegundefontein, now known as Bethel, and there is a provision in the title deed of plaintiff's said farm, that a certain pool in the river shown on said diagram shall be used in common between plaintiff's said farm and Gegundefontein.

5. The said river consists, in ordinary times, of a number of pools supplied from water arising in the bed of the river, and the plaintiff and his predecessors in title have always enjoyed the use of the water flowing in the river from the sources aforesaid for the purpose of watering their stock and irrigating their lands.

6. And the plaintiff further says that as a riparian proprietor he is entitled to a reasonable share of the water in the said river for the purpose of irrigation and of the watering of the stock.

7. In or about the years 1903 and 1904 the defendant, by himself, his servants or agents, constructed a furrow upon his said farm Bethel, and by this means let out and diverted all the water in the said river on to his own lands at a point above the aforesaid common pool, and uses the same for his own purposes.

8. As a result of defendant's operations, there is no water flowing in the said river available for plaintiff, and the common pool is dry; plaintiff has been deprived of all water in the said river for watering his stock, and for the irrigation of his lands.

9. And the plaintiff further says that the defendant has diverted and used far more than the reasonable share of the water of the said river to which he is entitled.

10. By reason of the aforesaid wrongful and unlawful acts of the defendant, the plaintiff has been greatly injured in his property and has suffered loss in the sum of £100 sterling.

11. The plaintiff claims: (a) An order restraining defendant from diverting all the water of the said river on to his own lands, or from diverting more than a reasonable share in the water of the said river, or from diverting the water in the said river in such manner as to cause the said common pool to be dry. (b) Payment of the sum of £100 sterling, being damage sustained by the plaintiff by the wrongful and unlawful acts of diversion aforesaid. (c) Alternative relief. (d) Costs of suit.

Defendant's plea and claim in reconvention were: For a plea the defendant says:

1. He admits the allegations in paragraphs 1 and 2 of the declaration, save that he says that the correct name of the farm referred to as Vernietwerk in the latter paragraph is Botha's Kraal.

2. He admits that portions of his farms adjoin plaintiff's farm, and that part of the course of the Ongers River passes through his (defendant's) property, and that, as to another part, it passes past plaintiff's and his (defendant's) farms, and (subject to what is stated in paragraph 10 hereafter) the bed of the said river is the boundary between their respective properties for a considerable distance, but he denies that the Ongers River is a perennial stream, in so far as that portion is concerned by which plaintiff and defendant are affected or as to any other portion.

3. He does not admit the allegations in paragraph 4, and puts the plaintiff to such proof thereof as he may be prepared to adduce at the trial.

4. He admits that in or about the year 1905 he constructed a furrow upon his farm Botha's Kraal, and led out of the Ongers River the waters flowing from two fountains, both on his (defendant's) farm Bethel, situate in the Ongers and Leeuwpoot Rivers respectively, but he says that the said waters were not portion of a perennial stream, and plaintiff possessed no rights therein, and what he (defendant) did was done lawfully, and as of right and in respect of water rising on his lands and not forming portion of a perennial stream.

5. He denies that he has acted wrongfully and unlawfully in anything which he has done, and that plaintiff has suffered damage in the sum of £100 or any part thereof by reason of any act for which he (defendant) is liable.

6. Save as herein admitted, the defendant denies the allegations in paragraphs 5 to 10 (both inclusive) of the declaration.

Wherefore he prays that the claim be dismissed, with costs.

And for a claim in reconvention, defendant (now plaintiff) says:

7. He craves leave to refer to the allegations in the preceding paragraphs.

8. He annexes hereto a diagram on which is approximately indicated *inter alia* the course of the Ongers River over his property, and its further course, in so far as it forms a boundary between the respective properties of the parties hereto.

9. He says that at the points S and L and X and Y the river possesses double river beds, the one being indicated by a red line and the other by a black line.

10. He says that the true river boundary between plaintiff's (now defendant's) and his properties is indicated by the black line running from the point C to L, thence by the red line to the point X, thence by the black line to the point Y, and thence by the red line to the point K, but plaintiff (now defendant) wrongfully and unlawfully claims that it runs along the red line from E to K, and has wrongfully and unlawfully erected a fence, which is indicated by the dotted black line, and has thereby deprived defendant (now plaintiff) of the triangular portions of land marked CLE and XZY respectively.

Wherefore defendant (now plaintiff) prays: (a) Declaration that in respect of the portions of the boundary in dispute the true boundary is that indicated by the black lines CL and XZY, and that the triangular portions of land indicated by the spaces CLE and XZY are the property of plaintiff. (b) Such further and other relief as may seem meet, together with (c) costs of suit.

Plaintiff's replication and plea to the claim in re-convention were: For a replication to defendant's plea the plaintiff says that, save in so far as the said plea admits any of the allegations in the declaration he denies all and singular the allegations of fact and conclusions of law in the said plea contained and joins issue thereupon and again prays for judgment with costs of suit. And for a plea to the claim in re-convention the plaintiff, now defendant in reconventions, says:

(1) He denies that the true river boundary between his property and that of plaintiff in reconvention is represented

partly by the black and partly by the red lines on the plan annexed to the claim in reconvention, and says that it is represented approximately by the red lines on said plan.

(2) He admits that he has erected a fence along the river bank, but says that he does not claim the fence as his boundary, but the middle of the river, on the bank whereof the said fence runs.

(3) He denies that the triangular portions marked C L E and X Z Y are the property of plaintiff in reconvention.

(4) He does not admit that the pool marked as common on the diagram of plaintiff and defendant is upon the course of the river as marked in black lines on the said plan.

Save as above, he denies the allegations in the said claim. Wherefore he prays that plaintiff's claim may be dismissed with costs.

Mr. Searle, K.C. (with him Mr. W. P. Buchanan), for plaintiff. Mr. Schreiner, K.C. (with him Mr. Benjamin), for defendant.

Petrus A. Maskew, Government Land Surveyor, Cape Town, said that in January last he surveyed the river in dispute and prepared the plan produced. There was a well-defined course, but no water in the river.

Mr. Schreiner cross-examined witness at considerable length in regard to the position of affairs on the ground.

The plaintiff was next called.

In cross-examination, witness said he claimed that the true boundary of his property was the fence which he had erected. The fence was within his property, but the boundary line, he maintained, was the bed of the river. He claimed that he was entitled to take his fence to the middle of the river. In the average year the river for six or seven months flowed down in a good stream to Petruisfontein. Richmond had a very erratic rainfall. The rain-gauge showed a fall of from 10 to 15 in. per annum. The water from the fountains ran for six or seven months a year in such a stream as to reach Mr. Booyesen's farm at Petruisfontein; he referred to the period prior to the diversion. He claimed that the common pool that received the fountain water referred to in his declaration was in the river bed. He could not say where the pool was now, because it had been washed away. Witness had only about 20 years' knowledge of the farm.

In re-examination, witness was proceeding to say that he made an arrangement with Mr. Theron, but—

Hopley, J. (interposing): I am sorry you did not come to an agreement with Theron instead of coming here, because this litigation is going to cost a good deal of money. I don't know which of you will have to pay.

Philip Jacobus Kock (brother of the plaintiff), formerly residing at Jan de Langefontein, and Johan G. du Plessis, farmer, Tarka district, a former resident and owner of the farm, having been called,

George Doran, a farmer, of Richmond, stated if the fountain water was not taken out of the river there would be a strong continuous flow.

Mr. Searle closed his case.

Andries Jacobus Burger, a retired Richmond farmer, who had been farming in the district from 1854 to 1896, and Rudolph Phillipus, described the neighbourhood and the system of taking water from the river. The latter stated when he first knew the place there was no spring in existence like the one in question.

Further evidence having been called for the defence, Mr. Schreiner closed his case.

Mr. Searle: The plaintiff claims that the Ongers River is a perennial stream, and that the defendant has interfered with his (plaintiff's) reasonable user of the same. In 1903 the defendant constructed a furrow, and the result was that the pool to which both parties had a right of user became dry. In this case there are two points to be considered: (1) As to the water; (2) as to the land. In January, 1846, grants were made of both farms within fourteen days of each other. In the oldest diagram the Ongers River is given as a boundary and that shows that our predecessor in title had a right to water. Then in a subsequent diagram a "pool in common" on the river is marked. In the transfer deed of Vernietwerk it was stated to be Government ground. In 1853 one Du Plessis became owner of Jan de Lange Fontein, and his diagram shows the river in the same position. Old Mr. Burger then came to live upon Gegundfontein. In the diagram of 1873 the river is represented by Mr. Meiring as falling within plaintiff's property, and so also in the diagrams of 1864 and 1865.

[Hopley, J.: It is common cause that the bed of the River was the boundary?]

The diagrams show the river boundary and a common pool in the river. The diagram of 1865 was made when J. de L. Fontein was cut off from the remaining extent. As to the common pool nobody now knows where it was or when; but documents do not bear out the statement that it was 380 yards from the river. It has again been suggested that the pool may have been in the old bed of the River. Du Plessis' farm has been occupied by himself, and his predecessors in title have lived on the farm over 50 years. Du Plessis' three sons have lived on the farm over 20 years. The veld was very good in the neighbourhood of the river. If it was a dry farm how came these people with flocks and cattle to live on the farm for fifty years. From 1862 to 1873 there was no irrigation and no cultivation. Then

Pretorius married the widow Burger, and did some cultivation, especially from 1874 to 1876. Pretorius was there in 1863, though he may not have been on Botha's Kraal, and not on Bethel. In 1863 Surveyor Meiring recognised that the river was the boundary, and Stretch's diagram agrees. Du Plessis farmed as a stock farmer till 1894. Kock and Theron then purchased the place. Theron watered his stock at the river for some seven years, apparently with Kock's permission.

My next point is: "Has this River a permanent source, a well-defined course, and is it capable of common use?" Those are the three points the Court will consider in determining whether it is a permanent stream. See *Van Heerden v. Wege* (1 Appeals, 180) and Juta's Water cases (427, 440, 441). That is the law on the subject. Defendant's own witnesses admit that this river is capable of common use, though it is occasionally dry. That is the evidence on both sides, and it would be most inconvenient to hold that this river is a permanent stream at Richmond and again at Enslin, but it is not permanent between those two places.

[Counsel proceeded to deal further with the evidence.]

The water is taken some 1,450 yards from the Langes Fontein boundary, first in the river, then in a sluit, and then in a pipe, and that is a very important point. No one may take water for irrigation until the lower proprietors have had their user for ordinary purposes. *Hack v. Van der Merwe* (Buch. 1874—148), *Relief v. Louw* (Buch. 1874—165), Juta's Cases (432), Maasdorp's Colonial Law (Vol. 1, 114, 115).

Then again it cannot be argued that if the old course of the river was the boundary and the river has changed its course that an original riparian proprietor can be cut off from the river.

[Hopley, J.: Suppose the river had changed its course, say, 500 miles, would an original riparian proprietor still be a riparian proprietor?]

That is a different question, but see *Beaufort W. Municipality v. Maddison* (11 C.T.R. 582). There is very little authority on the point, but see Angell on Water Courses, par. 57 and the footnote there. Voet (41—1—18 to 20) refers rather to the rights of the Crown. Hunter's Roman Law (p. 129, 1st edition), citing Justinian. In an American case it was held that where a river had changed its course the land between the two courses had not changed its jurisdiction. The old diagrams all seem to show that the river has not changed its course. See Maskew's diagram and compare it with the diagrams of 1864, 1865, and 1873.

[Hopley, J.: The evidence shows that the river has changed its course since 1853.]

Libenberg said that the water was running in both channels. See *Vermaak v. Palmer* (Buch., 1876, 25), particularly the judgment of De Villiers, C.J., at p. 35. Here there has been user of the water for over 30 years, and I submit that it has not been proved that it ever changed its course.

Mr. Schreiner: The plaintiff alleges that we have diverted certain water which supplied a common pool, that he is entitled to use the water of the river for primary and secondary purposes and that we have obstructed him in the exercise of that right. As to the common pool, it is referred to in the titles of both parties. This pool was either in the river or outside of it. There is a pool which was used in common, but we do not say that the pool referred to was in the river. It would appear that there were two pools: one perhaps in the river and the other some distance away. We contend that there was a pool on the boundary between Langes Fontein and the neighbouring property. Possibly the so-called "pool" at the beacon may merely have been a fresh water vley. The pool may have been by the old loop but not by the new, which is over 200 or 300 yards from the stream. See *Mouton v. Van der Merwe* (Buch., 1876, 18 and 22). Also see 26 of Land Beacons Act. In subsequent cases it has been admitted that the Court must be guided by the position of beacons.

Then we know that this pool is 120 yards from the old loop and 263 from the new. These pools would be far from the beacon, but the beacon was far from the river. Taking the evidence it would seem that the pool about 25 yards from the river was the one referred to. If the pool was in the river, was it in the old loop or in the new. There is no question but that the old loop is of considerable antiquity. The probability is that the pool was in the old loop.

[Hopley, J.: We have nothing to guide us save probabilities.]

The evidence does not support the contention that this is a public perennial stream. We have a source and a defined channel, but there is no continuous flow. There is no *flumen*, but in parts there is a *rivus*. From *Hough v. Van der Merwe* (Buch., 1874, 148) our law as to water is judge-made, but in no case has it been laid down that a river which does not flow throughout the greater part of the year is a public stream: see *Vermaak v. Palmer* (Buch., 1896, 25) and *Jordaan v. Winkelman* (Buch., 1879, 79) where it is shown that a negative servitude cannot be acquired by prescription. There must be proof that the river is a *flumen publicum*. Here the river runs only for a day or two after

rain. In *Van Heerden v. Wiese* (1 Ap. 5) the river flowed for months after a day's rain. The decision of this Court tend to extend the meaning of the term "public perennial stream," but the line must be drawn somewhere. The water of the Ongers River is not capable of public use.

[Hopley, J.: If this is not a *flumen publicum*, *Hough v. Van der Merwe* does not apply.]

Here there is a small spring rising on my client's land, and the plaintiff attempts to contend that we must let the water run down to the lower farms. Even if this be held to be a public perennial stream do we make any unreasonable use of it? There is no rule that the lower proprietor is entitled to preference over the upper. The upper proprietor has a preferent right to the use of the water for primary purposes and nothing more if the stream be capable of common use. This stream is not capable of common use. As to the claim in reconvention, we do not press very much for the triangular piece of ground. As to the loop the evidence is very scanty, but it goes to show that the plaintiff annexed the ground between the old loop and the new. There is but little case law bearing on this case, but see *Angell on Water-courses* (Sec. 57) *Grotius De Jure Belli ac Pacis* (Bk. 2, Cap. 8, Secs. 8 to 17). Here alluvion is the only title by which they can come in. There are side lights on the question of alluvion in *Voet* (41, 1, 18), *Burge* (Vol. 3, p. 418), *Instit.* (2, 1, 20).

[Hopley, J.: These authorities are irrelevant as here there is no question of alluvion.]

If they have not a title by alluvion they have no title at all. *Grotius* (2, 9, 12, 13 and 18).

Mr. Searle (in reply): The differences between us and the other side are two. In *Vermaak v. Palmer*, *Jordaan v. Winkelman*, and *De Wet v. Hiscock* (1 E.D.C. 249) there was no question of prescription, but of natural right. In *Southey v. Schoombie* (1 E.D.C. 288, 289) the river in question was very similar to the Ongers River. Here, as in *Southey's* case, the upper proprietor claims to divert all the water. Then again, I can find no authority for saying that a perennial stream must flow during the greater part of the year. Then as to common user, it is said that if the upper proprietor uses water for irrigation there would be none left for the lower proprietors. That is the very position overruled in *Retief v. Louw* (Buch., 1874, 181) and Ap., 1856 ) which was approved in *Hough v. Van der Merwe*.

[Hopley, J.: The Courts have never had to deal with a public stream which was just capable of supporting animal life and no more.]

But such a case is quit possible. In *Van Heerden v. Wiese* (1 Ap. 5) this river was treated as a permanent stream at Richmond. In some years the river is quite dry, and yet the Court held it to be a perennial stream. The water in the Ongers River is capable of common use because it has actually been used by a number of stock farmers on its banks.

[Counsel proceeded to argue further on the facts of the case.]

Hopley, J.: The first point to be decided is the nature of the Ongers River at the locality in question in this case. I was naturally predisposed to hold that this was a perennial stream, seeing that it had been decided in the case of *Van Heerden v. Wege* (1 Ap. 180) that the same river is a perennial stream some thirty miles below the point with which we are at present concerned. On considering the report of that case it is apparent that the finding of the Circuit Court Judge and the subsequent judgment of the Court of Appeal largely depended on the fact that the Circuit Judge had believed evidence to the effect that at that portion of the River a day's rain would cause the river to flow continuously for two months. In considering the merits of the present case, I am not bound by that finding, nor by the decision in that case, and as far as the present case is concerned the evidence certainly is not to the same effect; since the utmost that has been deposed is that a fairly good rain will cause the river to flow for three or four days, and an exceptionally heavy rain for some time longer. Now this river has (so it is said) its source on Toon Bothasfontein, and the evidence shows that on that farm there is a fountain arising in the bed of the watercourse, the water from which fountain the owners of the farm have always used and entirely diverted for their own purposes upon their own farm; so that none of it goes down the river, or reaches the next farm. I do not think that such a water can properly be called the source of a river. It seems to me rather of the nature of a private water, arising, it may be in a watercourse, but used and treated entirely as a private water. The only water that runs along this water-course from Toon Bothasfontein to the properties lower down is that which finds its way into it from the area which it drains when there is rain. The next farm in the course of the river is Driefontein, on which is situated the town of Richmond, and which is the Commonage of that town. On that farm and in the watercourse in question a strong fountain breaks out. That is the main source of the Rich-



mond water supply. Its water is taken, carefully conserved, and every drop of it used for the water supply of the town, so that none reaches the next farm along the course. Other fountains lower down, and before we come to the water in dispute, arise in the river-bed, and on each farm they are treated in precisely the same way as the two I have mentioned; the farms on which they arise taking the exclusive use of their waters, and allowing none to go down to their next neighbours. Confining ourselves to original grants and neglecting modern sub-divisions; the fourth farm which this river reaches is the farm Gegundefontein which has been sub-divided into four portions two of which are named "Bethel" and "Botha's Kraal," both the property of the defendant. The boundary of Botha's Kraal on its eastern side is the river in question, which there divides it from the farm Jan de Langesfontein, the property of the plaintiff. Before it reaches this boundary the Ongars river flows over Bethel, on which farm it is joined by a small river called the Leeuwpoot River. In this latter river, a little way from the junction is a weak spring, and in the Ongars River, also before the junction, there is a fairly strong fountain. These springs are both on "Bethel," which, as I have said, belongs to the defendant, and they have both become stronger and slightly changed their positions in comparatively recent years owing to the washing away of soil by floods, such processes disclosing more of the underground water and deepening the course by which it can escape. The united water of these two fountains the defendant has diverted below the junction of the two watercourses and has taken to his land at Botha's Kraal, where all the water (about sufficient in ordinary times to fill a three-inch pipe) is used. It is practically upon the flow of these two fountains that I am asked to declare the Ongars River a perennial stream at this point, for any other flow of water there is due to rain, and the average rainfall in the district is said to be about 15 inches. Such rainfall is distributed throughout the year, and the water in these watercourse after a rain flows only for a few days, unless the rain be of an exceptionally large and universal nature. I cannot in such circumstances hold that the River in that locality is a perennial stream, and I think it would be an absurd abuse of language so to describe it. I think that these fountains are private waters rising on the defendant's ground, and that he has used them as he lawfully might, and as all those living higher up the river use their waters, which arise in the bed of this river.

The next point is whether over these private waters the plaintiff is entitled to

any servitude. The only trace of any such right is to be found in the terms of the deeds of grant which for both farms J. d. Langersfontein and Geguldsfontein were made in January, 1846. In those deeds it is a condition that a certain pool, described as being at the southern beacon on the boundary between the two properties should be in common to the two farms. Now there is no beacon actually on the bank of the river, although I think that possibly the surveyor who surveyed J. d. Langersfontein in 1830 may have intended that it should be erected there; but it stands some distance from the river. It must, however, on the evidence, be taken to be the original beacon; and no evidence has been adduced that there ever was any pool in the river at or near the point. It was urged for the plaintiff that the pool must have been in the river; but on referring to the original diagram of 1830 I cannot find that any pool is shown in the river, or that any locality is exactly assigned for its position.

There is evidence of the existence at one time of a small vlei between the beacon and the river; but that has disappeared as a sluit from it to the river has been formed, and the water is no longer retained. It may be that it was the "common pool," but, if so, it has disappeared; and if the pool in 1830 was in the river that likewise has disappeared through the river bed having been washed out, so that no water lies collected at that place. In any case there is no evidence on which I can find that at present any servitude over the waters of these fountains exists.

I come lastly to the consideration of the question whether there has been such use of the water as to give the plaintiff's farm a right by prescription to a share of it. The rights of the parties must be taken to date from 1846, when their original grants were made. The neighbouring owners were for more than half a century on the most friendly terms, there were no fences and practically no boundaries, the cattle of each farm grazing unmolested beyond the boundaries of their owner and finding water at any portion of the river where it might be conveniently obtained. In 1862 and again in 1874, 1875 and 1876 the defendant's predecessors in title turned out the water of these fountains, much in the same way as the defendant is now doing, for the purposes of agriculture, without any protest from the predecessors of the plaintiff. It is true that no inconvenience to the latter arose as their stock were free to get water at the point of diversion or anywhere they could find it; but at the same time there was such an assertion of a right to use this as a private water, which right was put into practice at

such a time as to exclude the possibility of the acquisition of prescriptive rights by the plaintiff and his predecessors. I hold therefore that the plaintiff has established no rights to any portion of this water, and that his claim in convention must fail.

With regard to the claim in reconvention I was disposed to the view that the present flow of the river at the point in dispute should be held to be the boundary, unless it should be proved satisfactorily that at the date of the grant the course was different. The original diagrams and grants clearly show that, whatever may have been the exact spot at which the beacon between the two farms was intended to be placed, the river was the actual boundary fixed upon. That in my view means the river as it then ran and not as it afterwards might run. Close to the boundary beacon is the piece of land in dispute, lying between the present course of the river and a considerable sluit to the east of it which has been spoken of throughout this case as the "Onde loop," or ancient course of the river. That is now silted up at its mouth and has been dammed up near its exit by the plaintiff, who has thus caught a considerable quantity of water at that point; but he has placed his fence right up to the bank of the present, or western course of the river. The piece of land between these two courses is about four morgen. I have come to the conclusion on a careful examination of the diagrams and on the evidence especially of Mr. Burger, senr., and of Mrs. Liebenberg, that the Eastern arm on the "Onde Loop" was the course of the river in 1846 and was what was intended to be the boundary.

Another small piece of ground near Patryfontein has also been similarly enclosed by the plaintiff, but no evidence has been adduced to show that the present course of the river up to which he has fenced was not the original course. As to that portion therefore his fence has been rightly placed; but as to the fence at the beacon it has enclosed land belonging to the defendant, who is plaintiff in reconvention, and his claim to this land must be allowed. By consent, however, of his legal representatives it is agreed that in setting back his fence to the "Onde Loop" he may place it along the western bank of the "Onde Loop" so as to have exclusive use of the water which he has dammed in that place.

Judgment in reconvention must therefore be for the plaintiff as to his main claim with the modification now consented to.

The plaintiff must pay the costs in convention and as defendant in re-

convention he must pay the costs of the claim in reconvention.

[Plaintiff's Attorney: P. De Villiers. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Jury.]

LIQUIDATORS OF ROYAL { 1906.  
HOTEL CO. V. RUTHERFORD. { Mar. 7th.

Builder—Retention—Insolvency.

*In an action by the trustees of an insolvent to eject the defendant from a portion of certain buildings which he had built by contract for the insolvent, it was proved that he still had the keys of the rooms in his occupation, and that the amount still owing to him for the building of those rooms was £2,000.*

*Held in a charge to the jury, that the defendant was entitled to retention of the rooms until that sum was paid.*

This was an action brought by the liquidators of the Royal Hotel Company, Limited, against Charles Thomas Rutherford, builder, for an order of ejectment from certain portion of the company's property in Plain-street, Cape Town.

Plaintiffs, in their declaration, said that in 1903 a contract was entered into between the company and the defendant whereby the latter undertook to erect certain buildings and works at the Royal Hotel. Defendant proceeded to carry out the works and supply materials in connection therewith in terms of the contract, and received certain payments from time to time in respect of work done upon the architect's certificates, but none of such payments were ever appropriated to any particular portion of the said works. The works were completed on the 12th December, 1904, and on

the 10th January, 1905, there was still unpaid by the company £3,324. Certain arrangements were made between the defendant and the company, and that a payment was made of £2,000 on the 27th January, 1905, to the defendant, who thereupon gave the company possession of the bedrooms, servants' quarters, and kitchen, and also of the Arcade. The hotel was formally reopened in January, 1905, and the company had since then had possession of the said premises, with the exception of the shops in the Arcade, of which defendant had retained possession. In September, 1905, the company went into liquidation. The plaintiffs desired to dispose of the premises, and for that purpose wished to obtain possession of the premises. The plaintiffs had tendered and again tendered against delivery of the said shops the sum of £750, with interest at 6 per cent. from the completion of the said contract, which they said more than represented any sum to which defendant might be entitled by virtue of any legal preference or lien that he may have. Plaintiffs prayed for an order of ejectment against defendant.

Defendant, in his plea, denied that he agreed to give up possession of the Arcade or the shops, that he gave the company possession of the Arcade, or that they ever had possession thereof. He said that there was a sum of £2,036 due to him in respect of work done and materials supplied in connection with the erection of the Arcade and shops, and that he was entitled to retain possession until payment of the said sum.

Mr. Burton (with him Mr. Van Zyl) was for plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner), was for defendant.

Mr. Burton said that the defendant apparently accepted the basis that he had only retained possession of what he was in possession of as against work done and materials supplied in respect of that particular portion of the building, so that it seemed that there could only be two substantial issues. One was whether defendant ever gave plaintiffs possession of the Arcade, which defendant denied, or what would be the value of the Arcade and shops, or the shops alone.

George Charles Starkey, secretary to the liquidators of the company, and formerly secretary of the company, said that the company was formed in 1902, and the final order of liquidation was granted in September, 1905. The total amount of the defendant's contract in the first instance was £20,632, but afterwards certain extras were agreed upon which brought the amount to £22,786 6s. 4d. The balance remaining unpaid on the whole contract was £2,736 6s. 4d., exclusive of interest, which to date would be £193 12s. 6d. On the

10th January, 1905, the amount unpaid on the architects' certificates was £3,324. On the 27th January, 1905, £2,000 was paid to defendant, leaving £1,324 still due, to which had to be added the final certificate of the architects, viz., £1,412 6s. 4d. The Arcade running through from Plein-street to Zieke-street, could be closed at each street by telescopic gates. In the early portion of January, 1905, the keys were in the possession of the defendant, but about the middle of January the keys were handed over to Mr. McCarthy, who was then resident director of the company. Mr. McCarthy was not now in the Colony. Defendant himself told witness that he had given the keys to Mr. McCarthy. From that date onwards the Arcade gates at both ends were daily opened and shut by the servants of the company. There was a formal re-opening of the hotel on the 13th January, 1905. Witness had seen the public making use of the Arcade as a public thoroughfare. There were 11 shops in the Arcade. Defendant had kept the keys of the shops. This state of affairs continued right up to the liquidation, and to the present time. Since the liquidation repairs had been executed by the liquidators on the roof of the Arcade, owing to damage done by wind about six or eight weeks ago. The defendant commenced an action against the company some time ago, but did not proceed with it.

Cross-examined: Witness believed that the summons was issued before the liquidation. The company owed defendant £2,734. The liquidators had disposed of the property, including the shops. Witness did not know whether the final certificate of £1,400 given by the architect included £1,000 retention money.

Further evidence was given on behalf of the plaintiffs by John Frederick Glogg, manager of the hotel; Charles Dance, night porter; Arthur Thos. Babbs, quantity surveyor; Francis Ed. Masey, architect; and Wm. Hawke, architect.

Mr. Burton closed his case.

Charles Thomas Rutherford (defendant) said that under the contract the company were entitled to retain 20 per cent. until they had £2,000 in hand. Then witness was to be paid in full. In May they had £2,000 in hand. In September the hotel premises were practically finished, with the exception of small patching-up work. There was nothing finished at that time in the Arcade. Practically, the whole of the work in the Arcade was done after September. The stanchions, with the brick-work round them, formed part and parcel of the party walls inside the shops. Witness declined to give up any part of the place until he was paid his money, though he gave the company possession of the kitchen and back part of the premises. Witness retained control over the

Arcade, and the building. In January, 1905, the company paid him £2,000—£1,000 retention money and £1,000 which he took as part of the other money. He had never agreed with the directors to give up the Arcade. The first proposal made to him by the directors was that he should retain a lien on the Arcade for the balance of the account. He subsequently told Mr. Starkey that he could not enter into such a thing, as his attorney advised him that it was impracticable. Witness gave the company the keys of the lounge, bar, and lavatories. He told Mr. Starkey when he received the £1,000 that he was giving nothing away. He had two keys for the telescopic gates of the Arcade, but afterwards he received a letter from Mr. McCarthy requesting him to let him have the Plain-street key. Witness gave up no rights, but he handed the key to Mr. McCarthy as a personal favour. He subsequently discovered that the key opened both the Plain-street and Ziekie-street gates. Of the retention money of £1,000 paid to him, he attributed a proportion to the work done on the Arcade. He took the proportion to be in the ratio of £9,000 to £22,000.

Evidence was also given by Joseph Dunn, of Dunn and Co., builders and merchants; Thomas Davy, plasterer; Charles Armstrong Gibbs, formerly of the Asphalte Company; Johan Jansen, one of the directors of the defunct company; Thomas Hitchin, quantity surveyor; and Maurice Cowan, architect.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said that whatever doubts there might be upon the different points raised in this case, there was no doubt upon one point, that there was still due to Mr. Rutherford, as the contractor for the rebuilding of the Royal Hotel, the sum of £2,736 6s. 4d. Unfortunately, however, the company, who were the owners of the hotel, had become insolvent, and now it became a question in competition with creditors of this company whether Mr. Rutherford was to receive the payment tendered by the plaintiffs or whether he was to receive the payment which he himself claimed by his plea. The plaintiffs tendered £750, and said that was all that was owing. Defendant said that he was quite willing to deliver the shops, the part of the building that he had possession of, upon payment to him of the sum of £2,036, not the full sum. So that, even if judgment were given for the defendant, he would still be a loser to the extent of £700, unless, as a concurrent creditor, he could obtain that amount from the estate. The claim of the defendant was that he was entitled to retain this property or so much of it as he was in possession of, until the money in

respect of the portion occupied by him was paid. It became a matter of great importance to the jury to decide what was the property actually in possession of the defendant. Defendant said that he had the shops as well as the Arcade, while plaintiffs said that he had the shops only, and not the Arcade. Plaintiffs relied upon the fact that defendant had handed over the key of the Arcade to the manager of the hotel, and under all the circumstances he (the learned Judge) would have great difficulty in holding that after the defendant had lost control of the Arcade, he could still be said to have actual possession. As to the shops, it was common cause that these shops were still in the possession of the defendant. Then the further question arose as to what constituted the shops. Plaintiffs' counsel seriously contended that the girders and stanchions which were fitted into the walls of the shops were really not part of the shops. Well, he (the learned Judge) thought that the contention was wholly untenable. He considered that the value of the shops, of which defendant had possession, was £7,972.

The jury found: (1) That the contractor had no lien on the Arcade; (2) that the contractor had a lien on the shops; (3) that the value of the shops was £7,972; (4) that £1,000 of the £2,000 paid to the contractor by the company in January, 1905, was retention money; and (5) that the amount claimed by the contractor is due, viz., £2,036.

Judgment was entered for an order of ejectment against defendant upon payment to him by plaintiffs of £2,036, plaintiffs to pay costs.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller. Defendant's Attorneys: Van Zyl and Buissinné.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

*Ex parte* MOZES. { 1906.  
Mar. 8th.

Dr. Greer again mentioned this matter, which was an application for an order requiring the A.R.M. of Cape Town to issue a special marriage licence to the petitioner, Abm. Mozes. Counsel said that the matter was originally mentioned

before the Chief Justice on Monday last, and had been allowed to stand over for production of the Magistrate's reasons for refusing the licence and to enable him (counsel) to look into the Belgian law as to divorce. He understood that the Magistrate's reasons had now been filed.

Maasdorp, J., said that as the application was originally mentioned before the Chief Justice, it had better stand over until his lordship was sitting, so long as there appeared to be no urgency.

LEVY V. INSOLVENT ESTATE { 1906.  
EPSTEIN. Mar. 8th.  
" 9th.

This was an action brought by Sophie Levy (born Epstein), of Kimberley, and formerly of Worcester, against the trustee in the insolvent estate of Dora Epstein (plaintiff's mother), for restoration of certain property, alleged to have been wrongfully seized, and also for damages.

Plaintiff, in her declaration, said that she was married out of community of property to one Percy Levy, and was by him assisted as far as needs be in this action. Defendant was the duly elected trustee in the insolvent estate of Dora Epstein. In April, 1905, he wrongfully and unlawfully seized and removed certain four cattle, wearing apparel, and household effects, property of the plaintiff. Portion of the goods had been returned, but defendant wrongfully and unlawfully detained the cattle and certain other goods of the value of £300, and, although requested to do so, refused, and still neglected to deliver the said cattle and goods to the plaintiff. In May, 1905, plaintiff obtained a rule nisi restraining defendant from selling the said four cows as assets in the insolvent estate of Epstein. By reason of the defendant's wrongful and unlawful acts, plaintiff had suffered damages in the sum of £100. Plaintiff prayed for the rule nisi be made absolute, an order compelling defendant to deliver the said cattle and other goods forthwith, or, in the alternative, payment of £300 for the cattle and goods, and £100 damages.

Defendant, in his plea, said he did not admit that any of the said wearing apparel, and household effects, retained by him were the property of the plaintiff, and he put the plaintiff to proof thereof. Plaintiff had not furnished to him any proof of ownership. He denied having removed the cows, which, at the time of the voluntary surrender, and at all times material to the suit, were in the possession of one S. Smeaton, who claimed to have a right of pledge over same. He prayed that the claim might be dismissed.

Plaintiff, in her replication, said that the cows were wrongfully and unlawfully

removed from the possession of Mr. and Mrs. Johnson, by the duly-authorised agent of the said Smeaton. She denied that the said Smeaton had a right of pledge over the cows.

Mr. Alexander was for the plaintiff; Mr. Upington (with him Mr. De Villiers) was for defendant.

Sophie Levy (the plaintiff) said that she was the wife of Percy Levy, and resided with him at Kimberley. About five years ago she was engaged to one Davis, in Liverpool. She came out to this country with her four sisters in March, 1904. She brought out all the things that appeared on the list, except a glass case, a blanket, quilt, rug, pictures, two bedroom carpets, two chairs, and a sewing machine. She had prepared the list from memory in Kimberley. The reason why she brought so many things was that they had been preparing a home in England. At that time, Davis was in Liverpool, and witness was in Manchester. When witness arrived in Cape Town she was met by Davis, who had come out to this country about nine months previously. Davis handed to her £80, and she had in her possession £35, which she had saved from her work. Witness had earned her own living since she was 12 years of age. From Cape Town witness went to Worcester, and stayed with her mother. She took the goods up to Worcester. Witness had a quarrel with one of her sisters, and she took a room with another lady, residing at 17, Tulbagh-street, Worcester, about two months before her mother surrendered her estate. She took away all the things comprised in the present claim. Somebody broke into the room afterwards, and removed the things. Witness was not there at the time.

Mr. Alexander: They were taken under a search warrant.

Witness (in further evidence) said that among the goods taken by the trustee were articles belonging to Mr. Levy, including a Jewish Bible. The trustee had returned some goods both to Mr. Levy and witness. She was married to Mr. Levy in June last. Her mother had carried on business in Worcester, and witness had handed over to her, first, £35, and £20 afterwards. Witness went on to describe her transactions with Mrs. Johnson, who had handed to her the four cows in security for £66, money lent. Dr. Smeaton, who had the cattle, was the landlord of the premises where witness had a room, and also of the premises where her mother carried on business. She suspected that Smeaton was not acting fairly, and she then sent Johnson to take away the cattle. Witness had not pledged the cattle to Smeaton; he had not lent money to her, but he advanced loans to her mother. Witness's attention was afterwards called to an advertisement



in the "Worcester Standard" of a sale of the cattle, and she instructed her attorney to stop the sale.

Cross-examined by Mr. Upington: Witness left England by the Durham Castle on the 19th March, 1904, and two days after her arrival in Cape Town she went to Worcester. The receipt given by Mrs. Johnson for the loans from her had not been altered from "Mrs. Dora Epstein" to "Miss Sophie Epstein." The pen that witness was using was bad, and she went over the paper twice. All the receipts were in her handwriting. She denied that any of the documents had been altered from her mother's name to her own.

Mr. Upington put in a number of the receipts, and asked his lordship to judge of whether they had not been tampered with.

Witness emphatically denied that any of the receipts had been altered. One of the receipts which Mrs. Johnson had signed with a mark witness said was in Mrs. Johnson's handwriting. Her mother had borrowed £20 from Smeaton, and had signed an IOU. Her mother only signed one document at that time. Witness did not see a pledge. The insolvency was rushed on her mother.

Mr. Upington: You were not bringing out a stock for a drapery business? What you brought out was a sort of wedding trousseau?

Witness: There was some drapery bought on the Parade. I did not buy it; Mr. Levy bought it.

What were you going to do with this huge collection of stuff?—I wanted to have a home.

You could have a fairly "happy home" without 27 pairs of sugar-tongs?—Well, that was bought on the Parade. Mr. Lewy bought it in job lots.

Your comfort would not be materially diminished if you did not have 133 pillow-cases?—Well, I could have as many as I liked, couldn't I?

Certainly, but you bought this for the "happy home." Were you going in for entertaining, on anything like a large scale when you got to Kimberley?—I am not supposed to say what I am going to do.

There are 76 tablespoons?—I can have as many as I like.

As a matter of fact, we have had this stuff brought down here for identification. There is about half a ton weight of goods—drapery, crockery, tin-openers, and chocolates?—I suppose there was only a box or two of chocolates; nothing whatever belonging to my mother.

Where did you get the chocolates?—I was given presents of them.

Where?—I did not steal anything.

They were large boxes?—Yes, I was given presents of them.

At Worcester?—Yes, at Christmas time.

In further cross-examination, witness said that they received a draft for about £39 before they left England. This was to pay for the passage of witness (who was then 21 years of age) and the other members of the family. She believed the draft was sent by her mother. Witness also received £20 from Davis, who was at that time in Bloemfontein.

Further evidence was given on behalf of plaintiff by Mrs. Greenfield, of De Korte-street, Cape Town; Mrs. Francina Johnson, of Worcester; John Johnson, farm labourer (husband of the previous witness); Mrs. Lena Love (sister of the plaintiff), a housemaid employed at Rondebosch; Clara Taylor, of Cape Town, formerly of Worcester; Sarah Epstein, of Cape Town (another sister of the plaintiff).

Mr. Alexander closed his case.

Daniel Bland (trustee in the insolvent estate and defendant in the present case) said that the schedules of the insolvent showed the following: Assets, £76; outstanding debts, £66; liabilities, £160; deficiency, £18 2s. 6d. As a matter of fact, at the second meeting debts were proved amounting to £175. It was impossible to trace the proceedings of the insolvent through her books. In consequence of certain information he received from Mrs. Leigh (the landlady of the room where plaintiff had the goods stored), witness had a search warrant taken out. He applied for the key, but it was refused. The door of the room was forced, and certain things were found. He got a key from Mr. Townson, and closed the room for the night. Next day witness had the goods removed to the police station. He had made careful inquiries as to the goods since the claim was made, and he had made a demand for proof of ownership. In reply, he received a letter from Mr. Hirschberg (plaintiff's attorney), saying that he was prepared to produce proof of ownership. Witness sent back certain apparel, and a violin. Witness had never had possession of the cows. Smeaton had the cows. He arranged with Smeaton to bring the cows to the sale. Smeaton filed a preferent claim against the estate, and claimed that he was entitled to the cows under a pledge. Witness had not deprived plaintiff of possession of the cows, but he disputed the ownership claimed by plaintiff.

[Maasdorp, J.: Do you claim the cows for the insolvent estate?]

Mr. Upington: Smeaton claims the cows under a right of pledge in security for a debt.

Witness (in further evidence) said that Smeaton wanted the cows to be realised to pay out his claim. Witness thought that the proceeds would be more than sufficient to pay Smeaton's claim, hence he arranged for the sale. Plaintiff

had not produced any proof of ownership of the goods, which witness had retained.

Cross-examined: The cows had been sold by Mr. Smeaton since the interdict was obtained. Witness had not moved to set the rule aside. Mr. Smeaton had withdrawn the preferent claim of £20, which he had proved in the estate.

Mr. Alexander: As a fact, the rule of Court has been absolutely evaded?

Witness: Not by me.

Cross-examination continued: Witness had not tried to obtain an account as to the sale of the cows by Mr. Smeaton. He did not know whether there was any balance after Mr. Smeaton's claim had been satisfied and the expenses paid.

Daniel Cornelis Boonzaier was called to give evidence as a handwriting expert in regard to the receipts put in by plaintiff. He said that he was formerly in the Master's Office, and it was at that time his duty to scrutinise handwriting. The receipt signed by Francina Johnson had been altered from March to May; the date on the stamp had been altered. He was almost sure the word "Mis" had been altered. The date on another receipt had also been altered. The name had also been altered, it was now "Miss Epstein," but originally he should say it was "Mrs. Epstein." In a receipt dated the 17th August, 1904, he thought that there had been a subsequent addition of the letter "s" to the word "Mis." In another receipt it was evident that the name of the person to whom the receipt was made out had been altered. It might originally have been "Mis" or "Mrs.," but it was now "Miss." In other receipts it was apparent that alterations had been made. In several cases it was difficult to say whether originally the receipt had been made out to "Mis Epstein" or "Mrs. Epstein." It was apparent that an "s" had been added, and the letter "i" in each case was more heavily dotted than the other vowels in the rest of the documents. In one receipt the name "Miss Sophey Epstein" had been written over another name, which, in view of the information he had been given, was, he believed, originally "Mrs. Dora Epstein."

Cross-examined: Witness was told the theory of the defence that the receipts had been altered from the insolvent's name to the daughter's name before he examined the documents. The alterations were very glaring. In one of the receipts the name was clearly written "Mis Epstein"; no attempt had been made to add another "s" to "Mis," although there was plenty of room in the line.

Daniel Bland (the defendant) was then recalled.

In cross-examination, witness said that the amount of debts proved against the estate Epstein was about £179. The value of the stock taken over from Davies was about £140. That was the

value of the stock list, according to Mrs. Epstein's books. Witness could not give the stock that he took over as trustee. The stock at the sales realised £41 6s. 10d. There were a few other articles that he had kept back, which he should consider to be of the value of 25s. He did not think that the goods which he had retained, and which formed the subject of the present action, would realise above £75. He did not include the cattle in the estimate. They were principally people from the location that dealt at the insolvent's shop. Mrs. Johnson called upon him after he had advertised the cattle for sale by auction, and she implored witness not to sell the cattle, saying that they were her *bona fide* property. She had a document, from which it appeared that she had borrowed £50 on the cattle. The document did not show that the cattle were her property. The rule *nisi* was served on witness on the 12th May. He gave Mr. Smeaton notice that he was interdicted from selling the cows, and that he should not bring them to the place of sale on the following day. Smeaton sold the cows after the morning market in July. Witness still had his recourse as trustee against Smeaton. Smeaton had given notice to withdraw his claim against the estate on account of money lent.

Evidence was also given by Attorney Theron, Worcester; F. Lindenberg, Deputy-Sheriff, Worcester; S. Ley, boarding-house keeper; the Messenger of the Resident Magistrate's Court; Daniel Joseph, painter, Worcester; Henry Deenik, confectionery manufacturer, Woodstock; Alexander Turnbull Law, traveller for Alford, Wills and Abbott; James Wm. Bam, traveller for Van der Byl and Co.; Henry George Fisher, general dealer, Worcester; and Samuel Smeaton, a retired railway servant, Worcester. The last named said that he did not know the cattle had been interdicted when he sold them.

Several of the witnesses were called to speak to goods which they had supplied to Mrs. Epstein or had seen on her premises.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The Court has to decide whether the goods in dispute belonged, at the time of the insolvency of Mrs. Dora Epstein to the insolvent, or to her daughter (the plaintiff). Firstly, with regard to the cattle, it would appear that there had been certain transactions between Johnson and Mrs. Epstein in respect of the cattle. Whether, in the first instance, she was directly interested or her daughter, it would be difficult to decide; but the transaction ultimately came to this, that the parties considered it necessary to go to Mr. Theron to

have it reduced to writing, and the matter there reduced to writing was comprised in a receipt, dated the 12th January, for a sum of £66, in settlement of the purchase price of the cattle. Now, it is quite clear, in the face of this document, that it amounts to nothing else than this—supposing it to be genuine—that Johnson had sold to Mrs. Epstein the cattle, together with other things, and the payment was made in full settlement of the purchase-price. Mr. Theron says that he drew up the document on instructions from both parties, and both were present at the time. Then the cattle at that time vested in Mrs. Epstein. I will consider afterwards whether the genuineness of this document has been destroyed by further evidence. Some days afterwards Mrs. Epstein obtained a loan from Mr. Smeaton, and he consults Mr. Fisher in respect to it. The loan is arranged for, and an I.O.U. is received from Dora Epstein, and we have the evidence of Fisher that within a very few days a pledge was given in security of that loan, and he says that the pledge was in writing, and consisted of these very cattle, which, according to the receipt, were sold by Johnson to Mrs. Epstein. That was the position in which affairs stood, if we are to believe Mr. Fisher, in March. Both these documents are put in evidence. In March these documents were again seen by Mr. Fisher, the pledge being still in its original state, but he said that shortly afterwards it was altered. So, up to March, the genuine documents—because I believe Mr. Theron and Mr. Fisher—the genuine documents, untampered with, proved property in Mrs. Dora Epstein. Notwithstanding that the property is now claimed by the plaintiff, and she says that she can also produce genuine documents to show that the property was hers. She says that they consisted of receipts received from Mrs. Johnson, in which she acknowledges sums of money advanced by her to Mrs. Johnson, and that was the £66 which was afterwards represented to have come from Mrs. Epstein. I wish to say at this stage that it may be said that what passed between Dora Epstein and Johnson and Theron should not be taken as evidence against the plaintiff. But I accept the evidence of Smeaton, in so far that the plaintiff was the very person who handed him this pledge, upon which it appeared that the property belonged to her mother. She now puts in a certain number of documents to prove receipt of moneys advanced by her to Johnson, and I will say at once that, without going into detail, I have no doubt in my own mind that every one of these documents has been tampered with, and that alterations have been made in them with respect to the plaintiff's name upon the documents. I

base my decision on my own observations, though I admit I was largely assisted by the expert evidence in this case of Mr. Boonzaier. It is very often dangerous to rest one's judgment simply upon the opinion of an expert, but the expert has made the reasons for his opinion so clear and has drawn the attention of the Court to certain features in these documents, which prove beyond doubt that they are not the documents in their original state. Now, it is said that in finding that, one throws a doubt upon the evidence of Mr. and Mrs. Johnson, and that they are wholly uninterested in this case. Whether they are interested or not, it is impossible for me to say, but I do find that they have made statements which are inconsistent with the statements of witnesses, whose evidence I accept. With reference to the other goods, the position seems to be this, that Miss Epstein, as she was at that time, was living with her mother. She had just arrived from Europe, and she had brought with her certain property which may have been necessary for her own use. At the time of the insolvency all the goods now in dispute were on the premises of the insolvent, and were distributed about the house in the same way as her own property would have been. There were also goods which were in the shop. When Mrs. Epstein got into difficulties the plaintiff set about removing a portion of the goods, and it is now found that the goods which she removed were of considerably more value than the goods she left. Now, what does the evidence amount to? That she clandestinely and under suspicious circumstances, accompanied by falsehood, removed property from her mother's premises that would ordinarily be regarded as her mother's property. I do not believe that the property had been collected as plaintiff says it was for the future home of herself and her intended. We have further evidence from which I am satisfied that the property that was removed was not the property of the plaintiff. I am dissatisfied with the evidence of Sophie Levy, because if her story had been true it would have been corroborated by the evidence of the insolvent, and because of the character of the evidence given by the plaintiff upon the other branch of the case. I have come to the conclusion, therefore, that the plaintiff has wholly failed to prove that these articles belonged to her, and from the evidence given by the plaintiff, I am satisfied that they have come out of the insolvent estate, and that they belonged to the mother. If there are any articles that belonged to her, they must be the merest trifles which the Court cannot consider now. There is some evidence that as she was passing through Cape Town and staying for a few days, people seemed to force things upon her, which she collected, and took

away with her, but the evidence is altogether unsatisfactory. There may have been some trifles which came into her hands in that way. Under the circumstances, I give judgment for the defendant, with costs, the rule nisi to be discharged.

[Plaintiff's Attorney: H. Hirschberg.  
Defendant's Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

KRYNAUW V. DE BEER. { 1906  
Mar. 10th.

Agent — Power of attorney —  
Disclosure.

*The applicant having appointed the respondent as her agent under a power of attorney, revoked the power, appointed another agent, and requested the respondent to give full information as to his acts under the power to such agent. The respondent replied saying that the power was irrevocable and that he was only bound to give information to the applicant herself. In an application to compel the respondent to return his power to the applicant:*

*Held, that the position taken up by the respondent justified the applicant in making the application, but as the respondent might require the power in support of his costs done thereunder, it was ordered to be handed over to the Registrar of the Court.*

This was an application to make absolute a rule nisi, calling upon the respondent to show cause why he should not deliver up a certain power of attorney granted to him by the applicant in or about the month of December, 1905, the rule having operated as an interim inter-

dict. Mr. Van Zyl was for applicant, Mrs. Anna M. Krynauw, of Somerset West; Mr. Upington was for respondent. Johannes J. de Beer, agent, Somerset West.

The matter arose out of a power of attorney, granted by applicant to respondent to sell on her behalf a farm known as Helderfontein, division of Caledon. Applicant said that she did not intend to grant an irrevocable power to respondent, and she also said that she specified that the purchase price should not be less than a certain sum. She did not understand the English language, and at the time of signing did not know the exact terms of the power. The power was now alleged to be irrevocable, and no sum at which the farm could be sold was named in the document. Respondent said that he had a customer for the farm, but he would not disclose particulars to applicant. Respondent said that an attempt was being made to take the work out of his hands, and place it in the hands of Fagan and De Villiers.

Mr. Upington submitted that the application for the rule had been prematurely made, and that the respondent should have been allowed an opportunity of properly placing the facts before applicant.

Mr. Van Zyl contended that the application was quite reasonable, because respondent withheld from her certain information that she was entitled to as owner of the property. If he had sold the farm, then the applicant was prepared to pay his commission. Surely the power of attorney did not give him a lien for his commission. The applicant had taken up the position all along that she would ratify what had been done by the respondent acting under the power. What she objected to was the purchase price being paid into the hands of the respondent.

Mr. Upington said that, as to the necessity for the rule, there had been no question of taking out the purchase price. The applicant had acted in hot haste, and had upon an *ex parte* application rushed into court for a rule.

De Villiers, C.J.: It is clear law that it is the duty of an agent when asked for information to make a full disclosure to his principal of everything done by him under the power. The principal is entitled at any time to revoke that power, with certain exceptions not necessary to be mentioned now. If the agent is asked to say what he has done, he is bound at once to make a full disclosure of everything which he has done under the power. But if the principal had the power to revoke, the principal also had the power to appoint another agent, and if that agent is authorised to ask for information from the first agent as to his acts under his power, the latter is not justified in withholding

such information. The respondent however, took up the attitude that this is an irrevocable power, and that he is entitled to withhold the authority, unless applicant herself came in person to him, and got the full explanation from him. He did not give the full information to the applicant's husband, nor to her second agent. If he had given the full information, I should certainly have said that the applicant ought not to have applied to compel him to hand up the power. I think, under all the circumstances, that the applicant, having not succeeded in getting the full information to which she was entitled from her first agent (the respondent), she was justified in coming into court for the purpose of compelling him to hand over the power. Now that he has given the explanation, it is another matter. For myself, I think he should not be ordered to hand over the power to the applicant. The suggestion that respondent makes—but makes at the last moment—that the power should be handed over to the Registrar of the Court, is, I think, very reasonable. The Court will make the rule absolute, with this alteration, that the power be handed over to the Registrar of the Supreme Court, but I think that the respondent should pay the costs of the application.

[Applicant's Attorneys: Sauer and Standen. Respondent's Attorneys: Walker and Jacobsohn.]

#### BLACK V. BLACK AND ANOTHER.

Mr. W. Porter Buchanan said that this was an application in an unfortunate dispute between partners, the partners being the father (for whom he appeared) and certain sons. An interdict was asked for against the respondents, and the appointment of Mr. James Douglas, chartered accountant, as liquidator of the assets and liabilities of the firm. A settlement had, however, now been arrived at, whereby it was agreed that there should be a dissolution of the partnership, and that Mr. Harry Gibson be appointed receiver and manager of the partnership, costs between party and party to come out of the estate.

Mr. Benjamin (for respondents) consented.

Judgment entered in terms of settlement.

#### MCKAY AND CO. V. MCKAY.

This was an application by Mrs. McKay and Peter Bischoff, of the firm of McKay and Co., music dealers, Church-street, upon notice calling upon Clarence McKay to show cause why a certain writ of attachment should not be

set aside. Mr. Gardiner was for the applicants; Dr. Rainsford was for respondent.

Mr. Gardiner said that the application arose out of an action recently heard before Mr. Justice Buchanan. Mrs. McKay, who was the widow of the late J. T. McKay, and Mr. Bischoff and Mr. Clarence McKay (the present respondent) were bequeathed the business of McKay and Co., and they were all made partners by the will, and had been carrying on in partnership, Mrs. McKay having a half-share and the other partners a quarter share each. Certain salaries were stipulated to be paid. A dispute arose between the partners, Clarence McKay claiming that he was entitled to an increase in salary. The matter came before the Court upon a question of the interpretation of the will. Judgment was given in favour of Clarence McKay, awarding him a sum of £125, as the increase due to him. The order of the Court was that costs should be borne by the defendants individually, and in their capacity as executors of the estate of J. T. McKay. His Lordship, in his judgment, said that the plaintiff would not be entitled to press his claim in competition with other creditors. An attachment had been made under the judgment of certain pianos and other musical instruments belonging to the firm of McKay and Co. The applicants sought to have the attachment set aside on the ground that it was not against their individual property.

Respondent, in his affidavit, said that applicants would not make any proposal to him in regard to his claim, and that they were trying to keep him out of his money.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said he thought this was a case in which the parties should endeavour to come to some settlement.

Dr. Rainsford said he thought probably they would be able to arrive at a settlement, because, of course, it was not to the advantage of respondent to force McKay and Co. into insolvency.

De Villiers, C.J.: If no settlement is arrived at, then either party may apply again to the Court. At present the case must be postponed *sine die* to enable the parties to come to an arrangement; in the meantime the respondent is restrained from selling in execution any goods of the partnership that have been attached. As at present advised, my opinion is that the question now raised can only arise in insolvency. Until there is insolvency, or clear proof of insolvency, one partner would have the same rights against the estate as other creditors.



# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### ADMISSIONS.

{ 1906.  
Mar. 12th.

Mr. Gutsche moved for the admission of Dominicus J. J. Hoytema as an advocate.

Application granted, oath to be taken before the Registrar of the Witwatersrand High Court, Johannesburg.

Mr. P. S. T. Jones moved for the admission of Reuben Winfred Rookes Toms as an advocate.

Application granted and oath administered.

Mr. De Villiers moved for the admission of Carl Johannes Stegmann as an advocate.

Application granted, oath to be taken before the Registrar of the High Court, Johannesburg.

Mr. Roux moved for the admission of Johan Christoffel Roche Pohl as an advocate.

Application granted, oath to be taken before the Registrar of the Circuit Court at Graaff-Reinet on the 14th inst., with leave to telegraph the order.

*Postea* (March 13th).

Mr. Roux said that there was some question as to whether the Registrar on Circuit had power to administer such oath, and counsel applied for a variation of the order, so that the oath may be taken before the Judge.

The order was varied accordingly.

Mr. Watermeyer moved for the admission of Arthur Mosteyn Watkins as an attorney and notary.

Application granted and oaths administered.

Mr. De Villiers moved for the admission of Frank Henry Steven Ochse as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Hanover.

Mr. Sutton moved for the admission of John Harm Kruger as an attorney and notary.

Application granted, oaths to be taken before the A.R.M. of Venterstad, district of Albert.

Mr. Sutton moved for the admission of Henry Alfred Ready Clark as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Idutywa, Transkei.

Application granted and oaths admission of Charles Sinclair Scholtz as an attorney and notary.

Application granted and oaths administered.

Mr. Van Zyl moved for the admission of Henry Percival Farren Gillet as an attorney and notary.

Application granted and oaths administered.

## PROVISIONAL ROLL.

FLEMMER AND ANOTHER V. 1 1906.  
OOSTHUIZEN. 1 Mar. 12th.

### Insolvency—Deed of assignment.

*O. had assigned his estate to his creditors and they had accepted the assignment and disposed of a portion of the estate. They now applied for the final adjudication of defendant's estate as insolvent.*

*Held, that as it was not competent for the creditors to take advantage of the deed of assignment and then treat it as null and void, the provisional order of sequestration must be set aside.*

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent, the petitioners being the assignees under a deed of assignment in the estate.

Mr. Burton appeared for the defendant, who is a farmer in the district of Steynsburg, and opposed the application.

Affidavits having been read and counsel heard in argument on the facts.

Maasdorp, J.: The applicants in moving for the sequestration of this estate, desire to treat the deed of assignment as wholly void and ineffectual, and they do so on the ground that the respondent has failed to comply with some of the conditions of this deed. Now, it seems to me, from what has taken place between the parties, that it would be wholly impossible now to treat this assignment as void, and to place the respondent back in the position which he occupied before the agreement was entered into. Certain portions of the property have already been disposed of by the applicants under this contract, and it appears that they advertised for sale the landed property, and the bond is actually in force which was passed by the respondent in favour of the applicants for the debts due before this

bond was passed. It seems to me that the applicants are now in this difficulty, they wish to say the deed of assignment is ineffectual, and at the same time they take proceedings upon it, because the debt, which is alleged as the ground of the application, is a debt due under this bond. Now, it is not open to the applicants to act in that manner. If they treat the deed of assignment as partially good, then they can enforce a further compliance with the remaining terms by the respondent. But they cannot take advantage of the deed, and at the same time treat it as no release of the respondent from his liabilities. It seems to me that if this agreement was to be a release from his liabilities on giving up the property, then the respondent is not insolvent. It has been treated so by the applicants. But, going into the merits of this case, it appears to me that the more important provisions of this agreement have been carried out. It seems that there has been a holding back on the part of the respondent with respect to some portion. He should certainly have done his best to have brought in the wagon and oxen, which certainly were a very small part of the property, but the applicants seem to have taken possession, and he should have been compelled under the deed of assignment to do his duty, but, instead of taking what I would regard as the more direct course, and getting hold, through the respondent, of the cart and oxen, when the whole matter would be disposed of, they have taken advantage of the fault of the respondent in that respect to set aside the whole of the important transaction which has been partially carried out. Under the circumstances, I think the sequestration order should be set aside, with costs.

MARAIS V. HEATLIE.

Mr. Lewis moved for the provisional order of sequestration of the defendant's estate to be made final.  
Order granted.

STEVENSON V. BRUGMAN.

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

VAN DER MERWE V. KNOUDS.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

TRUSTEE AND DEBENTURE HOLDERS,  
KROONSTAD (O.R.C.) BREWERIES, LTD.  
V. KROONSTAD BREWERIES, LTD.

Mr. M. Bisset moved for provisional sentence for £19,280, on a judgment of the High Court of the Orange River Colony, for interest and costs, and for the property at East London specified in the summons to be declared executable.

Order granted as prayed.

BODKIN V. ABSALOM.

Mr. Sutton moved for provisional sentence on a mortgage bond for £350, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

CHRISTIE V. WOOD.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond. Counsel said that defendant at the last hearing appeared and made certain allegations, and the matter then stood over. He did not, however, appear to-day. Plaintiff had sworn certain replying affidavits denying the allegations made by respondent.

Provisional sentence, and property declared executable, with costs, including costs of postponements.

MARAIS V. S. AND A. EGERWITZKY.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £4,600, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

SAUERLAUDER AND KRUGER V KAHL.

Mr. Swift moved for provisional sentence upon a promissory note for £132 2s. 7d., with interest and costs.

Order granted.

BRADY V. HEINECKE AND CO.

Dr. Greer moved for provisional sentence upon a promissory note for a balance owing of £17 11s., with interest and costs.

Order granted.

**SEARLE V. PERROTT.**

Mr. Russell moved for provisional sentence on a certain acknowledgment of debt for £342 19s. 9d., less £130, paid before issue of summons, and £45 paid since, with interest *a tempore morae* and costs.

The debt had become due by reason of defendant's failure to pay instalments.

Order granted.

**VAN RHYN WINE AND SPIRIT CO. AND OTHERS V. GIDDY.**

Mr. Douglas Buchanan applied for this matter to stand over, there being no return of service.

Application granted.

Later Mr. Buchanan produced proof of service on defendant, and moved for the final adjudication of his estate as insolvent.

Order granted.

**FLETCHER'S WHOLESALE V. BASSON.**

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**MARGOLIN V. FITZROY.**

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Defendant admitted insolvency.

Order granted.

**LIND V. GESWINT.**

Mr. M. Bisset moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

**KERR V. COMBRINCK.**

Mr. Douglas Buchanan moved for a provisional order of sequestration to be made final.

Order granted.

**AITWELL AND CO. V. SMITHSON.**

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ESTATE ROSS V. LA GRANGE.**

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £800,

with interest, and £2 16s. 2d., premiums of insurance paid, the bond had become due by reason of the non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**ROSS AND CO. V. KAMP AND CO.**

Mr. Lewis moved for provisional sentence for £25 10s. 1d., and £2 3s. 1d., costs, upon a judgment of the R.M.'s Court at Cape Town, and for certain property mentioned in the summons to be declared executable.

Order granted.

**ESTATE JUNKER V. SLAMANY.**

Mr. De Valliers moved for provisional sentence on a mortgage bond for £500, with interest, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for rents due on the said property to be declared executable.

Order granted as prayed.

**GILLIERS V. GOUS.**

Mr. Payne moved for provisional sentence on a mortgage bond for £150, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for the rents receivable to be attached for the benefit of the plaintiff's claim.

Order granted.

**ESTATE GUEST V. BARNARD.**

Mr. Palmer moved for provisional sentence on a mortgage bond for £433 15s., due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**SACHS V. JACOBSON.**

Mr. Roux moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £167, and costs.

Defendant said that he was without means. He was at present employed in a shop at £5 a month. He offered to pay £1 a month.

Decree granted, operation to be suspended on payment of £1 a month, first payment on the 1st April, with leave to plaintiff to again move the Court.

BRUYNS V. WILSON.

Mr. Roux moved for a decree of civil imprisonment upon an unsatisfied judgment for £122, and £9 5s. 11d. costs.

Defendant said that he was without property, and that he already had several orders against him in the Magistrate's Court. He was employed at a salary of £15 a month. Witness hired the furniture that was in his house. He was unable to make any offer to the plaintiff.

No order was made.

BRUYNS V. JACOB.

Mr. M. Bisset moved for provisional sentence on a promissory note for £416.

No order, owing to defective service of summons.

THOMPSON AND CO. V. PALMER. HERBERT AND BRIGHT.

Promissory note — Consideration  
—Libel—Publication.

Mr. Gardinar moved for provisional sentence upon a promissory note for £300, dated November 30, 1905, and payable on the 28th February at the "Owl" office, Mutual Buildings, Cape Town, the defendants having signed the note jointly and severally.

Dr. Greer appeared for the first defendant; Sir H. Juta, K.C., for the second and third defendants.

Affidavits having been read and counsel heard in argument on the facts.

Maasdorp, J.: The plaintiff in this case sues the defendants on a promissory note for £300, signed by all three defendants, and the defence set up by them is that they received no consideration for the making of this note. The issue between the parties in this case arises from the following facts: It seems that there was an agreement entered into between the plaintiff and the "Owl" Syndicate, under which the plaintiff undertook the publication of the "Owl" newspaper from the 1st April, 1905, to the 1st April, 1906, and one of the terms of this agreement was that in case the plaintiff should become liable in an action for damages in respect of any libellous matter published in the newspaper, that the syndicate would reimburse the plaintiff, and hold him harmless. It appears that in respect of an issue of this paper on the 31st March an action was brought for some libellous matter, and judgment was given for the plaintiff in a certain sum, and involving an amount of costs altogether amounting to some £600. The plaintiff claimed payment of a portion of this amount from the syndicate, and

three of the defendants gave a promissory note in respect of £300 being part payment of that amount. The defendants now say that they were not legally responsible for that amount, and consequently they gave this note without consideration; in fact, they allege they did it as an act of grace. The point upon which the defendants proceed is this: that this particular paper was published on the 31st March, and published by the Central News Agency, and that consequently there was no publication on the part of the plaintiff. As a matter of fact, it appears that a certain number of copies were handed to the plaintiff in this case. Now, it seems to me that if the publication of that particular paper ceased with the Central News on the 31st March, the whole of the publication of that issue would not cease, but the publication of it go right on, and it went on on the 1st April and after. Consequently I can see no reason why it should not be under this agreement. The agreement makes no reference to the date of printing of any particular issue, but it says that the paper as printed and bound shall be handed to the plaintiff for publication. Well, this particular copy, though dated the 31st March, a large number of it remained still for publication, and the nature of publication simply seems to be this: that after delivery of a number of copies to the plaintiff, the plaintiff was to set about selling them, and account for the money for the copies sold and return the unsold copies. I cannot see why that should not take place with regard to the paper published on the 31st March; as a matter of fact, there was a part publication by the Central News Agency on the 31st March. The publication continued thereafter, and this paper was handed over by Mr. Palmer, the registered proprietor, acting on behalf of the syndicate. On the 1st April these papers were handed over for publication, and they were duly sold, which amounted to the publication here mentioned. The publication of that particular copy of the "Owl" consequently falls under the agreement. They become liable under the agreement for the payment of these damages and costs, and under the agreement that liability falls upon the syndicate. Three of the syndicate made this promissory note, and they made it in respect of a debt for which they were liable, and consequently on the whole there is sufficient proof there was consideration. Provisional sentence will be granted, with costs.

GERECKE V STACK AND OTHERS.

Dr. Greer moved for provisional sentence on two promissory notes for a balance due of £66 8s. 7d., with inter-

## SEARLE V

Mr. Russell moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

The debt had been paid by defendant's father.

Order granted.

VAN RHYN WINE AND  
OTHERS V

Mr. Douglas Buchan moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Application granted.

Later Mr. Buchan moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Order granted.

## FLETCHER'S WHOLESALE

Mr. Douglas Buchan moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Order granted.

## MARGOLIN V

Mr. Douglas Buchan moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Defendant admitted.

Order granted.

## LIND V.

Mr. M. Bisset moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Provisional order granted.

## KERR V.

Mr. Douglas Buchan moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Order granted.

## AITWELL AND

Mr. Gutsche moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.

Order granted.

## ESTATE ROY

Mr. M. Bisset moved for sentence on a certificate of debt for £342 paid before issue of writ, with interest and costs.



plied the premises in question, and he was satisfied that his client had not a good claim for compensation. He should not therefore press the claim.

Mr. Jones applied for judgment. Judgment granted for ejectment, with costs.

**ROLFES, NEBEL AND CO. V. SHUTTE.**

Mr. De Villiers moved for judgment under Rule 319 for £144 4s. 9d. and £2 7s. 4d., goods sold and delivered, interest and costs.

Order granted.

**KEUR V. LANGERMAN.**

Mr. P. S. T. Jones moved for judgment under Rule 319 in default of plea for £90 10s. 9d., amount of a certain inheritance due to plaintiff by defendant as executor.

Mr. Burton (for defendant) applied for a postponement until a certain action instituted by Langerman against Keur for purchase price of a horse and cash lent had been heard. The action was set down for hearing on the 13th inst. Deponent said he was willing to pay into court the amount of the inheritance pending result of action he had taken against Keur. He admitted that the inheritance claimed by Keur was owing to him.

Mr. Jones read a replying affidavit by plaintiff's attorney.

Judgment granted, with costs, including costs of the present application, execution to be suspended pending the hearing of the case of Langerman v. Keur.

**BLACK V. KAMP.**

Mr. Douglas Buchanan moved for judgment under Rule 329d for £82 10s., rent, and £17 15s. and £4 7s. 6d., Municipal and Divisional Council rates.

Order granted.

**WELCH V. PRIEMS.**

Mr. Rowson moved for judgment under Rule 329d for £124 10s. 8d., less £36 odd paid.

Order granted.

**CAPE TOWN TOWN COUNCIL V. RAJIEM.**

Mr. Gutache moved for judgment under Rule 329d for £17 18s. 11d. and £4 10s., less £10 paid on account, for rates and water charges.

Order granted.

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**DRUMMOND V. CAMPBELL AND CO.**

Mr. Rowson moved for leave to sign judgment against plaintiffs (Campbell and Co.) in default of filing declaration.

Order granted.

**WORMS V. BOLDT AND CARL.**

Mr. Lewis moved for leave to sign judgment against plaintiffs for not proceeding with their action within the time specified by rule of Court.

Order granted.

**ABRAHAMSE V. ABRAHAMSE.**

Dr. Greer moved for leave to sign judgment against plaintiff in default of proceeding with her action.

Order granted.

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

LANGERMAN V KEUR. { 1906.  
Mar. 13th.

This was an action brought by Frederick J. B. Langerman, of Sea Point, against Barend C. Keur, also of Sea Point, to recover the purchase price of a horse and wagon, and money lent and advanced.

Plaintiff, in his declaration, said that on the 1st October, 1902, he sold and delivered to defendant certain horse and wagon for £60, on condition that the purchase price should be paid at the rate of £10 monthly, with interest from date of sale to payment of purchase price. Defendant had failed to pay the purchase price or any portion thereof. Defendant was further indebted to plaintiff in the sum of £20 ls., money lent and advanced. Plaintiff claimed £60, with interest from the 1st October, 1902, at 6 per cent. per annum, and £20 ls., with interest *a tempore morae* and costs of suit.

Defendant, in his plea, admitted that on the 1st October, 1902, he bought a horse from plaintiff for £16, but he denied that he had purchased a horse and wagon, or had promised to pay the purchase price in monthly instalments.

He admitted having received delivery of the horse, but denied that he had received delivery of the wagon. He admitted having received the advances of money. He said, further, that after issue of summons, he tendered to plaintiff payment of £16 and £20 ls., but this tender was refused by plaintiff. He again tendered £36 ls., with interest *a tempore morae* and costs.

Mr. Burton was for plaintiff; Mr. P. S. T. Jones was for defendant.

Mr. Jones applied for leave to amend the plea, so as to read that defendant admitted having bought the horse, "for which £16 would be a fair and reasonable sum to pay." Counsel added that no price was fixed at the time of the transaction.

[Maasdorp, J.: Well, then, there was no sale.]

Mr. Jones: Strictly, there is no sale in law.

[Maasdorp, J.: I don't think that the plea requires any amendment.]

Mr. Jones: I don't want the objection to come later on that I have not substantiated the plea.

F. J. B. Langerman (the plaintiff) gave evidence. Defendant, he said, lived close to his place, and witness had known him for many years. About three and a half years ago he procured a situation for defendant with the Sea Point Municipality as stableman. Witness went to England, and on his return he found that Keur had lost his situation, and he asked witness to help him to get a horse and cart. Witness bought a horse and van from Mr. Breda for £55 10s. After some negotiations, defendant bought from him the horse and another wagon that witness had had in his possession for about a year. The price agreed upon was £60, to be paid in six monthly instalments. He had bought the wagon the year before from Mr. Morrison for about £9. The horse and wagon and harness that witness threw in were delivered to defendant, and had been kept at his mother's place. Defendant had been in the habit of riding sand for the Municipality and doing other work. Defendant was repeatedly in trouble, and only six weeks ago he was sold up, after an action in the Magistrate's Court. Witness did not proceed against defendant, because the latter had been without money. An inheritance of £90 came due to defendant under his mother's will, of which witness was executor. Witness then told him that he would have to pay the debt out of the inheritance. Defendant protested, and eventually told witness that he could take half of the inheritance. Witness had known defendant's dishonesty for about three and a half years.

Cross-examined: Witness could not give any definite instances of defendant's dishonesty.

Mr. Jones: You must not say these things without having some justification for them. You wish the Court to believe, in a general sort of way, that Keur is a dishonest man?

Witness: I don't wish the Court to believe that.

Mr. Jones: Do you withdraw it, then?

Witness: Well, I don't know that I should. As far as I can say, I cannot call him honest, because I have always found him the most unmitigated liar that ever existed.

Henry C. van Breda, of Sea Point, said that he was offered £60 for the horse before he sold it to Mr. Langerman. He became dissatisfied with the conduct of his coachman, and decided to sell the lot out and have finished with it. At a sacrifice, he sold the horse, van, and harness to plaintiff for £55.

Daniel van der Spuy, formerly employed by plaintiff as coachman, gave corroborative evidence as to the sale of the horse and wagon to defendant.

Frank Frost, cabman, formerly a cartage contractor at Sea Point, said that he had seen Keur using a four-wheeled American van, on which the name of Mr. Morrison had been painted.

Thomas Edward King, an employee of the Sea Point Municipality, said that he had seen the van in Mrs. Keur's yard. The van was only once taken out. Eventually the wheels were taken from the van, and put on to Mrs. Keur's milk cart. He regarded the wagon as lumber.

Cross-examined: Witness considered the value of the van to be about £8 or £9. Mrs. Keur's business was quite distinct from defendant's.

Mr. Burton closed his case.

Barend C. Keur (defendant) said that he was a cartage contractor, and used to ride stone, bricks, sand, and builders' materials. He had not carried on a parcels business. He carried furniture for Mr. Langerman to Milnerton in a van he got from Mr. Breda's before he took the horse. Plaintiff a few days afterwards offered him the wagon and horse for £60, but witness declined to have the wagon, and said that it was no use to him. Witness afterwards got the horse, but no arrangement was made as to the price. He agreed to give plaintiff some payment each month, about £5. Witness had never used Mr. Morrison's old wagon. The wheels were taken off the wagon, and put on his mother's milk cart. He had not agreed to pay interest to Mr. Langerman. He bought the horse simply for use in his Scotch cart. His mother died on Christmas Day in 1904. About October last he mentioned to Mr. Langerman that he should want some money from his mother's estate. He owed plaintiff £20 ls. for money advanced up

to that time, and also payment for the horse. Witness had sold the horse for £15 10s. He considered that £16 was a fair price to pay for the horse.

Cross-examined: The sale of the horse took place early last year. He sold the animal because he had no work for it. The horse was over ten years old. Witness was not surprised to see the van in his mother's yard, because plaintiff used to give her old goods.

By the Court: Witness kept his carts and horses at the tramway terminus, and not at his mother's yard.

Pieter Langeveld (nephew of the defendant) said he took the van from Mr. Langerman's place to Mrs. Keur's yard. The wagon was a "ramshackle affair." A pair of wheels was taken off for Mrs. Keur's milk cart, and the body of the wagon was afterwards chopped up for firewood.

Robert Morrison, of Sea Point, said that he was the original owner of the wagon, having sold it about seven or eight years ago to plaintiff. The wagon was very old at that time.

Reginald Metcalfe, attorney, of the firm of Silberbauer, Wahl, and Fuller (defendant's attorneys), said that he had endeavoured to make a settlement on the basis of £16 for the horse. Witness described an interview that he had with Mr. Berrange (plaintiff's attorney), who insisted that Keur had had the wagon. Witness had been prepared to "spring" up to £25 or £30 for the horse.

Mr. Jones closed his case, and counsel having been heard in argument on the facts,

Maasdorp, J., said he found that plaintiff had proved his case, and he gave judgment for plaintiff as prayed, with costs.

REHABILITATIONS. { 1906.  
( Mar. 13th.

Mr. De Villiers applied for the discharge from insolvency of Johannes Petrus Visser, and for his re-investment with his estate.

Granted.

Mr. Sutton applied under the 117th section of the Insolvent Ordinance for the rehabilitation of Henry Magor.

Granted.

Mr. Swift applied, under section 14, Act 38, 1884, for the discharge from insolvency of Johannes Petrus du Plessis.

Granted.

#### GENERAL MOTIONS.

*Ex parte* THE IMPERIAL { 1906.  
COLD STORAGE AND SUP- { Mar. 13th.  
PLY CO., LTD.

Mr. Burton moved for a rule *nisi* under the Derelict Lands Act to be

made absolute. Counsel also asked the Court to fix the 8th July, 1905, when purchase was made, as the date at which transfer duty should be payable.

Rule *nisi* made absolute, and rule *nisi* granted calling on the Treasurer, as representing the Colonial Government, to show cause why applicants should not be allowed to declare the 8th July as the date of alienation, the price to be ascertained by valuation by some competent referee, rule to be returnable on the 17th April.

#### *Ex parte* CROUS.

Mr. Van Zyl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* ADAMS.

Mr. Parker moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* VILJOEN.

Mr. Van Zyl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* DAVIDS.

Mr. Sutton moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* NOLTE.

Mr. Watermeyer moved for a rule *nisi* to be made absolute authorising the Registrar of Deeds to issue a certified copy of bond.

Rule made absolute.

#### NEUGEBAUER V. SIGNAL HILL QUARRY CO.

This was an application to have a rule *nisi* made absolute declaring a certain engine executable in satisfaction of a judgment.

Mr. Watermeyer applied for an adjournment *sine die*, saying they were informed that respondents had become insolvent.

Mr. De Villiers (who appeared for a third party, Ashley) urged that the matter should be adjourned to a de-

finite date. His client denied that the engine was his property.

The matter was ordered to stand over in view of respondent's insolvency.

*Ex parte* MAYEMA.

Mr. Payne moved for an order authorising the Registrar to pass transfer of certain property.

Rule nisi granted calling on all persons concerned to show cause on the 17th April why an order should not be granted as prayed, rule to be published once in a newspaper circulating at Elliot.

Order as prayed.

*Ex parte* KLEYNHAUS.

Mr. Van Zyl moved for leave to transfer certain property in which minors were interested in the division of Wodehouse

Referred to the Master for report.

MARAIS V. ADAMSTEIN.

Dr. Rainsford moved on the petition of Pieter J. Marais, for leave to sue one Adamstein by edictal citation and for the attachment of certain property in Cape Town *ad fundandam jurisdictionem*. Petitioner said that he held a mortgage bond for £6,500 against the property, and that the capital had become due by reason of the non-payment of interest, and he proposed to sue for provisional sentence and payment of insurance premiums. Respondent formerly lived at Laingsburg, but his present whereabouts were unknown.

Leave to sue granted, and property attached *ad fundandam jurisdictionem*, citation to be returnable on the 1st June, personal service to be effected.

Maasdorp, J., observed that he did not think sufficient effort had been made to trace respondent's whereabouts, and he did not feel disposed, as requested, to allow substituted service at the present stage. Petitioner might, after proper efforts had been made to trace respondent, move the Court for substituted service.

*Ex parte* POTGIETER AND ANOTHER.

Mr. Alexander moved, on behalf of petitioners, the minor sons of J. M. Potgieter, for an order authorising the Master to pay out a sum of £220 from certain inheritance in the estate of their late parents, the money being required by petitioners for their farming operations. The Master, in his report, recommended that the application be not granted.

Maasdorp, J., said that the Master had come to the conclusion, from his

inquiries, that petitioners, who were boys of 18 and 16 years, had no knowledge of business. He also said that he had been unable to ascertain what the real position of the minors was in this case. The application would be refused, as recommended by the Master. Of course, it would still be in the powers of the minors to give the Master further information, and then the application could be renewed.

MARAIS V. COLLINS.

Mr Douglas Buchanan moved for leave to sue the respondent, James Collins, by edictal citation, for provisional sentence on a mortgage bond for £3,000, and for the attachment of certain property in Cape Town *ad fundandam jurisdictionem*. Collins had left the Colony, and was believed to be living at 114, Cannon-street, London.

Leave to sue granted, and property attached *ad fundandam jurisdictionem*, citation to be returnable on the 1st June, personal service, if possible; failing which, publication once in the "Government Gazette" and once in the "Daily Telegraph," London.

*Ex parte* PHILLIPS.

Mr. Burton moved on the petition of Morris Phillips, general dealer, Kenhardt, for leave to sue one McDonnell, a contractor, by edictal citation, for the attachment of certain timber *ad fundandam jurisdictionem*, and for a temporary interdict against the Colonial Government, restraining them from parting with certain moneys due under a contract to McDonnell, who was believed to have gone to German South-west Africa.

Leave to sue granted, and property attached as prayed, citation to be returnable on the 30th April, personal service if possible, failing which, publication once in the "Gazette" and once in the "Cape Times"; also an order granted interdicting the Colonial Office from paying the moneys due to McDonnell, pending the suit, with leave to anyone interested to move to set aside the interdict.

*Ex parte* GREEF AND OTHERS

Mr. Sutton moved for an order confirming a certain sale of property in the division of Malmesbury.

Order granted as prayed.

*Ex parte* ESTATE HOLST.

Mr. Pyemont moved, on behalf of the executrix testamentary, for leave to

raise on mortgage a sum of £1,000 on certain property in Somerset-road, Cape Town.

Leave granted to raise mortgage as prayed for purposes mentioned in petition.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

KERR V. COMBRINCK. { 1906  
Mar. 14th.

Mr. Douglas Buchanan applied for an amended order in this matter. On the 12th inst., upon his application, the provisional order for the sequestration of the defendant's estate was made final. Counsel applied for that order to be cancelled, and for the return day of the provisional order of sequestration to be extended until the 17th April.

The order was amended accordingly.

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

SINGER V. VAN GERBIE. { 1906.  
Mar. 14th.

Dr. Rainsford moved for an order of ejectment against the respondent from the Spes Bona Hotel, Hopefield, and for costs.

Mr. De Waal, for the respondent, consented on condition the order be stayed until Wednesday, March 21, and this counsel for the applicant agreed to.

Order as prayed.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1906.  
Mar. 15th.

Mr. Sutton moved for the admission of Cecil G. W. Muggleston as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Elliotdale, Transkei.

### PROVISIONAL ROLL.

ALING V. DE VRIES. { 1906.  
Mar. 15th.  
" 22nd.

Mr. Douglas Buchanan mentioned this matter, which was an application to have certain property at Elliot declared executable to the provisional sentence obtained on a Magistrate's Court judgment. Mr. Buchanan appeared for one Bezuidenhout, who claimed to be the owner of the property in question. He now produced an affidavit by his client's attorneys, from which it appeared that an inquiry addressed to Elliot had elicited the information that Bezuidenhout was in possession of the property, and that the purchase price was paid several months ago. The deponent went on to say that the consent of the Governor to the transfer of the property in question had now been obtained.

Mr. De Waal (for plaintiff) pointed out that there was no allegation that Bezuidenhout had been in possession since the 5th March, or any other date.

[Maasdorp, J.: I think what the Court required was an inspection of the grant.]

Mr. De Waal put in the grant.

[Maasdorp, J.: The matter will be considered.]

*Postea* (March 22nd).

Maasdorp, J.: In this matter the plaintiff, Aling, moved for provisional sentence on a Magistrate's Court judgment, and also for certain land registered in the name of the defendant to be declared executable. Bezuidenhout, whom I may call the respondent in this case, appeared on the return day and opposed the prayer with respect to the property being declared executable. It appears that De Vries is the registered owner of certain land, which he holds under somewhat peculiar circumstances. He holds it under quitrent title, and at the same time it is not in his power to dispose of it without the consent of the Government, nor can he subject it to any hypothecation or security for any debts



of his. This property was sold by De Vries to the respondent. The respondent has paid the purchase price and taken possession; he has also obtained the consent of the Government to the transfer of the property to himself. Plaintiff bases his claim solely on the ground that this land is still registered in the name of De Vries, and that consequently, on the authorities which have been cited, he is now entitled to have it declared executable in the same way as a trustee in insolvency would be entitled to claim the property for the benefit of creditors. Now, it seems to me that in considering a case of this kind the question of ownership is not the only one to be considered. There are various interests of creditors when persons have contracted with a defendant which the Court will protect, and we have had a case before this Court not long ago in which the Court decided that certain property belonging to a native which passed into the hands of another native subject to certain rights, which did not convey ownership, and which still left the ownership in the defendant, that those rights were still of such a nature that the Court will protect them from the judgment creditor. A trustee in an insolvent estate stands in a very different position from a judgment creditor. The former has to deal with property in the insolvent estate for the benefit of creditors, and the Court has held in such cases that he is entitled to claim the property for the benefit of creditors which still remains registered in the name of the insolvent. Now, the plaintiff in this case has not shown that he has exhausted all the remedies by means of which he might have obtained the payment of his debt. He simply comes into court on the ground that this property is still registered in the name of the defendant; there is nothing to show that there is not other property by which his debt might be satisfied. It may be that there is none, but there is nothing to show that to the satisfaction of the Court, and, consequently, in the circumstances of the case, I do not think that the Court would have granted the prayer to declare the property executable, and the result would therefore be that plaintiff would have failed and the respondent be successful in that matter. Plaintiff now admits that defendant has been declared insolvent. The property, therefore, will be dealt with under the Insolvent Ordinance, and what the rights of the parties will then be it is not necessary for me now to decide. Consequently the only question the Court has now to decide is the question of costs. Costs would have had to be paid by the unsuccessful party. To my mind, plaintiff would have had to pay costs on that ground. As to the costs incurred upon the first day of hearing of this matter,

I might say that plaintiff came into court in ignorance of the claim of respondent, and, consequently, he cannot be called upon now to pay costs of the respondent's appearance on that occasion, but all subsequent costs to the first appearance must be paid by plaintiff (Aling).

ROSS V. WOODSTOCK LICENSING COURT. { 1906.  
SING COURT. { Mar. 15th.

#### Licensing Court—Informality— Declarations of canvassers.

*R., having applied for a retail liquor licence, produced the usual declarations of canvassers in terms of Schedule B. to Act 28 of 1883. The names of the canvassers had been filled in by themselves at the beginning of the declarations, but they had omitted to sign their names at the end. The Licensing Court held that the declarations were informal and refused the licence.*

*Held on review, that the Licensing Court was justified in its action, but as the said Court did not oppose the granting of the licence, and as the Court was satisfied that the declarations were genuine, it condoned the irregularity.*

This was an application by Carl Ross upon notice calling upon the Woodstock Licensing Board to show cause why an order should not issue rescinding a ruling given at the annual meeting of the Licensing Board on the 7th March, 1906, in respect of petitioner's application for a retail liquor licence at Parow, and, further, why the Board should not consider his application on its merits. Mr. Alexander was for the applicant; respondents did not appear.

From the applicant's affidavit, it seemed that the Licensing Board had held that the declarations of canvassers put in at the sitting of the Court in reference to the signatures of voters appearing on this memorial were informal, inasmuch as the declarants, instead of signing at the foot of the document, signed immediately after the pronoun "I," at the commencement of the declaration. The Board held that this was informal, and postponed the application until the 21st March to enable applicant to obtain a decision of the Supreme Court on the point raised.

Mr. Alexander having been heard in argument,

Maasdorp, J.: There is no opposition by the Board here. In this case there is no doubt that there is an informality and that the proper way in which a declaration of this kind should be signed is at the foot of the declaration, and it is for this reason, because the name that appears in the body of the declaration may have been written by any other person, and very often that is the case—that the name in the body is written by one person and the signature when the declaration is made before a justice of the peace is the person who makes the declaration. The Licensing Board were perfectly right in regarding it as an informality, an informality which put them in a difficulty, and one which, considering that it was to some extent in conflict with the requirements of the Act, they thought justified them in refusing the application. It has now been made quite clear that the name which was written in the body of the document when it was declared was written by the declarant himself, and under these circumstances there is the necessary evidence required by the Act to authenticate the signatures of the voters. Under these circumstances, as it was only necessary that the Court should have such evidence on which to proceed, I consider that this declaration may now be accepted, but in the first instance I think the Board was justified in regarding it with some doubt, and, looking upon the informality as one which they could not pass over.

Mr. Alexander mentioned that the Licensing Court had quite as much evidence before it as his lordship had now.

It is very fortunate for you that the Board does not oppose. The Court now finds there is sufficient evidence to make these declarations satisfactory evidence of the genuineness of the signatures. The Court holds that the declarations are admissible as proof of the signatures; it does not hold that the declarations are in proper form, but under the circumstances they are sufficient.

### GENERAL MOTIONS.

DARROLL V. DUGGAN AND { 1906.  
ANOTHER. } Mar. 15th.

Mr. Gardiner moved for a rule *nisi* to be made absolute, calling upon respondents, Duggan and W. A. Currey, as trustees in the insolvent estate of Humphreys and Turkington, to show cause why the said trustees should not be ordered to pay to petitioner the amount of dividend accruing to the said Duggan out of the insolvent estate.

Counsel also applied for costs against the first respondent (Duggan).

Rule made absolute, with costs against Duggan.

### *Ex parte* ESTATE LATE NEVELING.

Mr. Gutsche moved for leave to mortgage certain property, in which a minor was interested.

Order granted as prayed.

### *Ex parte* MCCARTHY.

Mr. Sutton said that this was an application for leave to sue *in forma pauperis* for divorce, but as petitioner lived at Knysna, he had not been able to appear personally before the Court.

Application referred to the ensuing Circuit Court at Knysna, so that petitioner may appear personally.

### *Ex parte* ACHBERG.

Mr. Alexander moved for leave to sue the Colonial Government *in forma pauperis* for damages for the alleged wrongful, unlawful, and negligent conduct of the servants of the C.G.R., by reason of which petitioner's husband—a passenger from Cape Town to Salt River—was killed at Salt River Station on the 7th October last. Counsel said that he was prepared to grant the usual certificate.

Rule *nisi* ordered to issue, calling upon the respondents to show cause on the 17th April why leave should not be granted as prayed.

### *Ex parte* ESTATE VAN DER HOVEN.

Mr. Sutton moved for the appointment of Mr. James Wm. Borchards as *curator ad litem* to represent petitioner's minor child in a certain partition of farm property in the division of George.

Order in terms of Master's report, Mr. Borchards to be *curator ad litem*.

### *Ex parte* DE WAAL.

Mr. Douglas Buchanan moved for the release and discharge of petitioner, a medical practitioner, practising at Colesberg, from curatorship, under which he was placed by order of the Court on the 1st August, 1903, and for re-investment in his estate. The curator did not appear, and the petitioner's wife, who made the original application, consented to the present proceedings.

Order granted as prayed.

*Ex parte* THE TRUSTEES OF THE MALAY MOSQUE, IN BUITENGRACHT-STREET.

Mr. P. S. T. Jones moved for leave to execute mortgage of £350 on certain property in Frere-street acquired by the petitioners, to take the place of the Mosque in Buitengracht-street.

Order granted as prayed.

*Ex parte* DE JAGER.

Mr. Close moved for leave to sell certain property.

Order granted as prayed.

*Ex parte* TRILL.

Mr. Sutton moved for leave to sue by edictal citation for provisional sentence on a certain mortgage bond, and for the attachment of certain property *ad fundandum jurisdictionem*.

Attachment and leave to sue granted, citation to be returnable on the 3rd May, personal service, failing which publication once in the "Gazette" and once in the "Star" (Johannesburg).

*Ex parte* BAUMANN.

Mr. De Villiers moved for leave to pass transfer of certain property in which minors were interested. The Master's report was favourable.

Order granted in terms of Master's report.

*Ex parte* DA COSTA AND OTHERS.

Mr. P. S. T. Jones moved, on the petition of Alfred da Costa and others, shareholders or creditors of the South African Trade Protection Society and Trust Company, for an order for the compulsory liquidation of the company. Petitioners said that the company's head offices were in Johannesburg, but there were branches in this colony, at Cape Town, Kimberley, Port Elizabeth, East London, King William's Town, and Queen's Town, the head offices for this colony being in Cape Town. The principal business of the company was the publication of a weekly newspaper, giving particulars of judgments given in South African Courts of Law, of interest to commercial people and other mercantile matters, but publication had been discontinued for some two months. In February, 1906, the High Court of the Witwatersrand made an order for the provisional liquidation of the company in the Transvaal. The liabilities of the company exceeded its assets, and it was unable to pay its debts. The assets in this colony consisted of cash at the Standard Bank amounting approximately to £60, furniture at the various offices pro-

bably worth about £300, and outstanding accounts amounting to about £2,000, while the liabilities in this colony were approximately about £6,000. Petitioners applied for an order that, so far as its assets and liabilities in this colony were concerned, the company be placed under compulsory liquidation, and suggested that Mr. John Burnett Hobday, manager in Cape Town, be provisional liquidator. [Maasdorp, J.: Is the company registered in this colony?]

Mr. Jones: No, my lord; it is registered in the Transvaal, and has branch offices throughout the Colony.

Maasdorp, J., said that he did not see any need to appoint a provisional liquidator, as Mr. Hobday would no doubt continue as manager. A rule nisi would be granted, calling upon all persons interested to show cause on the 17th April why the company should not be placed under compulsory liquidation, rule to be published once in the "Cape Times," and to be served on the provisional liquidators in the Transvaal and the manager in Cape Town.

*Ex parte* McDONALD.

Mr. Van Zyl moved for leave to sell certain property in the division of Oudshoorn.

The matter was referred back for further information from some responsible person on the spot, such information to go before the Master.

*Ex parte* FLYN.

Mr. Sutton moved for leave to pass transfer, on behalf of petitioner's minor son, of certain property at Komgha, which had been expropriated by the Government for railway purposes, proceeds to be paid into the Guardians' Fund.

Order granted as prayed.

*Ex parte* BROWN AND WIFE.

Mr P. S. T. Jones moved for leave to register an ante-nuptial contract to have the effect of keeping the petitioners' estates separate and to enable the first petitioner to cede to the second petitioner a certain life policy and furniture. The parties said that they had been under the impression that a marriage in Cape Colony had the same effect as a marriage in England, and that the Married Women's Property Act applied.

Order granted in terms of first prayer of petition, saving all just rights of creditors.

*Ex parte* THE ESTATE LATE GILL.

Dr. Rainsford moved for leave to sell certain property at King William's Town in accordance with arrangement made between the chairman and members of the Gill College Corporation and the legatees under Dr. Gill's will.

Order granted as prayed.

*In re* THE KRAAIFONTEIN HOTEL COMPANY, LTD. (IN LIQUIDATION).

Mr. Van der Byl presented the first report of the official liquidators, and applied for the usual order as to publication and so forth.

Ordered that the account lie for inspection at the office of the liquidators for 14 days, and rule granted calling upon the persons mentioned in the list to show cause why they should not be declared to be contributories, rule to be returnable on the 17th April.

*Ex parte* THE NEW GREAT DAMARA SYNDICATE, LTD.

Mr. Close moved, on the petition of the New Great Damara Syndicate, for leave to sue one John William Stanley by edictal citation, and for the attachment of certain 16 shares in the syndicate *ad fundandum jurisdictionem*. Counsel explained that petitioners had entered into a contract with respondent in respect of certain copper mining interests in German South-West Africa, and Stanley was described in the agreement as of Kanhandja, German South-West Africa. It was intended to bring an action against Stanley for a declaration of rights and damages.

Leave to sue granted, shares attached as prayed, citation to be served upon Mr. Tennant, attorney, and to be returnable on the 1st May.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

*Ex parte* MCINTOSH. } 1906.  
Mar. 16th.

This was an urgent application calling upon Mr. A. T. Hennessy, as *curator bonis* in applicant's estate, to show cause

why he should not pay over to his (McIntosh's) solicitor a sum of £30 for his defence at the Criminal Sessions now sitting. Dr. Greer was for applicant; Mr. P. S. T. Jones was for respondent.

From the affidavits, it appeared that applicant was awaiting trial at the Criminal Sessions on a charge of embezzling a sum of about £400, the moneys of Messrs. Hammond and Co., whom applicant represented in Cape Town. The moneys which he was accused of having embezzled were, he said, his own, and not those of Hammond and Co., and he desired a sum of £30 to be paid over to his solicitor for the purposes of his defence. His estate had been provisionally sequestrated, and Mr. A. T. Hennessy had been appointed *curator bonis*. The curator's position was that he had no funds belonging to the estate from which he could make any payment to applicant's attorneys. Owing to lack of information, he had been unable to collect any of the moneys set out in the assignment. He had ascertained that certain debts claimed to be due to applicant, were by him purported to have been ceded to one Hildyard Home Drummond.

Counsel having been heard in argument on the facts.

De Villiers, C.J.: Any order that the Court may make will be confined to assets belonging to the applicant. The Court cannot dispose of the property of other people for the purpose of defending the petitioner. The Court will, therefore, direct the respondent to pay to the applicant's attorney a sum of £25, out of any funds coming into his hands and belonging to the applicant, for the defence of the applicant at the Criminal Sessions now being held, the applicant undertaking to give every assistance to the respondent, and point out any debts of the applicant which may be collected.

Dr. Greer: I take it that the costs of this application will come out of the estate?

[De Villiers, C.J.: I think that had better be applied for afterwards.]

Mr. Jones: Curator's costs, I take it, would come out of the estate?

[De Villiers, C.J.: Oh, yes. Leave is reserved to the applicant hereafter to apply as to the costs of this application.]

OLIVIER V. BREYTENBACH.

This was an application by plaintiff in the suit for removal of trial to the Circuit Court at Oudtshoorn. Mr. De Villiers was for applicant; Mr. Russell was for respondent, for whom objection was raised that insufficient time would be allowed in which to prepare his defence. Respondent did not object to the case

going to the Circuit Court after the one now pending.

The trial was ordered to be removed to the Circuit Court, costs to be costs in the cause, order to be telegraphed.

CAPE ELECTRIC TRAMWAYS, LTD. V. COLONIAL GOVERNMENT. { 1906.  
Mar. 16th.  
" 19th.  
" 27th.

Railway Company—Working railway—Rights of cessionary—Arbitration—*Privilegium*—Debentures—Act 44 of 1905.

*The plaintiffs bought a line of railway, with the right of working the same, from a syndicate which in turn had purchased the line with the same right from the official liquidators of a company who had been authorized by the Court to effect the sale in the course of the winding up of such company. The Government recognized the plaintiffs, as well as the syndicate, as owners of the line and entitled to work the same, and afterwards introduced a Bill, which became Act 44 of 1905, authorizing the Government to take over the line of railway at a cost to be settled, pending agreement, by arbitration.*

*Held, that in estimating such cost, the arbitrators should include the value of the right of working the line of railway.*

This was an action brought by the Cape Electric Tramways, Ltd., against the Colonial Government for a declaration of rights in respect of a certain line of railway known as the Sea Point Railway.

Plaintiffs' declaration was as follows:

1. The plaintiffs are the Cape Electric Tramways, Limited, a company with limited liability, incorporated and registered in England and carry on business in this colony. The defendant is the Honourable T. W. Smartt, in his capacity as Commissioner of Public Works, and as such representing the Colonial Government.

2. Power to construct and work a line of railway from Cape Town to Sea Point and various other powers in connection therewith were granted by Act 23 of 1889, to a company styled "The Metropolitan and Suburban Railway

Company, Limited," which was duly formed, which constructed the said line hereafter called the Sea Point Railway, and exercised the powers under the Act.

3. The said line was worked principally with rolling stock hired from the defendant, the Cape Town terminus was upon the defendant's ground, by virtue of an agreement with the defendant, and the line ran partly over private property transferred to the said company and partly over land vested in the Table Bay Harbour Board, the Cape Town Municipality, and the Green and Sea Point Municipality, with all of whom agreements were entered into.

4. By virtue of the Act the said company issued in the months of December, 1893, and February, 1894, debentures to the amounts of £25,000 and £9,000 respectively, and on the 28th July, 1898, the said company was placed in liquidation by order of this Honourable Court.

5. On the 16th March, 1899, the Official Liquidators of the said company reported to this Honourable Court that they recommended the acceptance of an offer from a syndicate called the Sea Point Railway Syndicate to purchase the whole undertaking of the said company as a going concern, for £20,000, upon the syndicate agreeing to take over all agreements existing between the company and other persons.

6. All the necessary legal requisites were observed with regard to this report, and the said recommendation of purchase and sale, which were duly approved of and confirmed by this Honourable Court, by order dated the 13th day of April, 1899, and pursuant to such order the official liquidators on the 10th August, 1899, sold and ceded and made over to the syndicate the said undertaking with all rights, powers, privileges, running powers of the said company, and also certain agreements in the third paragraph hereof referred to, and the said liquidators duly reported their action on the 15th September, 1899, to this Honourable Court, which report specially stated "that the steps necessary to secure the completion of the sale owing to the nature of the company's agreements and running and other rights has taken longer than would have been the case under more ordinary circumstances," and which was—after the necessary legal requisites—duly presented to and accepted by this Honourable Court, no objections being lodged.

7. Among the said agreements ceded and made over by the said official liquidators to the said syndicate were certain agreements with the Cape Town Council by which the said company had undertaken to pay certain annual sums in consideration of certain running rights; the said syndicate raised the sum of £25,000 by



debentures upon the said undertaking sold to them under the said order of Court, and a bond was duly registered, securing the said debentures, which said bond and debentures have been paid by the plaintiffs, who hold the cancelled debentures.

8. Thereafter, the said syndicate, having duly received possession of the undertaking sold to it, spent considerable sums in repairing the said line and ran trains over it, and entered into arrangements with the defendant, who had full knowledge of the facts hereinbefore stated, for the supply of rolling-stock, but owing to military exigencies the same could not be supplied, and eventually the said syndicate sold all its rights in respect of the said undertaking to the plaintiffs. The said syndicate had been treated as the owners of the whole of the said railway as a going concern, and with all the rights, powers, and privileges of the original company by the Cape Government Railways, the Table Bay Harbour Board, and the aforesaid two Municipalities, and when, in 1901, the plaintiffs purchased all the rights of the said syndicate and the undertaking sold to it, due notice thereof was given, in writing, by the plaintiffs to these said persons. All the aforesaid agreements were duly taken over by the plaintiffs, who have duly performed all obligations resting upon them thereunder.

9. No objection was raised by the defendant then or at any time prior to the validity of the said order of this Honourable Court or to the said syndicate exercising all the powers granted by the Act No. 23 of 1889, but, on the contrary, the Colonial Government recognised the said order and powers.

10. Thereafter the plaintiffs, desiring to convert the said line of railway into a double line, to be worked by electric instead of steam power, took the preliminary steps for the introduction into Parliament in 1901 of a private Bill to amend the Act No. 23 of 1889 in these respects, and negotiations took place with the Colonial Government and the other bodies mentioned in paragraph 3 hereof in respect thereto, and similar steps were taken in 1903.

11. No agreement was arrived at and the Bill was not introduced, and from 1902 the ratepayers of the Green and Sea Point Municipality urged upon the Colonial Government to exercise its power of expropriation under Act 23 of 1889, and on the 26th November, 1904, the Colonial Government, through its duly-authorized agent, the General Manager of Railways, gave notice to the plaintiffs that the Government would request Parliament at its next session to authorise them to exercise their powers of expropriation of the Sea Point Railway, under section 21 of Act 23 of 1889.

12. At that time, and since April, 1903, an agreement, of which the Colo-

nial Government had knowledge, existed between the plaintiffs and the Table Bay Harbour Board, by which the Sea Point Railway has been worked by the latter body for goods traffic, and the said agreement was in force when Act No. 44 of 1905 was promulgated in June, 1905. The said Act is the authority referred to by the General Manager of Railways in the notice of November, 1904.

13. On or about the 18th July, 1905, the defendant, in the "Government Gazette" of that date, gave notice purporting to be in terms of section 4 of Act 44 of 1905, that it was the intention of the Government to enter upon and take over forthwith the said line of railway, and calling upon all persons and companies claiming to have legal claims therein and thereto to lodge their claims with him.

14. Thereupon the plaintiffs, on or about the 22nd of July, 1905, addressed to the defendant a communication complaining of the terms of the said notice, inasmuch as the plaintiffs were, as the defendant was well aware, the owners of the said line of railway, and the usual and proper notices of the Government's said intention had not been given to them as such owners, but the defendant, wrongfully and unlawfully, and in defiance of the plaintiffs' rights, maintained that there had been no legal assignment of the rights acquired by the company under Act 23 of 1889, and that both the order of Court aforesaid and the said agreement, by which the said railway was sold as a going concern were *ultra vires* and bad in law, and that the plaintiffs had no right or title to the said undertaking, which they had so purchased as aforesaid.

15. In any case the defendant lay by and with full knowledge acquiesced in all the proceedings above set forth, and in the said order of Court, the reports of the liquidators and the said agreements, and then and thereafter recognised the position, first, of the said syndicate, and afterwards of the plaintiffs, as entitled in succession to the railway company, to the entire undertaking aforesaid as a going concern, and the defendant is not entitled in law to question the validity of the said proceedings, order, reports, and agreements, or of the legal position and rights of the plaintiffs, as above set forth, but is by his conduct aforesaid debarred and estopped from raising any such question.

16. Thereafter, in pursuance of the defendant's said notice and contention, he proceeded on or about the 18th July, 1905, by himself, his servants or agents, wrongfully and unlawfully, and in spite of the plaintiffs' protests, to trespass upon and take possession of the said line of railway and the private property of the plaintiffs, without giving to the plaintiffs any notice of expropriation be-

yond the public notice in paragraph 13 hereof referred to.

17. On or about the 25th of August, 1905, the plaintiffs, in consequence of the said acts of the defendant, applied to this Honourable Court for an order, restraining the defendant from entering upon or interfering with the plaintiffs said property and undertaking, save and except under and in conformity with the provisions of Acts 23 of 1889 and 44 of 1905, especially as to compensation. The plaintiffs crave leave to refer to the records of the said application from which it will appear, *inter alia*, that the defendant denied that the plaintiffs had any legal claim to be treated as owners entitled to compensation and claimed that they had no title in respect of the said railway.

18. Upon the hearing of the said application this Honourable Court made the following order by consent of parties: "That the applicants, without prejudice to their rights, consent to the Government taking immediate possession of the line of railway known as the Sea Point Railway, and that the compensation to be paid to the applicants therefor be settled by arbitration in terms of the Lands and Arbitration Clauses Act of 1882, such arbitration to be held over pending an action to be brought for a declaration that the applicants were the purchasers of the said railway as a going concern and are entitled to be compensated upon the basis of the value of the said railway as a going concern."

The plaintiffs now claim: (a) A declaration of their rights in the premises. (b) A declaration that they were the purchasers of the said railway as a going concern, and that they are entitled, in any arbitration by which their compensation for the said expropriation shall be settled, to be compensated upon the basis of the value of the said railway as a going concern. (c) Alternative relief. (d) Costs of suit.

Defendant's plea was as follows:

1. The defendant admits paragraph 1, and as to paragraph 2 craves leave to refer to Act No. 23 of 1889, for the powers conferred upon the said company.

2. As to paragraph 3, he craves leave to refer to paragraph 2 of the said Act, whereunder it was agreed that the said line of railway should commence at such a convenient junction with the Western Railway System at Cape Town as may be agreed upon between the Commissioner and the directors of the company; the only agreement arrived at with the said company was terminable at three months' notice, and he craves leave to refer to the same when produced. With regard to the course of the said line, he craves leave to refer to paragraph 2 of the said Act, and to such agreements as may be produced by plaintiff, referring thereto; there is no agreement in force

between the plaintiff and defendant as to the said terminus, and no such agreement has ever been entered into.

3. He admits paragraph 4, and as to paragraph 5 craves leave to refer to the liquidator's report for the terms thereof.

4. As to paragraph 6, he admits the presentation and confirmation of the said report, and refers to its terms when produced. He admits that no objections were filed or were taken to the said reports, but he says that upon the said company being placed in liquidation, all the powers of running or working a line of railway under the terms of the said Act ceased and determined, and he craves leave to refer to the terms of the said Act.

5. As to paragraph 7, he admits that there were agreements between the said company and the Council, and craves leave to refer to their terms when produced; he says that he was no party to the said agreements, and does not admit that the same conferred the rights on the syndicate which they may have purported to do. He admits that debentures were issued, and a bond registered, but does not admit the other allegations in the said paragraph.

6. As to paragraph 8, he admits that the syndicate took possession of the railway line, and ran certain trains over it, and entered into certain arrangements for the supply of rolling stock by the Government, but says that the said arrangements never came into force or were acted upon, and the rolling stock could not be supplied owing to military exigencies. He denies that he treated the syndicate as alleged, and has no knowledge of the treatment by the Harbour Board and Municipalities. He admits that notice was given to him in writing that the plaintiff had purchased the syndicate's rights. He does not admit the other allegations in the said paragraph.

7. He admits that no objection was raised to the order of Court as alleged in paragraph 9, but denies the other allegations in the said paragraph.

8. He admits that there were negotiations with Government as alleged in paragraph 10, and craves leave to refer to the correspondence containing the same, when produced. As to negotiations with other bodies, he refers to such proof as may be adduced.

9. As to paragraph 11, he refers to the said notice of November, 1904, for its terms, and admits the other allegations in the said paragraph.

10. He denies that the Government had knowledge of the agreement in paragraph 12 referred to. He admits that Act No. 44 of 1905 was the Act contemplated in the notice of November, 1904.

11. As to paragraph 13, he craves leave to refer to the said notice, when produced, for the terms thereof.

12. As to the allegations in paragraph 14, he craves leave to refer to the correspondence between plaintiff and the Government, and to the proceedings in this Honourable Court when produced; he admits that he contends that the plaintiff has and had no power or rights to run or work the said railway; but he admits that the plaintiff is entitled to reasonable compensation, to be assessed by arbitrators under Act No. 44 of 1905, for the value of the material, plant, etc., forming portion of the said railway line or used in connection therewith, and for the value of any land, their property, so used, and he is willing to pay the said sum when assessed. He denies that the plaintiff is entitled to compensation on the basis of the said railway being a "going concern," if by that is meant that it had or has running powers in respect of the said line.

13. As to paragraph 15 he denies that he acquiesced as aforesaid in any manner which can prevent him from taking up the position that the plaintiff has not in law running powers in respect of the said line, and he denies that any acts of his did or could act as an estoppel, with regard to what are the legal rights under Act No. 23 of 1889.

14. As to paragraph 16, he admits that he took possession of the said line, and says that he did so under the powers conferred by paragraph 4 of Act No. 44 of 1905. He admits that plaintiff protested.

15. As to paragraph 17, he admits that plaintiff is entitled to be compensated for the value of the materials, plant, etc., in and upon the said line of railway or used in connection therewith, whether placed there by the company or the syndicate or the plaintiff, and for any land, plaintiff's property, used for the said line; and he tenders to pay such amount as may be assessed by arbitration for the same.

16. He admits paragraph 18, but, save as above, denies the other allegations in the said declaration.

Wherefore he prays that the plaintiff's claim may be dismissed, with costs. And for a claim in reconvention, the defendant (now plaintiff in reconvention) says:

17. He craves leave to refer to the matters above pleaded.

18. Subsequent to the taking possession of the said line of railway by him as referred to in paragraph 14 of the plea, he has necessarily expended considerable sums of money in repairing the said line of railway and the works in connection therewith, in order to enable the said line of railway to be placed in a condition fit to be worked and run as a railway, and the said railway is now in such condition.

The plaintiff in reconvention claims:  
(a) That it be declared that the defendant in reconvention is entitled to compensation upon the basis of the value of the material, plant, etc., in or upon

the said line of railway or used in connection therewith, such as stations, gate fences, etc., when taken over under Act 44, 1905, and in addition, for the value of any land duly transferred to the defendant in reconvention, over which the said railway passes, and which has been taken possession of by the plaintiff in reconvention. (b) That in the event of the Court deciding that the plaintiff is entitled to compensation on the basis claimed by him, in estimating the amount of compensation to be paid to defendant in reconvention, the necessary expense incurred by plaintiff in reconvention in placing the said railway in a fit condition for traffic, be deducted, in any arbitration. (c) Alternative relief. (d) Costs of suit.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C., and Mr. Burton), for plaintiffs. Mr. Searle, K.C. (with him Mr. Evans), for defendant.

Mr. Schreiner outlined the pleadings and the points at issue between the parties.

De Villiers, C.J. asked counsel whether the difference would be great between the line as a going concern and otherwise.

Mr. Schreiner replied that it would. He went on to say that up to the "Court stage," as he might call it, the defendants made no recognition of the rights of the plaintiffs. They then offered to pay something, but it was found that they took up the position that the plaintiffs had no rights to run the line, and that they put the value at scrap heap prices. They were willing to pay the value of the land.

Mr. Searle said that it might simplify matters a good deal if he explained that the Government were prepared to admit that they had treated the plaintiffs as though they were in the same position as the company. They took up the position that the Government, as a Government, were not aware of these rights claimed by the plaintiffs.

Conrad Christian Silberbauer, chairman of the Sea Point Syndicate, formed to take over the Metropolitan and Suburban Railway Co., said that the latter company went into liquidation in July, 1898. The syndicate took over in April, 1899, but at that time the railway had got into a very neglected state. The syndicate had discussions regarding the railway with the Commissioner of Works at that time, Mr. Sauer. The Commissioner said that he would recommend to the Railway Department the hire of the rolling-stock to the syndicate on the same terms as the Metropolitan Railway had had. At first he said he was averse to any company going on the same site for a railway station in Cape Town, because of the inconvenience caused to the Government Railways. He also said that if any other Government land could be found in the neighbourhood he would

strongly recommend the grant of such land for the purpose of the Cape Town terminus. The conveyancers searched the matter thoroughly, but could only find Harbour Board land. Witness communicated this to the Commissioner, and then the latter said he would recommend that the terminus be granted at three months' notice. They saw the Commissioner again subsequently, and he then said he would only carry out that promise if the syndicate would give the Government the right to purchase the railway. They did not consent to that. On the day prior to the order made in the liquidation of the old company, the syndicate was registered with £25,000 worth of debentures. Then they began to put the line into order. Witness communicated with the General Manager of Railways on the subject of the hire of rolling-stock, the Cape Town Station, and the repair of engines. An agreement was come to. The Cape Town Station was to be on six months' notice. The syndicate's engines were repaired, tickets were printed, and a time-table framed, and every preparation was made for opening the line on the 1st September, 1899. Bye-laws were procured, and submitted to the Commissioner of Public Works. Then the stoppage came, because the Government could not supply rolling-stock when the war broke out. The syndicate had appointed a superintendent and general manager, staff, and engine drivers. They had received transfers of all the private lands over which the line ran. The only other bodies concerned would be the Harbour Board, military authorities, the Colonial Government, and the Municipalities of Cape Town and Sea Point. The Sea Point Municipality wanted the Beach-road widened so as to straighten the line. This was done. The Cape Town Municipality also recognised the rights of the syndicate. Recognition was also given by the Imperial Government, the Colonial Government, and the Harbour Board. He was not aware of anyone else whose consent was required to enable the syndicate to work the railway.

[De Villiers, C.J.: Did you actually work the railway?]

Witness: We did not. First of all there was the crisis before the war broke out, the Government could not supply the rolling-stock, and then the war actually broke out, and the Government were unable to supply the rolling-stock. We had no rolling-stock of our own, except the two engines. Proceeding, witness said that in 1900 the present plaintiffs closed upon the option which had been given them by the syndicate, and on the 16th November, 1900, witness gave notice of the sale to the Tramway Company of the syndicate's undertaking to the General Manager of Railways, Harbour Board, Sea and Green Point Municipality, and Cape Town Municipality. The syndicate, having sold the un-

dertaking, went into voluntary liquidation.

Cross-examined: The line was never worked by the syndicate either for passenger or goods traffic. They paid no rent to the Government for the use of the terminal station, but they put the station into good order. The Tramways Company obtained the option of purchase in August, 1899. The company bought out and out from the syndicate, when the latter took over the railway, 55 per cent. of the undertaking, and took an option for one year of the remaining 45 per cent.

Samuel Solomon Blumenthal Mills, a director of the Sea Point Railway Syndicate, said that the syndicate went to considerable expense in repairing the line, so as to make it fit for working. About £3,200 was spent in the way of wages and materials upon construction work. Medworth, the general manager of the Sea Point Line, made purchases of oil and so on from the Government for the construction work and with a view of running the line. If the Government could have supplied rolling stock the syndicate would have opened the line on the 1st September, 1899.

Cross-examined: The option given by the syndicate was that the Tramways Company should take over the line at the price paid by the syndicate, with 5 per cent. interest added. The syndicate did not attempt to get out rolling stock of their own. They found it would be impossible to get out rolling stock, and, furthermore, their financial resources were very limited.

In re-examination, witness said that the purchase was made by the syndicate in order to facilitate the connection of the Mills' Camp's Bay Syndicate with Cape Town. The plaintiff company acquired their rights in the Sea Point line by the negotiations which gave the Camp's Bay Company running rights over the Cape Town Tramway's lines.

By the Court: The idea was not, as far as he was aware, to shut up the Sea Point Railway; they had intended to work the railway.

Edward Ridge Syfret, the plaintiff company's representative in this colony, said that he held the company's power of attorney here. The option over the Sea Point line was exercised through witness. The company took over the line about two months later. Witness had nothing to do with arranging the terms. They had many interviews with Ministers from time to time concerning the railway. There had never been any failure to recognise the rights of the company until the notice appeared in the "Gazette" last year. Witness was present at various interviews when the Sea Point people were pressing for the taking over of the railway. In January, 1902, Sir Gor-



don Sprigg received a deputation from the Sea Point people. The transcripts put in of shorthand writer's notes was a fair report of the utterances of Sir Gordon Sprigg. Before 1902 witness had had communications with the then Commissioner (Dr. Smartt) on the same subject. Witness pointed out to Dr. Smartt what the company would be prepared to do, and Dr. Smartt said that as long as the company treated the Sea Point people fairly the Government would not interfere. Dr. Smartt spoke strongly at that time in favour of electrification of the railway. The plaintiff company had always been treated as successors of the Metropolitan Company. In December, 1900, witness had an interview with a deputation from the Sea Point Council, who recognised the plaintiff's position. After exercising their option, the company were going to introduce a Bill for the electrification of the railway so as to work it in conjunction with the tramways. That would have necessitated a broader gauge and laying down an extra rail. They communicated with the different municipalities, and the Government in connection with the scheme. The company spent a considerable sum upon preparations for introducing a Bill into Parliament. Witness saw Mr. Douglas upon the subject. In the first instance Mr. Douglass seemed wishful to assist the company in every way, but afterwards he took an antagonistic view. At a later stage Mr. Douglass asked them what they would be prepared to take for the line. Neither in 1902 nor in 1903 did they introduce the Bill, on account of the opposition. They did not abandon the scheme. Subsequently in 1903 they received notice from Mr. Douglass that he would like to bring a motion into Parliament to expropriate this line and others. Witness had never quoted any figure to the Government. The company paid £29,000 odd for the line.

[De Villiers, C.J.: What do they claim from the Government?]

Witness: They have made no claim.

Would they take £29,000 from the Government?—I think you could hardly expect them to do that, my lord.

I mean in addition to your expenses?—But they have been out of interest, and they have expended other moneys on the line.

Would they take the amount they have paid and their interest and expenses?—I am not in a position to say, but I think that would hardly be fair, because they bought the line at a time when no one else would touch it. They stood a certain amount of risk in buying it, and they certainly should get something for their risks and their rights.

[Hopley, J.: You mean to say that the line has appreciated?]

Witness: Oh, yes. In further evi-

dence, witness said that the company had not worked the line, their only rolling-stock being two engines. In 1901 the Harbour Board ran traffic over the line. The company also gave the military use of the line to the Green Point Camp. The C.G.R. applied to the company for leave to run stock over the line for the military. The Harbour Board used the line gratuitously down to April, 1903. At the end of 1902 the company approached the Harbour Board, and insisted upon receiving some payment for the traffic over the line. An agreement was arrived at between the company and the Board on April 4, 1903. The Board were given sole right to run traffic over the line, and they were to pay the company so much per ton. Coal and stores were run out to the terminus at Sea Point, to be transhipped into cars to Camps Bay. The agreement with the Harbour Board continued until the Government interposed in 1905. Had he known that this would have been the Government's line of action, the company would have taken the opportunity of being heard in opposition to the Bill introduced by the Government in the last session of Parliament. The company had not spent any considerable sum on the upkeep of the railway, the maintenance being taken over by the Harbour Board under the agreement.

Cross-examined: The company had not run any passenger traffic over the line. He believed that originally it was principally a passenger line. Anyone could have had good traffic carried one could have had goods traffic carried over the line through the Harbour Board. Goods brought out from England had been carried over the line for delivery at Sea Point. Witness believed that Mr. Searle drew the company's Bill. He did not know that the Government had opposed the Bill all the way through, on the ground that four lines would be required in Dock-road. The company's position was that at the date of expropriation by the Government they (plaintiffs) had the right to run over the line. They would have run between Sea Point and Cape Town, and would have tried to get a station on the present site. He admitted they would have had to come to some arrangement with the Government before they could run the railway, but he did not contemplate being unable to arrive at an arrangement. About the time they got the notice of expropriation from the Government, about November, 1904, the company began laying out considerable sums upon the improvement of the tram lines. He did not consider that that expenditure would have been unnecessary, even if the railway had been run by the company on the electric system.

Re-examined: The company prepared for promotion in Parliament three dif-



forent Bills, and at no time did the Government raise any objection to the principle of the Bills. The Cape Electric Tramways did not have any interest originally in the Sea Point Syndicate.

Mr. Schreiner closed his case.

Alexander James Robb, Assistant General Manager of Railways, said that he acted as General Manager in the absence of Mr. McEwen. Mr. McEwen was now absent in Natal in connection with the Customs Conference. Witness could speak as to the attitude of the Railway Department towards the question of electrification of the Sea Point Railway. The reports by officers of the department were universally against the electrification of the line. No point was raised as to the running powers of the railway, but there were minor difficulties. They regarded the quadruplication of the lines on the Dock-road as an impracticable proposition. As to the terminus at Cape Town, the department would object to another company running into their goods yard, because it would be extremely difficult, if not impossible, to work the goods yard with an outside company exercising control there. The terminus that the old company had was now actually merged into the goods yard. The present terminus was nearer the sea, upon recently-reclaimed land. The plaintiff company had not made application to the Government for rolling-stock for the Sea Point line. The cost of rolling-stock for that line would be about £60,000. The Railway Department carried traffic over the line for the military during the war at a very low rate, about sufficient to cover cost of haulage.

Cross-examined: Witness did not draw out the reports which had been prepared on the company's Bills. He believed that Fillis's Circus formerly stood on the site of the present station, at the foot of Adderley-street. He believed that the value of the rolling-stock at present on the line will be about £25,000 to £30,000. That was the value as second-hand rolling-stock. When witness said that the department were opposed to the Bill, he meant that they were opposed to the details; they were not inimical to the electrification of the line.

Harry Horne Elliott, Resident Engineer of the Western System of the Cape Government Railways, said that when he looked at the line last year the railway was not fit for heavy goods traffic or passenger traffic. So far as passenger traffic was concerned, it had the appearance of an abandoned railway. The Government had reconstructed the line, and had spent a very large amount upon it. They had spent between £24,000 and £25,000 in putting the line into order. That included about £1,500 for a little new work. The line, as it was previously, would not have been passed by the department as fit for traffic. They would not consent, if they could possibly

help it, to another administration coming into the C.G.R. goods yard.

Cross-examined: The old Metropolitan Company used to run into the goods yard, but the traffic was then very much less. That was under a three months' agreement.

Mr. Searle closed his case.

Mr. Schreiner: The case is much simplified by the admissions which have been made on behalf of the defendant. The disposal of the old company was, I submit a legal disposal. They sold the railway as a going concern, and if that was a lawful sale the Court will give judgment in our favour. Act 23 of 1889 authorised the construction of the railway. Sec. 5 gives the Company authority to take possession of vacant Crown land, but they never did so. Sec. 11 repeals Act of 1884 and gives the Company power to mortgage. A debenture is a floating charge. It is similar to our general bond. In England a railway company has no statutory power to mortgage its property; but it is not so with us. In England a railway company cannot be wound up under the Company's Act, and when the company goes into liquidation the debentures become valueless, but that is not our law. The English railway Acts give no power to issue debentures. True all English railways constitute themselves into companies, and as such issue debentures, but the debenture holders cannot foreclose.

[De Villiers, C. J.: Why not?]

It is only an inference from *Marshall v. Staffordshire Tramway Company* (72 L.T. 542) which shows the distinction between railway companies and tramway companies. A railway company in England cannot be wound up, and a railway cannot be sold by the company to which it belongs. In 1884 our debenture holders had no statutory recognition and hence the difficulty of financing a railway; but in 1889 that recognition was granted.

[De Villiers, C. J.: If you acquire rights to the ground over which you pass you may take your railway wherever you like.]

Certainly; but it is not the same with tramways. See Act 19 of 1861, and compare with the various Tramway Acts.

[De Villiers, C. J.: Is there anything to compel a railway to run trains?]

Not a word. The Cape Central Railway was authorised by Act 16 of 1883, which is closely parallel to Act 23 of 1889, but the Act of 1883 gave no power to issue debentures. The Cape Central went into official liquidation in England. Because it was a Colonial railway it also went into liquidation here; and in 1891 the English Court sanctioned the sale of the railway to the liquidators here. The property was

purchased and the present Cape Central is working under no other authority than that sanction, and that purchase from the original proprietors. In Act 42 of 1898 we find that concession money was provided and the New Cape Central Railways acquired the property. That showed that Parliament was satisfied that the acquisition was lawful. See also *Cape Central Railway In Re* (1 C.T.R. 84) and the same case at (2 C.T.R. 352 and 380). The defendant must show where our practice as established by this Court in 1899 is wrong; a decision which was anticipated by the Court of Chancery in 1891 and 1892. Act 24 of 1889 clearly recognised that Government was to enter into an agreement with the plaintiffs and not with a dead company (viz., the old Metropolitan and Suburban Company). The purchase was made from the Metropolitan and Suburban Company subject to all equities, Sec. 21 of Act 24 of 1889 gives the directors a free power of sale, and Act 44 of 1905 distinctly recognises the rights of my client. As to electric power, see Act 25 of 1905. Anyone may use steam wherever he pleases, but not electric power. We purchased this railway as a going concern.

[De Villiers, C. J.: I do not see how a company can sell as a going concern when it is not under liquidation. Would not "with running powers" be a more correct term?]

"Running powers" is a technical English term; it would not imply what we mean: "working powers" might be better. Our point is that we stand in the same position as the Metropolitan and Suburban Railway Company.

Mr. Searle: There can be no question of estoppel here. The question is whether Act 23 of 1889 came to an end when the old company went into liquidation, unless 44 of 1905 revived it. That it could not do; and this brings me to the position of companies authorised by Private Acts. Take, e.g., the Milnerton Railway Company, they had no power of assignment and therefore they had to go to Parliament to assign. From the case of the Wellington Railway (see Act 15 of 1872) downwards, our Parliamentary practice shows that unless power to assign has been granted by the Legislature it must be acquired by subsequent Acts. See *Hardcastle's Statutory Law* (p. 284).

In case not only of Railway Companies but of all public companies, a company can neither give up its powers nor delegate them. Brice on Tramways, etc. (p. 545) and *Gardiner v. L.C.D. Railway Company* (2 L.T. 201 and 211). That was a case in which debentures had been issued. A Railway Company cannot transfer its business to other companies. *Hodges on Railways* (p. 54, 7th Edit.—citing *Beaman v. Ruff*. As

to procedure in winding up companies, *Hodges* (p.p. 425, 537, 695). As to running powers, see *Beaman v. Ruff* (2 L.J. 1 Ch: 437), *Winch v. Birkenhead Railway* (5 D. G. and S., 562), *Midland Railway v. G. W. Railway Company* (42 L. J. Ch., 438), *L. and B. Company v. L.S.W. Company* (4 J. and J., 362). In *re Richmond Water Works* (3 Ch.D. 82, 99).

[De Villiers, C. J.: Why cannot a railway company hand over its rights to another company?]

Because an Act of Parliament may not be bought and sold. This is no question of cession of action, but of cession of powers and privileges. These cannot be ceded.

[De Villiers, C. J.: Suppose that a railway company here wishes to hand over its rights to another company, who could prevent it from doing so?]

Anybody having an interest.

[De Villiers, C. J.: Who would that be?]

Any public body, such as a Harbour Board or a Divisional Council or *Primus e populo*. The main question is whether a railway company has any powers of delegation. If these powers are inherent in such a company, why are there clauses in many modern Acts giving such powers? A liquidator could not carry on a railway; at all events it could not be done at once. The Kowie Company went into liquidation, and by Act 33 of 1894, Sec. 6, their powers were conferred on their successors. As to our law, the preamble to Act 23 of 1889 shows that powers under an Act of Parliament cannot be assigned. See Acts 25 of 1884 and 8 of 1887.

[De Villiers, C. J.: The Act of 1884 was never acted upon.]

No, but why was Act 8 of 1887 passed. That shows that a new company must go to Parliament before it can avail itself of a previous company's Act. Compare Act 16 of 1898 with 16 of 1902, as to the Milnerton Railway.

[De Villiers, C. J.: A line of railway may mean either the line itself or the running powers over the line; what is the use of the rails without powers to run over them?]

If the property is serviceable we should have to pay for it. All our law goes to show that you cannot assign railway rights without a special enabling clause in your Act. As a running railway the Sea Point line was derelict. No doubt there was property there. If Act 23 of 1889 was still in force the Government might have assigned under Sec. 21.

[De Villiers, C. J.: Suppose one company sells to another its line of railway, would not the purchaser have running powers?]

No, the sanction of Parliament should be obtained, or the concession would be too obscure. But here we have a

concession to the railway and to work the railway. It had been disused for years, and had not been kept open in terms of Act 19 of 1861. It is a valuable right *not* to work a railway, and we fear that the plaintiffs will claim that right. They have done nothing to utilise this railway; they do not want it, but they do want to throw all the traffic on the tramway. Our contention is that they should get compensation for such of their plant as would be serviceable for a railway, but we object to pay for privileges which no longer exist. See *Attorney-General v. G. N. Company* (5 Ap., 481). If the Company has no right to assign they are prohibited from assigning, Maxwell on Statutes (p. 363, 2nd Edit.). As to powers of liquidation, see 149 of the Insolvent Ordinance, but no person has power to sell Parliamentary privileges. As to estoppel, see *Queen v. Hutchings* (6 Q. B. 300). This case was cited with approval in *Everest v. Strodle*.

[Hopley, J.: Suppose the company had neglected to work the railway for six years, could they not have resumed working?]

I think not.

[De Villiers, C. J.: Then the question of assignment has nothing to do with your case.]

Oh yes; the disuse of the line together with the cession show that the Company were exceeding their rights.

[De Villiers, C. J.: The words of the concession were "as a going concern," why then could not the creditors of the original company come in?]

Like everybody else, they took what they could get, and there is but little chance of such an action now. On this point the liquidator was very careful. He only sold such legal rights as he might have.

[De Villiers, C. J.: Should not the arbitration have come first, and then you could have come to Court if there was any doubt as to the basis of arbitration?]

The application has been made by consent.

[De Villiers, C. J.: I do not see how the Act of 1882 is to tell the arbitrator how to decide on a point of law.]

[Mr. Schreiner: Possibly it may not go to arbitration.]

[Counsel having argued further on the facts.]

Mr. Schreiner was heard in reply.

*Cur. Adv. Vult.*

*Postea* (March 27th).

De Villiers, C.J.: The 4th section of Act 44 of 1905 empowers the Governor "to take over at a cost to be settled, failing agreement, by arbitration under the Lands and Arbitration Clauses Act 1882, the line of railway known as the 'Metropolitan and Suburban Railway,' authorised by Act 23 of

1889 to be constructed by the Metropolitan and Suburban Railway Company, together with all buildings and plots of land acquired by the said company and used in connection with the working of the said railway, as also all rolling stock, engines, carriages, plant, machinery, telegraph, or telephone apparatus, wire, instruments, and every matter or thing connected with the said railway or the working thereof." If that railway company had still been in existence at the date of the passing of the Act of 1905 there would have been no reasonable doubt as to the meaning of the section. The Act of 1889 had authorised the company not only to acquire, construct, and equip, but also to work and maintain the line of railway and the taking over by the Governor of such line of railway would include the taking over of the right to work such railway. Such taking over was to be at a cost to be settled, failing agreement, by arbitration, and in settling such cost, the arbitrators could not ignore the fact that the Government was taking over not only the material and plant, but also the right to work the railway at a profit or otherwise. It appears, however, that the company, after working the line for a short time with rolling-stock hired from the Government, was placed in liquidation by order of this Court on July 28, 1898. The official liquidators, in their report to the Court, recommended the acceptance of an offer from a syndicate called the Sea Point Railway Syndicate, to purchase the whole undertaking of the company as a going concern, for £20,000, upon the syndicate agreeing to take over all agreements existing between the company and other persons. This report was ordered to be duly published for the information of all concerned. No objections were raised, and on April 13, 1899, this Court approved of and confirmed the recommendation. The liquidators accordingly sold and ceded to the syndicate all rights, powers, privileges, and running powers of the company, as also the agreements just mentioned, including an agreement by which the company had undertaken to pay to the Town Council certain annual sums in consideration of certain running rights. The syndicate took possession of the line, and was treated by the Government as the owner of a going concern with all the rights and privileges of the defunct company. In 1901 the plaintiff company purchased from the syndicate all its rights in respect of the line. From that time until 1905, when the Act 44 of that year was passed, the Government treated the plaintiffs as the lawful owners of the line, and as such entitled to work the line. Negotiations were entered into between the plaintiffs and the Government with the view to the introduction by the plaintiffs into Parliament of a private Bill to authorise

the transformation of the line of railway into an electric railway. No agreement was arrived at, but on November 26, 1904, the Government gave notice to the plaintiffs that the Government would request Parliament at its next session to authorise the exercise of the Governor's powers of expropriation under section 21 of Act 23 of 1889. The rights which could be acquired by the Government under the Act of 1889 did not differ in any material respect from the rights it could acquire under the later Act of 1905, and there can be no doubt that an expropriation under either Act would include the acquisition of the right of working the line of railway. Within six weeks after the passing of the Act of 1905 the Government published a notice in the "Government Gazette" that it was the intention of the Government to enter upon and take possession of the line of railway, and calling upon all persons and companies claiming rights to lodge their claims. The plaintiffs objected, and thereupon the Government, for the first time, raised the objection that there had been no legal assignment to the plaintiffs of the rights acquired by the original company under the Act of 1889. The Government took possession of the line, whereupon the plaintiffs applied to this Court for an order restraining the Government from interfering with the line except in conformity with the provisions of the Acts already mentioned as to compensation. Upon the hearing of the application the Court, with the consent of the parties, ordered that the Government take possession of the line, and that the compensation to be paid to the plaintiffs be settled by arbitration, such arbitration to be held over pending an action to be brought for a declaration that the plaintiffs were the purchasers of the railway as a going concern, and are entitled to be compensated upon the basis of the value of the railway as a going concern. The result was that the present action was brought. The defendant, by his plea, admits that the plaintiffs are entitled to be compensated for the value of the materials, plant, etc., and for any land, the plaintiffs' property, used for the line, and he tenders to pay such amount as may be assessed by arbitration. He denies, however, that the plaintiffs are entitled to compensation on the basis of the railway being a "going concern," if by that is meant (as it obviously is) that they had or have running powers in respect of that line. The question therefore arises whether, in view of the fact that compensation is to be paid to cessionaries of the line of railway, a different construction should be placed on the 4th section of the Act of 1905 from that which would have been adopted if the original owner had been the owner at the date of the passing of the Act.

The defendant's contention is, in

effect, that the privilege of constructing and working the railway had been conferred on the original company exclusively, and that the company had no right to transfer that privilege to any other person or body. This contention raises a question of very great importance, but, in the view which I take of the case, it is not necessary for the Court to enter into a full discussion of that question. Mr. Searle has cited some passages from Voet (1, 4, 12, 13, and 14) in support of the defendant's contention, but, so far as they go, they appear to me rather to support the right of a company, to which statutory privileges have been conceded to transfer those privileges to others, if they are attached to a thing or undertaking, rather than to the person of the beneficiary. Where it is doubtful whether the privilege is real or personal, the fact that its exercise is for the benefit of the public is deemed a reason for holding that it was intended to be attached to the undertaking rather than to the person of the beneficiary. Assuming, however, that the original company in the present case had not the power, by its voluntary act, to transfer its right to work the railway to any other body, it does not follow that the legislature intended, by the 4th section of Act 44 of 1905 to place the defendants on a different footing, as to compensation, from that which the original company would have occupied. At the date of the Act the plaintiffs had already purchased the line of railway from a syndicate which in turn had purchased the line of railway from the liquidators of the original company under an order of this court. That order was in existence at the date of the Act, and it has never been reversed or even appealed against. Now, although I am always loth to impute to the legislature knowledge of existing facts, which could not be reasonably presumed to be known to it, I find it difficult to believe that the fact of the transfer under the order of court was not well known to the legislature. The Bill was introduced by the Government which had recognised the plaintiffs as the body entitled to work the line of railway. The report of the liquidators of the original company had been fully and widely published, the judgment of the Court had been fully reported in the newspapers, and the Government had in 1903 given notice of a motion in the House of Assembly as to the purchase of the line from its then owners. In regard to the validity of the order, it is difficult to see how it could now be impeached. There is no provision in our Companies' Act, as there is in England, excluding railway companies from liability to be wound up under the Act. The duty of the liquidators was to realise the assets and pay the debts of the company. Among the debts of the company were the debentures which it



had issued in order to assist it in raising the necessary funds for carrying out the undertaking. These debentures had been issued under the express authority given by the Act 23 of 1889. The eleventh section of that Act enacts that "the directors may from time to time—as occasion may require—take up, by way of loan, to be secured by debentures, a sum or sums of money not exceeding in all an amount equal to one-half of the subscribed capital of the company, and such debentures shall constitute a first charge on the property, undertaking, and assets of whatever nature of the company." Without the right of working the railway, the remaining assets of the company would have been of very little value, and accordingly the liquidators sold the line of railway—as they expressed it—as a "going concern." As no objection was raised by the Government or by any other person concerned, the Court confirmed the sale. The purchasers, as well as the plaintiffs, who bought from those purchasers, were recognised by the Government as bodies endowed with the full rights enjoyed by the original company. Even now the defendant admits by his plea that the plaintiffs are entitled to be compensated for the value of the plant, materials, and land owned by them in connection with the railway. This admission involves the further admission that the plaintiffs are the persons with whom an agreement is to be made under the fourth section of Act 44 of 1905, and to whom, failing such agreement, the cost of "the line of railway" to be settled by arbitration is to be paid. For the reasons already stated, I am clearly of opinion that in taking over the line of railway the Government should pay for the value, whatever that may, in the opinion of the arbitrators, amount to, of the right to work the line of railway. The Court will therefore declare that in any arbitration by which the plaintiffs' compensation for the expropriation of the line of railway in question shall be settled, the plaintiffs are entitled to be compensated for the value of the right to work the said line of railway, and the defendant will be ordered to pay the costs of this action.

I wish to remark, in conclusion, that it is a somewhat unusual course to ask the Court to declare the basis of an arbitration before the arbitrators themselves have had an opportunity of forming their own opinion on the matter. The order that an action for a declaration of rights should be brought was made with the consent of both parties, and it is only by reason of such consent and order that I have considered myself at liberty to entertain the present action.

His Lordship added that Mr. Justice Hopley, before whom the case was also

heard, concurred in the judgment he had given.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller; Defendants' Attorneys: Reid and Nephew.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

ADELAINE V. LOTZ. { 1906.  
Mar. 19th.

This was an application calling upon the respondent (defendant in the suit) to show cause why the evidence of one S. B. Joseph, a broker, should not be taken on commission.

The affidavit of J. E. Moore, one of the plaintiff's attorneys, stated that an action was pending between the parties as to the purchase price of certain goodwill and licence sold by plaintiff to defendant. The contract of sale was contained in certain broker's note, made by one S. B. Joseph, who was about to leave for Johannesburg on Wednesday, the 21st inst., and proceed thence to England, and who would not be in South Africa during next term.

The answering affidavit of Mr. Van Ryneveld, of Messrs. Dempers and Van Ryneveld, stated that defendant was a farmer, and the subject matter of the action was the alleged sale of the Good Hope Hotel, in Loop-street. It was essential for defendant's case, that the witness should give his evidence before the Court. Defendant's case would be prejudiced by the absence of the said Joseph.

Sir H. Juta, K.C., was for applicant; Mr. Schreiner, K.C. (with him Mr. McGregor), was for respondent.

Sir H. Juta said that it was generally considered that the party who called a witness was the usual one to apply for his evidence being taken on commission. Here it was the other way about, but there was the broker's note to speak for itself, and one could not go behind that.

Mr. Schreiner said that the case was one of lack of capacity on the part of the defendant to enter into the contract and non-understanding of the document which he was called upon to and did



sign. It was a case in which fraud and misrepresentation was raised, and he suggested that, if need be, the case should be postponed until such time as the witness Joseph would be able to give his evidence before the Court. It would be very prejudicial to the respondent if Joseph were not examined in Court.

[Hopley, J.: By whom is the fraud alleged to have been committed—Joseph?]

Mr. Schreiner: On the part of Joseph and plaintiff together.

[De Villiers, C.J.: If I thought defendant would be prejudiced in any way by the granting of the commission, and by the absence of Joseph from the trial, I should certainly refuse the application, but, as far as I can judge, it will really be the plaintiff who will be prejudiced by the evidence being taken on commission. It is for his interests that all his witnesses should be present, and give their evidence in person. The attorney for the defendant suggests at the close of his affidavit that he would be prejudiced, but he does not say how, and, in the absence of any statement how defendant will be prejudiced by the absence of Joseph, I do not see how he will be prejudiced. The Court will grant an order appointing Mr. Percy Jones commissioner to take the evidence of Joseph, costs to be costs in the cause.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

*Ex parte* THE BEDFORD  
AND COTTESBROOK MODEL  
DAIRY CO., LTD. { 1906.  
Mar. 20th.

Mr. Gardiner moved for an order authorising the reduction of the capital of the applicant company from £20,000 to £14,975, in accordance with resolutions adopted at a meeting of the shareholders. The petition stated that the memorandum and articles of association did not authorise a reduction of capital, hence the present application to the Court.

[De Villiers, C.J.: Under what section of the Act do you apply?]

Mr. Gardiner: Under section 35 and the following sections of Act 25, 1892.

[Hopley, J.: The application seems to be in the interests of the shareholders. The vendor is taking less shares.]

Mr. Gardiner: The vendor's capital is 5,000 fully-paid-up shares.

[Hopley, J.: He wants to tear up 2,000 of these shares?]

Mr. Gardiner: There are also 5,025 shares of the company unallotted, and we wish to reduce these by 2,050.

[Hopley, J.: It seems altogether in favour of the shareholders; their shares must become more valuable because of this reduction of the liabilities of the company.]

Mr. Gardiner: I do not think it would affect in any way the creditors of the company; their security is in no way reduced, because the shares which were given to the promoter were fully-paid-up shares.

[De Villiers, C.J.: The Court will grant an order, and dispense with the use of the words "and reduce."]

HOLLAM V. MOWBRAY } 1906.  
MUNICIPALITY. } Mar. 20th.

Municipal regulation—*Ultra vires*  
—Fish-horn.

*The appellant was convicted of the offence of blowing a fish-horn within the Municipality of M., in contravention of a regulation made by the Municipal Council under the 109th section of Act 45 of 1882.*

*Held, that as the mere blowing of a fish-horn by itinerant vendors of fish in ordinary course of their trade was neither a nuisance in terms of the 4th sub-section, nor interfered with the good rule and government of the Municipality in terms of the 27th sub-section, a regulation prohibiting such blowing, was ultra vires.*

This was an appeal from a judgment of the Resident Magistrate of Wynberg, sitting at Mowbray, on the 12th July last, who had convicted the appellant of contravening section (a) of the amended municipal regulations framed by the Mowbray Council, under provisions of Act 45 of 1882. The offence alleged was that "upon or about the 6th day of January, 1906, and at or near Mowbray, in the said district, the said John Hollam did wrongfully and unlawfully disturb the public peace or quietude by making a loud or unseemly noise, by striking or blowing on a fish-horn in the Main-road of Mowbray aforesaid." Accused pleaded not guilty, but was

convicted, and a fine of 10s. was imposed.

The grounds of the appeal were: (a) That sub-section (a) of the amended Mowbray Council regulations, promulgated by Government Notice No. 1,058 of the 5th October, 1905, is *ultra vires* of the powers vested in the respondent Municipal Council; (b) if the Honourable the Supreme Court is against the appellant on the above contention, then the letter, dated the 21st December, 1905, written by the Municipal Clerk to myself (appellant's attorney), and based on a resolution of the said Council, was a guarantee against prosecution, and the appellant ought not to have been convicted, he having had knowledge of the purport of the said letter; (c) against the conviction generally on the evidence before the Magistrate.

From the record, it appeared that a petition was put in during the proceedings in the Court below by the Municipal Clerk in favour of the abrogation of the bye-law prohibiting the use of fish-horns.

Mr. De Villiers was for appellant; Mr. Close was for the respondent Municipality.

De Villiers, C.J., said that surely a petition sent to the Municipality, and not sworn to by any of the signatories, could not be taken as evidence.

Mr. De Villiers said that he was surprised the Crown did not take objection in the Court below. The petition was signed by 88 ratepayers, who were in favour of the blowing of fish-horns, because the custom dated back a very long period, and it was looked upon as an ancient custom that should be allowed, and that it was a very effective way of bringing to the knowledge of those interested the fact that fish was on sale in the vicinity, and that the regulation was a hardship upon the fishmongers, as the class affected by this bye-law.

The record also contained a letter received by the attorney of the appellant from the Municipal Clerk, from which it appeared that the Council could not see their way to abrogate the bye-law, "but," it was added, "the Council is prepared to give you this assurance, that it will not enforce that bye-law in an exacting and arbitrary manner."

[De Villiers, C.J.: What is meant by "striking" on a fish-horn?]

Mr. De Villiers: I don't know, unless it contemplates some other instruments, because it says "striking or blowing upon a fish-horn, or other horn, or instrument."

[De Villiers, C.J.: But the charge is "striking or blowing upon a fish-horn?"]

Mr. De Villiers: I don't know whether my learned friend would seriously insist that defendant was "striking" a fish-horn?

Mr. Close: No; I think the charge is "blowing a fish-horn."

Mr. De Villiers said that this practice of blowing fish-horns had been acquiesced in by the public of the Colony and the Peninsula, and of Mowbray, and had been aided and abetted in—one might say by the public, who had made use of the blowing of the fish-horn for, perhaps, a century. Could it now be said that any blowing of a fish-horn was, *per se*, necessarily a public nuisance. Of course, the petition itself showed that, even in Mowbray, where there appeared to be a certain amount of public opinion against the fish-horn, yet there was a strong body of opinion in favour of the fish-horn. If the fish-horn was prohibited there might be a nuisance still by the perpetual ringing of bells and other instruments. Those who had plied the trade of fishmongers had a public custom in their favour; for more than 30 years they had, as of right and openly, blown the fish-horn. They had prescription in their favour.

[De Villiers, C.J.: If it is a nuisance there can be no prescription.]

Mr. De Villiers admitted that there could be no prescription, if it were a nuisance *per se*.

[De Villiers, C.J.: That is the real question—is it a nuisance?]

Mr. De Villiers urged that the length of time may prevent the character of a nuisance from attaching. He cited the cases of *Welby v. Hornby* and *Rex v. Smith*, as showing that a long passage of time may prevent the character of nuisance from attaching to an act which might otherwise have been a nuisance. Proceeding, he directed the Court's attention to a decision of the Chief Justice in 1890 in the case of *Rex v. Huntworth and Others*, which was an appeal arising out of a prosecution by the Municipality of the Paarl against the Salvation Army, or certain members thereof, for beating a drum in the public streets on Sundays. In that case the conviction of the Court below was quashed. He also called attention to a somewhat similar case, which afterwards came before the Court from Wellington, where, curiously enough, the bye-law forbade other noises except the fish-horn. Counsel contended that it was absurd after this length of time to come and try to set up the case that the fish-horn was a nuisance.

[De Villiers, C.J.: They say that people are becoming more and more nervous. I suppose our ancestors could stand it, but our contemporaries find it too much for their nerves.]

Mr. De Villiers: It may now be beneficial, really, that the fish-horn should be abolished, but, as your lordship laid it down in another case, however beneficial such a regulation may be, if it is beyond the powers of the Municipality, then, of course, it is *ultra vires*. Counsel went on to quote a number of Eng-

lish decisions in support of his contention.

Mr. Close said that the real point before the Court was whether the bye-law came within the powers granted by the Act of 1882, and whether, in its terms, it was a reasonable bye-law. He claimed that the Council had power to frame the bye-law under the section which gave them power to deal with noisome and offensive trades. If a trade were carried on by means of making loud noises, he submitted that it would be a noisome trade to the extent of being noisy.

[Hopley, J.: "Noisome" is not "noisy," surely?]

Mr. Close: Both words are from the same Latin root; they are very much the same in idea. They are both connected with the idea of a nuisance. Proceeding, he contended that the question of what was a nuisance was very much a matter of degree, and that what constituted a nuisance in a thickly populated neighbourhood, such as they found in certain parts of Mowbray, might not be a nuisance in a more scattered area, as, for instance, on the main road between Kenilworth and Wynberg. As to the convenience of the customers, the Court might properly take cognisance of the fact that very often the horns went on blowing, but the carts did not stop. He could not see why the fish trade should be entitled to any special privileges in regard to the manner in which the goods should be vended above any other trade. If a municipality had the power under the section of the Act, then the Court would be going very far in accepting a municipality's own construction of what was reasonable for its own particular case. A regulation in one municipality might be unreasonable in another. They had the evidence that the fish horn was a nuisance, and counsel submitted that the Magistrate was justified in his conviction.

De Villiers, C.J., said municipal councils no doubt had the power to make regulations for certain purposes, but they should not exceed the authority conferred on them by law. In the present case the respondent relied upon the fourth sub-section, and the 27th sub-section, of section 109 of the Municipal Act of 1882, in support of the regulation under which the appellant was convicted. The fourth sub-section gave the power to make regulations for suppressing nuisances, houses of ill-fame, and gaming houses. It was wholly impossible to believe that the Legislature could have intended to include among the nuisances which were to be suppressed along with houses of ill-fame the blowing of a fish horn. Then, as to the 27th sub-section, for generally maintaining the good rule and good government

of the municipality, of course, if it could be shown that the blowing of a fish horn in the street would interfere with good rule and government, then the regulation would be *intra vires*, but he did not believe that the blowing of fish horns by the itinerant vendors of fish in the ordinary course of their trade could constitute such an interference. In order to ascertain whether the appellant had been guilty of any offence in law, it was necessary to see what was actually done in the case. The appellant was driving through the streets with a fish cart. He saw a policeman, who stopped him, and asked him if he were aware the law prohibited the blowing of fish horns. The mere blowing of a fish horn, in the opinion of that policeman, was a contravention of the law, and he cautioned the appellant, who said that he believed all along that he was allowed to blow the horn. The appellant drove on, and when he proceeded some fifty or sixty yards, he turned round and laughed at the policeman. This was wrong on his part, but the blowing of the horn was done in the usual manner, and without being what the law would deem a nuisance. There was no evidence as to the nature of the noise, but he supposed the judges were allowed to bring into the consideration of the case their own knowledge of what took place in their immediate neighbourhood. Every day they heard these fish horns being blown, and it was impossible for anyone to say that it was such a nuisance as contemplated by the Act. The sound was certainly not very musical, and might affect the nerves of extremely sensitive persons; but laws were made for ordinary human beings, and cannot be adapted to the peculiar temperaments of each individual. These fish carts go through parts of the country where houses do not immediately adjoin the street. It was clear that they could not find the time to drive to every house. The housewives knew when the cart was passing, and if fish was not wanted, the cart passed along. It seemed to him to be a very useful kind of trade; useful to everyone concerned. Unless it was of such a nature as to endanger the health of the people or to become unbearable to people with ordinary nerves, he thought it would be going very far to say that the Legislature ever intended to make it an offence punishable by law. Here was a case where a fish-cart went through the suburbs and the moment it reached the limits of the Mowbray Municipality the driver was stopped blowing the useful horn. If the regulation was of such a nature as to render what had actually been done in the case punishable, then he said such a regulation was *ultra vires*. It might well be that a fish-horn might be blown

in such a way as really to disturb the peace and quietude and to amount to a loud and unseemly noise. It was possible it could be used in such a way, but in the present case it was not. In his opinion if the regulation meant that a fish-horn should not be blown in such a manner as to disturb the peace or quietude by the making of a loud and unseemly noise, then there had been no contravention of the regulation. If it meant that it should not be blown at all, then the regulation was *ultra vires*. In either case he considered that the conviction was wrong. The appeal would be upheld and the conviction quashed.

Hopley, J., concurred.

#### REX V. NICHOL AND OTHERS.

This was an appeal from the R.M.'s Court of Cathcart against a decision convicting the appellants on a charge of malicious injury to property. Mr. W. Porter Buchanan was for the appellants and Mr. Howel Jones was for the Crown. The appellants, four school-boys, were fined in £1 5s. or two days' imprisonment each for throwing a butcher's cart over an embankment into a river bed. The Magistrate, in his reasons for judgment, said there was no reason why the case should have come into Court. The complainant behaved in a most reasonable manner, giving the delinquents a chance to bring back the cart. Even after the summons any advance made would have led to its withdrawal, and he was of opinion that the accused showed considerable malice. The appeal was brought on the grounds that the conviction was not supported by the evidence, that malice was not proved, and that the complainant admitted, in evidence, that the property did not belong to him.

Counsel for the appellants having been heard in argument,

De Villiers, C.J., said the first question was whether an offence had been committed. The boys took a Scotch cart, which they saw standing in the street, they pushed it over the embankment four feet high into a river, which had two feet of water. On the face of that this was an injury to property, and very serious injury, and if it was done wantonly, then it became malicious. It was said it was a "lark" by the boys, but it was no "lark" to the owner of the cart. In his opinion it was a malicious act, and the Magistrate fully believed the evidence of the accomplices. He agreed with the Magistrate that the accused would have acted wisely if they had kept the case out of court, and they had again acted unwisely in appealing against a very proper decision.

Hopley, J., concurred.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

REX V. VAN DER BERG { 1906.  
Mar. 21st.

Act 20 of 1894, Sec. 21—Sheep—Scab.

*It is incumbent on an owner of sheep, who has reason for suspecting that his sheep are infected with scab, to use his best efforts to eradicate the disease and to give information to the inspector. He is not bound to dip the sheep if, owing to scarcity of water, that may not well be done.*

This was an appeal from a judgment of the Resident Magistrate of Philip's Town, who had convicted appellant of contravening section 21 of the Scab Act (No. 20, 1894), in that he "did wrongfully and unlawfully, after having become aware that a certain flock of sheep, his property, had become infected with scab, failed to make proper and diligent efforts to cleanse such sheep."

From the record, it appeared that the prosecution was laid on the information of Sheep Inspector Isak J. Marais, who said that on the 20th November, 1905, he placed defendant's sheep under an order to dip, the sheep being scabby. On the 21st December he again visited this farm, and found that defendant's sheep had not yet been dipped. He gave instructions on the 20th November that the sheep must be dipped. On the 21st December he extended the order for 14 days further, and told accused that he would report his case, and that he (accused) would be summoned. On the 8th January, 1906, he inspected defendant's sheep, and found that they had then been dipped.

Mr. Watermeyer was for appellant; Mr. Nightingale was for the Crown.

Mr. Watermeyer said that the first ground of appeal was that the offence charged was not a contravention of this Act at all, and certainly not of the 21st section, because there was no duty laid upon the defendant by the Act to make efforts to cleanse his sheep between the 20th November and 21st December. He submitted that on the authority of *Rex v. Theron* (3 C.T.R., 166), the time allowed for cleansing the sheep was six weeks. The extra fortnight allowed by the inspector was, he urged, an extension of time within which the sheep could be dipped, and

defendant dipped his sheep within the period. Counsel also submitted that the evidence did not support the conviction under the section of the Scab Act, because all that the evidence amounted to was that the appellant did not carry out the inspector's order, and that was evidently what was in the Magistrate's mind all the time. The Statute said "proper and diligent efforts to cleanse," and there was no evidence that appellant did not make effort to cleanse the sheep by other methods than dipping. The Act did not provide any penalty for not carrying out an inspector's order. It was in evidence that the only water available on the farm for domestic purposes was the water in a certain well.

Mr. Nightingale said that the accused was charged under section 21 that, after he became aware that his sheep were scabby, he failed to make proper and diligent efforts to cleanse such sheep. Section 21 required that when an owner of a flock should become aware that his sheep were infected, he should give notice. That the appellant in this case had done. On the 31st October he gave notice. Appellant was not charged with having failed to give notice to the sheep inspector, but he was charged with a different offence altogether. He was charged with having failed forthwith to proceed to make proper and diligent efforts to cleanse such sheep. They had this fact, that from the 31st October to the 20th November appellant made no efforts to cleanse his flock. That in itself was a contravention of the Act. Appellant was not charged with having committed a contravention of the order of the inspector; he had failed to dip the sheep, as the evidence showed, within the period of six weeks. The Act provided that that if at the end of the time allowed by the inspector, the owner had not cleansed the sheep, then the inspector may compulsorily dip them. It could not have been the intention of the Act that a flock-owner, whose sheep were infected, had merely got to give notice to an inspector, who might reside a great distance off, and that he should not himself make reasonable efforts to cleanse his own sheep.

Hopley, J., said it seemed that counsel for the Crown wanted to read the word "or" in the section as if it had been "and."

Mr. Nightingale said that the particular orders of the inspector were not material to the charge, and that, whatever view the Court might take of the evidence on record, the appellant had been rightly charged.

Hopley, J.: The history of this case seems to be that this man was living in a period of considerable drought on his farm, and with no water available, save such as he could draw from a well in the single cask that he seemed to possess, and that

on the 31st October last he gave notice to the inspector that his sheep, he thought, were beginning to suffer from scab. In his letter he says: "I had no water in which to dip, and my neighbours had no water. Let me know what I must do; I am handdressing, but I do not know whether I shall be able to beat the disease." Now, the Act only requires an owner, when he suspects, or has reasonable ground to suspect, that his sheep have become infected with scab, to give seven days' notice to the inspector, and to do his best to make proper and diligent efforts to cleanse such sheep." These duties, no doubt, are concurrent, and the Act means that he should not sit still if he could possibly avoid it; but he should do his best to try and eradicate the disease, and he must also tell the inspector. It is clear that he told the inspector and that he told him of the difficulties that he had in combating the disease, and that it was impossible for him to make what, under ordinary circumstances, were "proper and diligent efforts." He did what the Act enjoined upon him, and in so doing he threw upon the inspector the duty to come and see and advise him as to the exact measures that ought to be taken under the circumstances. The inspector came about three weeks afterwards, and he found that the sheep were infected with scab. He then gave an order allowing four weeks in which to dip and cleanse the sheep. There seemed to be no handy means of doing this, and when the inspector, slightly over four weeks afterwards, appeared again, he found that the sheep had not been cleansed. Then he might possibly have said, "You have taken no steps whatsoever to obey this order I shall now proceed with the remedy the law allows and dip the sheep myself." He did not do that; he extended the order for a fortnight. Then, when he called again, he found that his orders had been obeyed, and that the sheep had been cleansed. Now, defendant is prosecuted for not having cleansed the sheep before the expiration of the order, when the inspector visited his farm the second time. It seems to me that the authorities have missed their way. Once the inspector had taken this line, I do not think that he could revert to the previous section, and say that appellant did not make under section 21 "proper and diligent efforts" to cleanse his sheep in the first instance. He began by charging him with a contravention of the 22nd section for not obeying his (the inspector's) orders, but then, because he has obeyed his orders, he would hark back to the 21st section, and say that appellant could be held responsible for not having done everything reasonable to cleanse the sheep, irrespective of the inspector's orders. The question is, will the Act bear such an interpretation? The section says that every owner failing to



make such efforts, or give such notice within seven days as aforesaid, shall be deemed to be guilty of a contravention of this Act. Now, I must read this Act strictly, and it seems to me that these words give the sheep owner an alternative. It is cast upon him certainly to do both these things, but if he does one of the two, cleanses his sheep or gives timely notice to the inspector, he shall then be held to have done his duty, and not to have contravened the Act. That is my construction of the meaning of that section. If it is subversive of the policy of the Act, as Mr. Nightingale suggested that it may be, all I can say is that it is for Parliament to remedy the Act, and not for me. It seems to me that the proceedings have been misconceived in the present case, and that the appeal should be allowed. The appeal will be allowed, and the conviction quashed.

[Appellant's Attorney: G. Trollip.]

#### REX V. VAN QUICKELBERGE AND OTHERS.

##### Liquor licence—Act 28 of 1898.

*The appellant and her sons were executors in the estate of one V. Q. He had been the holder of a retail liquor licence. The appellant and her sons had been convicted of selling liquor to natives without a permit. V. Q.'s licence had not been transferred.*

*Held on appeal, that as V. Q.'s licence had not been transferred to the executors, they were not liable in a criminal case, and the conviction must be quashed.*

This was an appeal brought against a decision of the Resident Magistrate of King William's Town, by which three of the appellants were fined in £10 each, or a month's imprisonment, for selling liquors to natives without permits. The appellants were the executors testamentary in the estate of the late Desire van Quickelberge, of Green River. They were summoned in their capacity as executors testamentary for a contravention of section 2, of Act 28, of 1898. The police had reason to believe that liquor was being sold to natives, and traps obtained liquor from Ernest Quickelberge, who was in charge of the place at the time. The two brothers of Ernest lived some twenty-two miles from the canteen, and the widow, the third accused did not live at the hotel.

Mr. Burton was for the appellants, and Mr. Nightingale was for the Crown.

Counsel urged that it was the clear duty of the Crown to show that in their capacity the accused were managing the business. The question was, who was responsible for the carrying on of the business? the licence of which had never been transferred. The Magistrate was quite mistaken in assuming because they were executors in the estate they were responsible for the carrying on of the business. It might be that one or other of these persons was liable, but they were not liable simply because they were executors.

Mr. Nightingale having called the Court's attention to several points in the record of evidence,

*Cur. Adr. Vult.*

*Postea* (March 22nd).

Hopley, J.: In this case Julia van Quickelberge and three of her sons were summoned in their capacity as executors testamentary of the estate of the late Desire van Quickelberge on a charge of contravening section 2 of Act 28, 1898, by selling in their said capacity liquor to natives contrary to the conditions of their licence. One of the accused was not present at the trial. The widow and two of her co-executors appeared and pleaded not guilty. They were, however, convicted and sentenced. The material facts are that in April last the deceased was granted a licence to sell liquor at a place described as the hotel at Green River—which is also in parts of the evidence referred to for purposes of identification as "Quickelberge's Hotel," and "the hotel of the accused." Whether this hotel, to which seems to be attached a shop and a bar where liquors are sold, forms, or does not form, portion of the estate of the deceased, has not been proved in any way. It may, under antenuptial contract, belong to his widow, or it may be a leasehold of which, since his death, the widow or some other member of his family has acquired the lease. On this important point the evidence leaves us in the dark. Desire van Quickelberge died before the end of 1905, and letters of administration were granted to the accused as executors testamentary on December 21, 1905. Apparently the widow has continued to reside at the hotel, but her co-executors all seem to reside away from there, being according to the letters of administration resident in Berlin, Blaney, and Aliwal North, all in this Colony. The liquor licence for the premises has not been transferred, but is still in the name of the deceased, or was so, at all events, at the time of the alleged contravention of the law on January 12, 1906. On that day some brandy was sold to some natives, who were police traps, in the bar aforesaid by one Ernest van Quickel-

berge, a son of the deceased, but not one of the executors, and upon such the prosecution was instituted. Now section 62 of Act 28, 1883, provides that in case of the death of any holder of a licence, his widow (if any) or the executor of the deceased person, or in certain cases *curator bonis*, or a person approved of by the magistrate may carry on the business until the next meeting of the Licensing Court either personally or by agent approved of by any writing under the hand of the Resident Magistrate, without any formal transfer of the licence. The cases of the *curator bonis* and of the person or agent approved of by the Magistrate do not arise in these proceedings, since there has been no such appointment or approval, and we are consequently confined to the situations created by the personal carrying on of the business by either the widow or the executors—unless, indeed, some third party has been allowed to step in in an unlawful way to manage and carry on the business on his own account. It is clear that the business is being carried on—but in a prosecution like the present, which charges persons with a contravention of the law by reason of the Acts of an agent, it is part of the duty of the prosecutor to prove for whom such agent was acting. On this point the evidence is strangely defective. Nor does it appear to me that any presumption is raised of sufficient strength to warrant a finding. If the hotel had been proved to belong to the deceased's estate, some presumption might have arisen that the executors were not sundering from it the licence, and that they were carrying on for the benefit of the estate; but that has not been proved. The fact that the widow actually resides on the premises and that a son of hers, not one of the executors, manages the bar, would seem rather to point to the presumption that she was carrying on the business as widow for her own benefit, and not as executrix for the benefit of the estate; and the only direct evidence as to the person who is carrying on the business seems to point to Ernest van Quickelberge who made the sale of the liquor, and who, when interrogated by the police, described himself as the proprietor of the hotel. It is true that when he gave his evidence he seemed to modify such a statement by saying that he was managing the hotel in his mother's absence on the day in question; but if that was the case, it would point to the widow as the interested party, for it is not proved that she resided or managed there as executrix. It appears to me, therefore, that there is no evidence that is satisfactory to show whether the widow or the executors were carrying on the business, and that at all events the evidence is defective in not proving conclusively that the

accused as executors were so carrying it on. On this ground, and on this ground only, I hold that the appeal must be allowed, and I regret this conclusion, as the whole of the evidence convinces me that there were the illicit sales of liquor on the day in question by Ernest van Quickelberge, who, however, was not charged with any offence. The appeal is allowed, and the conviction quashed.

[Appellant's Attorneys: Syfret, Godlonton and Low.]

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

REX V. PRETORIUS. { 1906.  
 { Mar. 22nd

Magistrate—Finding on facts—  
Tainted evidence.

Hopley, J., said that a case from the Magistrate's Court at Victoria West had come under review, which he had submitted to his brother Judges. The case was that of the *King v. Willem Pretorius*, in which the Magistrate had taken a preliminary examination against Pretorius. At first, he was charged with one Koos Jooste, and the Attorney-General had remitted the case against Pretorius to be tried. The Magistrate had tried Pretorius, and had found him guilty of the crime of the theft of stock, and sentenced him to twelve months' imprisonment, with hard labour, and fined him besides. Pretorius and Jooste were two coloured men, working for a Mr. Wiese at a farm called De Dam, close to Victoria West, and very close to the native location there. These two people were employed by Wiese as shepherds, and another servant that he engaged was a girl called Marie Moss. Now, Marie Moss was a woman who had a husband in the location, with whom apparently she no longer lived. When she first came to the farm she transferred her affections to the prisoner Pretorius, and lived with him for a time, but, she said, "I got tired, and threw him away." Having discarded Pretorius, she seemed to have committed herself for a short while to Jooste, who also had a wife living at

the place. It was evident that Moss was on bad terms, as was natural, with Jooste's wife, though she herself denied it. When the present case arose against the two prisoners, this Marie Moss seemed to have got another man, David Kleinhans, who at all events was sleeping in her hut. Now, the owner of the sheep suspected nothing against the prisoners until some time or other in January, when it appeared that Moss wrote to Jooste, who had then left the farm, asking him to come back, but he declined, and it was then that she went to her master with this story, that he must keep Pretorius from her, and she would tell him something, and thereupon she told him that these two men had been habitually stealing his sheep, accusing them of some four or five thefts. Wiese had, it is true, lost some ten sheep, but he did not know exactly when, and he said that he always suspected the natives of stealing his sheep, which was extremely likely under the circumstances. There was no satisfactory proof that any theft had been committed on the farm, outside the evidence of Moss and Kleinhans, both of whom were accomplices. It was difficult to say why this should have been remitted to the Magistrate at all. It would be extremely dangerous under any circumstances to accept the woman's evidence. It might very well be that she was wanting revenge on Jooste, so that she brought this charge against him, and she seemed to have been on bad terms with Pretorius, and had complained that he was pestering her. With her motives so apparent from the circumstances, it seemed to him (the learned Judge) that the Magistrate ought not to have convicted on her evidence. He thought it was a pity that the case was remitted to the Magistrate. It would have been very much better to have brought it before a Judge and jury, so that they could weigh the evidence. He did not think that substantial justice had been done in this case, and he had submitted the matter to his brother Judges, who were not disinclined to that view. They were all agreed that the conviction should be quashed. The conviction would, therefore, be set aside.

#### REX V. FRASER.

This was an appeal from a judgment of the Resident Magistrate of Flagstaff, who had convicted appellant, George Hobart B. Fraser, of wilfully and unlawfully wounding a bull, and had sentenced him to pay a fine of £2, or in default one week's imprisonment. Mr. Gardiner was for appellant; Mr. Howel Jones was for the Crown.

Mr. Gardiner said that he admitted the wounding of the bull, but denied

the wilfulness of the wounding. He submitted that the man had good cause for his action, and that defendant's liability, if any, was a civil and not a criminal liability. The bull was dangerous, and running at defendant, and he fired his revolver. That the animal was dangerous was apparent, because no less than ten people had been chased by this very bull. Counsel submitted that the shots were fired by appellant in self-defence. There was such a strong doubt in the case that the Magistrate ought to have given the accused the benefit of it.

Without calling upon Mr. Jones,

Hopley, J.: I have carefully read the evidence in this case, and, while I feel with Mr. Gardiner that there are many points in which it is not altogether satisfactory, I still have to ask myself whether there is not sufficient evidence before the Magistrate to have found the verdict which he has found. He has, of course, to find that the shooting of this bull, with which the man was charged, was wilful and unlawful, and he has so found. Now the evidence is of two kinds. There is the evidence which shows that this bull had followed the cattle of the accused into his paddock, and that the bull was comparatively harmless there, and could have easily been got rid of by the servants of the owner of the bull, and by the servants of accused, who are Kafirs. Accused admits that he saw the bull in his paddock, and he says that he took no further notice at that stage, but got his gun, and went into the bush to shoot. On his return, the boys do not seem to have got the bull away, and he then deliberately armed himself with a revolver in his own house, and went and with his revolver shot at the animal, because, he said, he knew it to be a vicious and bad-tempered animal. Of course, if this had been done in self-defence, then the Magistrate would, under the circumstances, have found him not guilty. But the Magistrate did not take that view of the case; he took the other view, that this man went there with a revolver and intentionally and deliberately shot this bull for the purpose of annoying his neighbour (Mr. Ball), with whom he was on bad terms. That they were on bad terms is abundantly clear from the evidence. The owner of the bull had written letters, and had had altercations with the accused, and had called him very uncomplimentary names. The Magistrate saw the witnesses, and he chose which evidence he should believe, and it is impossible for me, sitting here as a Court of Appeal, to say that his view of the evidence was not correct. He has conscientiously found a verdict, and it is not for me sitting here to say that that is a wrong verdict. The appeal will be dismissed.

*Ex parte* VAN HEERDEN.

In reference to this matter, which was mentioned yesterday,

Hopley, J., informed Mr. Payne (counsel for petitioner) that he had noticed that the petitioner desired to leave for Pretoria. Was it, he asked, petitioner's intention to leave very shortly?

Mr. Payne said that he believed petitioner desired to leave at the end of this month. He wished to be admitted as an attorney and notary. As far as he understood, Van Heerden desired to take his examination at Graham's Town on his way to Pretoria, and thus avoid the expense of a special journey.

[Hopley, J.: It seems to me that there would be no difficulty in that case.]

Mr. Payne said he understood that it was not merely a matter of examination, but petitioner wished to be admitted before he left.

Hopley, J., suggested that notice should be given of the application to the Law Society, and that it might then be set down for hearing next Tuesday.

GENERAL MOTIONS.

*Ex parte* FERREIRA. { 1906.  
( Mar. 22nd.

Mr. Uppington moved for leave to raise a mortgage not exceeding £800 upon certain farm in the Willowmore district to enable petitioner (the usufructuary) to replace by pipes a furrow which had been carried away during floods. The matter had been standing over for production of fuller information, which was now furnished in affidavits by petitioner and his legal adviser.

Order granted allowing property to be mortgaged as prayed, security to be given to the satisfaction of the Master, costs of the application to be borne by the fund.

FOUCHE V. INCORPORATED LAW SOCIETY.

This was an application by Philip Jacobus Fouche for leave to include a certain period in articles of clerkship. Mr. Payne was for applicant and Mr. Gardiner was for the Law Society.

From the affidavits, it appeared that there had been two interruptions in applicant's service of clerkship with Mr. Gideon S. Cloete, attorney, of Lady Grey—during the closing of Mr. Cloete's office owing to the occupation of the village by the Republican forces, and during applicant's absence at Stellenbosch pursuing his studies for matriculation. He had also for a period performed the duties of Town Clerk at Lady Grey. The Law Society refused to recognise the breaks in service, and

directed applicant to enter into fresh articles on the 5th March, 1904.

His Lordship strongly commented upon the action of Mr. Cloete in accepting the office of Town Clerk and putting his clerk to do the work. It was all very well for the principal to draw his £50 or £60 a year for these little offices, and put his clerks to do the work, but all the same, it was a reprehensible practice.

Mr. Gardiner said that the Law Society objected to applicant, after he had entered into fresh articles, going back to the former articles, the service of which had been so seriously interrupted, and counting in the service he had then given.

Mr. Payne argued that there could be no doubt as to the efficiency of applicant, and submitted that, on the authority of the previous cases decided in the court, indulgence should be given as prayed.

Mr. Gardiner having been heard in reply,

Hopley, J., said that he did not see any reason for interfering with the course that events had taken in this case, and why the Court should grant an indulgence to the applicant. He thought the applicant should continue service under his present articles. There would be no order as to costs of the application. He thought that the attorney with whom applicant was articulated was more to blame than Fouche was for the irregularities which had been committed, especially in the matter of the Town Clerkship.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* LOTTEB. { 1906.  
( Mar. 23rd.

Mr. W. Porter Buchanan moved, as a matter of urgency, for leave to pass a mortgage bond for £2,600 on certain farm Normandie, Groot Drakenstein, district of Paarl. Petitioner is executrix testamentary in the estate of the late Johannes Petrus Lotter.

Order granted as prayed.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

COETZEE V. MEYER. { 1906.  
Mar. 26th.

Mr. P. S. T. Jones moved for removal of trial to the ensuing Circuit Court, at Mossel Bay, to be held on the 4th April.

Order granted as prayed.

COCHRANE V. NGESMAN.  
COCHRANE V. NQXAMNQXA.

Execution debtor — Seizure by messenger — Damages for wrongful seizure.

*The defendant, a messenger of a Magistrate's Court, finding a native, against whom he held a writ of execution, in possession of a horse, took it in execution. The native said that it belonged to the plaintiff, but the defendant did not believe him. The defendant kept the horse for a few days, and having in the meantime satisfied himself that the horse belonged to the plaintiff, he offered to return the horse. The plaintiff refused to take it unless he got damages for the detention of the horse. The evidence showed that at the time of the seizure the defendant acted bona fide, without negligence, and that he had reasonable grounds for believing that the native was the owner.*

*Held, that the defendant was not liable in damages for illegal seizure and detention.*

These matters came before the Court on appeal from the Resident Magistrate's Court at Stutterheim.

From the record, it appeared that the appellant (Messenger of the Resident Magistrate's Court at Stutterheim) had been sued for the alleged wrongful attachment of a certain horse, saddle, and bridle, in satisfaction of a writ for £30, issued in the suit of one John Johnstone, against Michael, who was in possession of the property when attached.

Michael is uncle of Elias, they both reside in the Komgha district, and the Messenger detained the horse, saddle, and bridle for a few days. After correspondence between the parties' agents, the Messenger offered to return the property, but this was refused unless he tendered damages. The result was that Michael had to go back to his home on foot. Elias, the owner, sued the Messenger for return of the horse, saddle, and bridle, or payment of value, £15, and also £5 damages, for wrongful detention. The Magistrate gave judgment for the plaintiff for £3 damages, with costs, and delivery of the horse, saddle, and bridle by noon of the following day, failing which the defendant to pay the value thereof as claimed. Michael also claimed £10 damages against the Messenger for what he described as "inconvenience, and loss of dignity," in having to walk from Stutterheim to Komgha. He was given judgment for £3, with costs. The main line of the defence was that there appeared to be some doubt as to whether Michael was or was not the real owner of the animal, the Messenger stating that his experience was that natives usually, when their cattle were seized under a writ, said that the stock belonged to some relative. He admitted that Michael had been employed under him formerly for a period of nine years as a constable, and that he had found him reliable.

The Magistrate, in his reasons for judgment in the first case, said he considered that the defendant, as Messenger of the Court, before seizing the horse, should, in terms of the 42nd Rule of Court, have demanded payment of the debt from Michael. He found that he (Cochrane) had not sufficiently reasonable ground for disbelieving Michael's statement that the horse was borrowed, and did not belong to him. He was of opinion that the security tendered by Michael's agent in terms of Rule 44 should have been accepted by the Messenger, if considered ample. The Magistrate added: The reasons here given apply also to the case of Michael.

Mr. De Villiers was for appellant; Mr. Benjamin was for respondent in each case—Elias Ngesman and Michael Nqxamnqxa.

[De Villiers, C.J.: One can understand a judgment for Ngesman, but I do not understand how it is possible to give a judgment for Michael.]

Mr. De Villiers: It is probably the first case in which such a judgment has been given in this colony. Counsel went on to cite the cases of *Olliver v. Keating*, *Ashburner v. Ryan*, and *Louw v. Fyfe*. He added that he did not know whether the Court would like to hear him on the point that appellant first attached the horse and then demanded payment.



[De Villiers, C.J.: It is quite clear that even if he had first demanded payment, he would not have got it.]

Mr. De Villiers contended that the messenger acted most prudently and cautiously, the debtor having previously left the district on a horse to avoid a writ. On the point as to whether the messenger should have believed Michael's statement, counsel submitted, that the appellant had ample grounds for regarding Michael's statement with suspicion.

Mr. Benjamin submitted that the proceedings on the part of the messenger were irregular throughout. In the first place, he should have made a demand upon the debtor before he actually seized the property. If the messenger chose not to follow the procedure laid down in the 42nd rule, he must do so at his own risk. There appeared to have been an excess of zeal by the messenger on behalf of the judgment creditor. There was, he submitted, proof of *mala fides* in the seizure made by the messenger. The writ had actually lapsed when the messenger made the attachment. Counsel, however, withdrew this statement a little later on its being pointed out to him that the writ was not returnable until August, 1906. Michael was a man of some substance; he was a man of good character, and there appeared to be no reason why the messenger should have doubted his word.

De Villiers, C.J., remarked that it was very foolish of the owner to refuse the tender of the horse by the messenger. He asked counsel how the amount of £3 damages was arrived at.

Mr. Benjamin said that the Magistrate exercised his discretion, and did not seem to have awarded an illiberal amount.

[De Villiers, C.J.: Michael says his dignity was offended by having to walk.]

Mr. Benjamin: I don't know how much the Magistrate found upon the "loss of dignity," and how much upon the "inconvenience" of having to walk.

De Villiers, C.J.: A judgment was obtained in the Magistrate's Court by one Johnstone against Michael, and a writ of execution was duly issued, returnable apparently at a very long period. At a date subsequent to the issue of the writ, the Messenger of the Court met Michael on horseback, and he naturally supposed that this native, who was riding, was the owner of the horse. That was the natural conclusion, and accordingly he claimed the right to attach, and he did attach the horse. It is said that no previous demand had been made, but it is quite clear, from what followed, that any demand would have been wholly nugatory, because Michael was wholly unable to pay the debt. Therefore, the absence of a de-

mand, in my opinion, should not weigh at all in the present case. The Magistrate laid considerable stress upon the fact that no demand had been made, but it is quite clear any demand would have met with no result. Michael at once told the messenger (the defendant in the present case, and now appellant) that the horse did not belong to him, but had been lent to him by one Elias. The messenger says he did not believe the man, for he was a relation of Elias, and in all probability was, as natives frequently do, protecting himself against the execution creditor. Some correspondence ensued, in the course of which the attorneys for Michael offered security, but the answer was, "The man who claims the horse is, you say, Elias. You say Elias is the owner. It is for him to give security." Subsequently Elias did claim the horse, and after the defendant had been in possession for six days he thought better of it and delivered back the horse, or, rather, offered it for delivery to Elias. Elias, however, refused to take the horse unless it was accompanied by damages. In my opinion Elias wholly misunderstood his rights. Even if entitled to damages, he should have accepted the horse and brought his action for damages afterwards. Now, it is quite clear, if the messenger had refused to deliver the horse, that Elias would have had an action for the horse or its value, as against the messenger, because, of course, that would have been a case of vindication of a man's property. But the action in the present case does not proceed upon that ground, but on the ground of dereliction of duty on the part of the messenger. The Messenger has duties to perform; he is often between the devil and the deep sea. On the one hand there is the judgment creditor insisting upon having his writ carried out, and on the other hand there is always the danger of seizing the wrong property. If the messenger uses his best judgment, if he is not guilty of any *mala fides* or negligence, he surely cannot be held liable. I fail to see what ground there is for imputing *mala fides*. He naturally believed this native riding the horse was the owner, although he subsequently changed his mind. In my opinion the magistrate erred in giving judgment against the appellant. There is not sufficient proof of *mala fides* or of negligence to have justified that judgment. As to the other case of Michael against the messenger, it is impossible to conceive upon what ground the Magistrate arrived at his decision. Michael, at all events, was in possession of the horse, and he could not complain that the horse was taken to be his. He was the man who had to pay the debt, and consequently I fail to see how he could possibly complain of the conduct of

the messenger in taking the horse found in his possession, in consequence of a judgment debt which he owed. In regard to his case also, I am of opinion that the Magistrate erred, and in both cases the appeal should be allowed and judgment entered for the defendant with costs in both courts. It should be understood that the defendant will forthwith return the horse to Elias.

[Appellant's Attorney: S. S. Hutton;  
Respondent's Attorneys: Silberbauer,  
Wahl and Fuller.]

ODENDAAL V. MARKS. { 1906.  
(Mar. 26th.

Acts 21 of 1876 and 43 of 1885—  
Magistrate's jurisdiction in  
Illiquid cases for price of  
goods.

*In an action brought in a  
Resident Magistrate's Court  
by the part owner of a motor  
car against another part owner  
for the sum of £40, being the  
loss sustained by the plaintiff  
by reason of the defendant  
having wrongfully sold such  
car, the defendant excepted to  
the jurisdiction.*

*Held, that the claim being  
illiquid, and not for the price  
of goods sold, the Magistrate  
had no jurisdiction beyond  
£20.*

This was an appeal from a judgment of the R.M. of Prince Albert, who had found for the plaintiff in the sum of £40 in respect of a third share in a motor-car. Mr. De Villiers was for appellant; Mr. P. S. T. Jones was respondent.

Mr. De Villiers said an exception had been taken to the summons on the ground that the amount of £40 was beyond the Magistrate's jurisdiction. The plaintiff was one of the partners in a motor-car with the defendant, and the defendant, without the consent of the plaintiff, sold the car. The plaintiff sued for £45, which represented a third share, the amount being reduced to £40 to bring the case within the Magistrate's jurisdiction. Under the Act 43 of 1885 the jurisdiction of the Court of R.M. was extended to £100 in all cases of merchandise, goods, etc., but here the plaintiff sued for the value of his share.

[De Villiers, C.J.: That is really an action for damages.]

Mr. Jones quoted a section of the Act, and pointed out that it suggested that

the Magistrate would have jurisdiction up to £40, so far as damages were concerned. The word "damages" was distinctly used. If the Magistrate only had jurisdiction up to £20, then the word was meaningless.

De Villiers, C.J.: It is clear that this is not an action for the purchase price of any share in a motor-car; it is an action for damages for wrongful conversion, and it cannot be treated as if for the price of any merchandise goods, or other movable property. The Resident Magistrate therefore had no jurisdiction by virtue of sub-section (b), section 5 of Act 43 of 1885. The plaintiff, however, contends that the requisite jurisdiction was conferred by the 6th section of that Act. The real meaning of a portion of that section is somewhat obscure, but I am satisfied that if the Legislature had intended to increase the jurisdiction of Magistrates, in ordinary illiquid cases, from £20 to £40, it would have done so in express terms. For the purpose of increasing the Magistrates' jurisdiction in liquid cases to £100, and afterwards to £250, it was deemed necessary to introduce the second section of Act 21 of 1876, and afterwards sub-section (a) of Act 43 of 1885. In the same way, for the purpose of increasing the jurisdiction in actions for the recovery of the price of goods sold to £100, it was deemed necessary to enact the provisions of sub-section (b) of section 5 of Act 43 of 1885. If the plaintiff's contention be correct, the Magistrate would have jurisdiction in actions for the price of goods even exceeding £100, provided that no objection was taken by the defendant, and such clearly was not the intention of the legislature. An action for more than £250 in liquid cases, or for more than £100 in illiquid cases, for the price of goods, cannot under the Act of 1885 be brought in a Magistrate's Court; but if either of such actions be brought for more than £40, and less than £250 in the one case and £100 in the other, the defendant must raise the objection mentioned in the 3rd section of the Act of 1876, and give the requisite security. The Magistrate, in my opinion, erred in over-ruling the exception to his jurisdiction, and the exception must now be allowed with costs in this Court and in the Court below.

[Appellant's Attorneys: Dampers and Van Ryneveld; Respondent's Attorneys: Findlay and Tait.]

# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

## ADMISSION.

*Ex parte* VAN HEERDEN. } 1906.  
Mar. 27th.

Mr. Payne moved for the admission of the applicant as an attorney and notary, and for leave to take the oaths before the R.M. of Bedford. Counsel said that the application was urgent, as the applicant wished to leave for Pretoria at the end of the month, and to take the oaths before he went to the Transvaal.

Order granted as prayed.

SALVAGE ASSOCIATION OF } 1906.  
LONDON V. SALVAGE SYN- } Mar. 27th.  
DICATE, LTD. } " 28th.

Ownership—Abandonment—First finder—Salvage—Shipwreck.

*The owners of a cargo which had been shipwrecked abandoned it to the underwriters, who took no effectual steps for seven years to raise the cargo. The respondents then began operations for salvaging the cargo.*

*Held, that there was not sufficient proof that the owners had abandoned their rights to any one else than the underwriters; and that although the respondents might be justified as against others than the owners, or representatives of the owners in appropriating the cargo, they could not do so against the will of the underwriters, who had acquired the rights of the owners.*

*A person cannot be held to have abandoned his property without clear proof of his intention so to abandon it.*

This was the return day of a rule nisi granted by the Court temporarily interdicting the respondents from proceeding with certain salvaging operations on the wreck of the Thermopylae, lying off Three Anchor Bay. Mr. Searle,

Q

K.C., was for the applicants; Sir H. Juta, K.C., was for respondents.

Mr. Searle asked that the matter should be allowed to stand over to enable the applicants to reply to certain affidavits filed by respondents on Monday afternoon.

[De Villiers, C.J.: Until when, Mr. Searle?]

Mr. Searle: I think we could reply to-day.

Sir H. Juta said that there was no urgency in the matter, because there was a rule nisi given, and the respondents had to keep an account.

Mr. Searle said his clients wished the matter to be disposed of, and not to stand over until an indefinite date. The respondents had been interdicted from carrying on further operations, and this interdict applicants wished to be made absolute.

Sir H. Juta said that he had been about to ask whether the interdict could not be amended. The point of the case was simply this: there was a wreck, respondents said that it was abandoned by whoever was the owner, respondents had been working at it for some time, and had been taking the bullion out of it, and now applicants came down and claimed to be owners. It was very fine weather at present, and to whoever this wreck might be found to belong would benefit by the fact that respondents might be able to work during this weather.

De Villiers, C.J. (to Mr. Searle): Would you object to their continuing to work it and keeping an account?

Sir H. Juta: We have to deposit everything at the Custom House, so that there is no question of an account.

Mr. Searle: My client instructed me to oppose, because he is not sure what may be taken out of the wreck.

Sir H. Juta: Then we are criminally liable.

[De Villiers, C.J.: How long has this treasure been hidden—since 1899?]

Counsel replied that there was a good deal of salvage by the applicants after the wreck, but he did not know how long that went on.

[De Villiers, C.J.: I suppose the question will be whether there was an abandonment by the owner?]

Mr. Searle acquiesced.

Sir H. Juta: We have been working for months without a word of objection.

[De Villiers, C.J.: Did applicants know it?]

Sir H. Juta: Oh, yes, they were watching the work.

[De Villiers, C.J.: Perhaps they thought you were finding valuable treasure?]

Sir H. Juta: We have been finding treasure, and we have been paying a royalty to the Government. I was going to ask whether this really was a matter that your lordship could deter-

mine on affidavit? It seems a pity that in this fine weather we cannot go on working the wreck.

[De Villiers, C.J. (to Mr. Searle): It seems rather a serious suspicion to throw out against these people.]

Mr. Searle: I am sorry to have to make it.

[De Villiers, C.J.: Unless applicants have some reasonable ground for the suspicion, it is a suggestion which they should not make.]

Mr. Searle: They felt this difficulty in the matter; they would prefer that this matter should be heard to-morrow.

[De Villiers, C.J.: Do you say I could decide the question of abandonment on motion? Will there be any conflict of evidence on that point?]

Mr. Searle: I think the facts will be admitted more or less on that question.

[De Villiers, C.J.: Very well, let it stand over. If it stands over until to-morrow only, there is no necessity for giving leave to proceed with the operations.]

Sir H. Juta applied for leave to continue the salving operations to-day, remarking that the weather was very propitious. He added that the material that the respondents were salving was metal, not coin.

De Villiers, C.J., however, directed that the whole matter should stand over until to-morrow.

*Postea* (March 28th).

From the affidavits which had been filed, it appeared that the *Thermopylae* was wrecked in September, 1899, and that formerly operations were carried out by the owner, as a result of which about £30,000 worth of cargo was salvaged. These operations were discontinued, and the next move was that made by the respondent syndicate, of which Mr. Richard Arderne Wilson is chairman, and which was formed principally for the purpose of searching for and recovering treasure-trove from abandoned wrecks. The syndicate approached the Government, or, rather, Captains Percy Gardiner and Gustav von Zweigberg did, for permission to work the wreck *Thermopylae*, and permission was obtained to work the wreck from the Treasury. On the 15th January, 1906, operations were begun, and after the salvagers had been at work for some time they located the wreck, which was sunk about six fathoms deep, and proceeded, with the aid of a diver, to recover portions of her cargo. A number of ingots of copper and tin had been salvaged, and a royalty had been paid to the Government. Eventually, Messrs. Thomson, Watson and Co., through Mr. Clifford Hume Knight, interposed, on the ground that the wreck had not been abandoned by the owners, and that the salvagers had no right to remove any portion of the wreck or cargo. He said that his firm

were agents in Cape Town for the London Salvage Association, who represented the underwriters of the wreck, as well as of the cargo. The applicant association (said Mr. Knight) was a branch of Lloyds. Messrs. Thomson, Watson and Co. sent a man to watch the respondents' operations, and finally the matter was brought into Court on the 19th March, and a temporary interdict was issued against the syndicate.

The respondents' position was that they had every reason to believe that the wreck had been abandoned, and that they were allowed to go on working for some time before a word of protest was raised by the applicants' representatives. On the other hand, Mr. Knight declared that they had never given out for one moment that they had abandoned the wreck, but that, as a matter of fact, operations formerly carried on had been suspended because of a certain obstruction. As soon as he heard that copper and tin had been recovered, he communicated with the Collector of Customs, asking him to detain same.

Mr. Searle submitted that the case came within section 1 of the General Law Amendment Act, No. 8, 1879. He went on to call the Court's attention to the Merchant Shipping Act, and said that the Act provided that there should be no recovery of wreckage except with the permission of the Board of Trade, and then that the proceeds should be handed over to the Board of Trade.

[De Villiers, C.J.: But we have no Board of Trade here.]

Mr. Searle: That is so, but the English Act does not provide for anything, apparently, as far as one can see, in the nature of abandonment. It seems to be the same way with our Government. Counsel proceeded to say that he had been unable to find any authorities dealing with the question of abandonment. There were now vessels lying in Table Bay, such as the *America* which had been there for years and years, and if the Harbour Board wanted to remove these vessels, they could not do it, except by allowing the owner to claim for the value of his property. This was property which was of value to him. He was informed that there had been prosecutions instituted against persons for touching these vessels and removing goods from them. Our Legislature recognised the fact that the owner of a wrecked ship had rights, and that no one could interfere with such rights.

[De Villiers, C.J.: Where is this wreck?]

Mr. Searle: Off Green Point.

[De Villiers, C.J.: Is that in the harbour?]

Mr. Searle: No, my lord, it is beyond the breakwater. I think the harbour limits only extend to the breakwater. Continuing, counsel contended that applicants were within their rights in

claiming this wreck, and asking that the respondents' operations should be stopped.

Sir H. Juta said that his learned friend said that they were within their rights. The first point was, who were "they"? Messrs. Thomson, Watson and Co., according to Mr. Knight, represented an association who represented the underwriters. There was no title to the wreck shown. Who was the person entitled to this wreck? The underwriters were not before the Court; they did not claim. It was of very great importance that the Court should know who it was that said he was the owner of this wreck. Counsel went on to refer to the English Acts and to the case of *Anderson and Murison v. Colonial Government* (8 Juta) and pointed out that in England if there were a wreck the owner must prove that he was the owner of the wreck within twelve months, and, if he did not do so, he lost his right. His learned friend talked about abandonment, and so forth, but the law of England was very much stricter in that respect. That was what was embodied to some extent in our own Acts. The Harbour Board, finding that a wreck was obstructing the navigation of the harbour, at once removed it, sold it, and if the owner did not establish his claim within twelve months from the date of sale, the owner lost all his rights.

[De Villiers, C.J.: But here there has been no sale.]

Sir H. Juta: No, my lord, nor would this apply to the wreck of the *Thermopylae*, because this is not a wreck which is obstructing the navigation of the harbour.

[De Villiers, C.J.: Why bring it in?]

Sir H. Juta: I bring it in because my learned friend says that, according to the law of England, which he wishes to make applicable here, there is no such thing as abandonment of a wreck. Counsel went on to say that, according to our common law, all property could be abandoned. His learned friend wanted to make out that ships stood on some other footing. In our law, as far as he could find, there was no difference between bullion or cargo which happened to be in a ship and any other property. It could be abandoned whether it were lying on the rocks or under the water on the rocks or if it were actually on the sea-shore. Surely the person who claimed to be owner should come forward and make his claim.

[De Villiers, C.J.: The owners, I understand, are the underwriters.]

Sir H. Juta: In our affidavits we particularly raise this point, that we don't even know who claims to be owner, and they did not in their answering affidavit say who was the owner. The underwriters are an intermediate body, of whom we know nothing. Continuing, counsel argued that the matter was

one that could not be properly dealt with on affidavit. If evidence were called, he was convinced that the Court would see that applicants had abandoned the wreck. It would be a very great hardship to decide the case on the affidavits after the great expenditure that respondents had incurred and after Mr. Knight had stood by until February and allowed respondents to carry on the operations without a word of protest until they began to land bullion. The applicants had not even taken the trouble to mark the spot where the wreck lay, and respondents had the utmost difficulty in finding the steamer. The case was clearly one that should be brought to trial.

Mr. Searle said that the respondents had only been at work about three weeks before they were actually warned as to the rights of the owners. Applicants had taken compass bearings, and they could have found the wreck at once. The salvage operations had formerly been carried on for years before they were discontinued. Clearly applicants were the owners of the wreck.

[De Villiers, C.J.: Who are the owners?]

Mr. Searle: The Salvage Association are the owners. I mean the underwriters.

[De Villiers, C.J.: Who are the underwriters?]

Mr. Searle: We can give the name in a very short space of time. We are the agents of the underwriters.

[De Villiers, C.J.: You don't know yourself who are the underwriters.]

Mr. Searle said that the name could be given and, besides, Messrs. Thomson, Watson and Co. were a substantial firm. Counsel went on to contend that there had been no abandonment of the wreck by the owners.

[De Villiers, C.J.: Do the ship and cargo belong to the same owners?]

Mr. Searle: I am instructed that they do not.

[De Villiers, C.J.: Would you undertake to be liable for damages in case the applicants should not satisfy the Court hereafter that they are the agents of the owner of the cargo?]

Mr. Searle: Certainly, my lord.

De Villiers, C.J.: It is clearly laid down by the authorities in our law that a person cannot be held to have abandoned his property, unless his intention so to abandon it is clearly proved. In the present case, therefore, the respondents, if they claim to be entitled to the cargo of the *Thermopylae*, as against such owners, are bound to prove that such owners of that cargo have altogether abandoned their right of ownership. The mere fact that for some years they have not made any efforts to recover that cargo is not sufficient evidence. The fact is that a person whose property has gone down in a shipwreck cannot be presumed to have



abandoned it because for some years he has taken no steps to raise it. He may hope that, in the meanwhile, some appliances may be discovered by which the recovery of his property might be facilitated. Anyhow, in my opinion, clear proof of abandonment must be given, and in the present case there is not, in my opinion, such clear proof of abandonment. But the respondents are actually in possession of the field, they are working at this wreck, and they are entitled to recover the cargo except as against the true owner. An owner may always vindicate his property wherever it is found, and, therefore, the true owner in the present case can vindicate his property, but no one else. The underwriters to whom the owners have abandoned the cargo would of course become entitled to the rights of owners. It is suggested by Sir Henry Juta that the applicants do not represent the true owner. The evidence upon the point is to be found in the affidavit of Mr. Clifford Knight. He says: "My firm are the agents in Cape Town of the Salvage Association of London, who represent the underwriters of the steamship *Thermopylae*, which was wrecked at Green Point in the month of September, 1899, as well as the underwriters of the cargo laden on board the said vessel." It is very much to be regretted that the name of the underwriters was not given, because that would, to some extent, have remedied the defect of the affidavit; at the same time, I think there is sufficient *prima facie* evidence to justify the Court in holding that the applicants do represent the owners. If it should ultimately be found that they do not, then the respondents will be entitled to damages from the present applicants for depriving them in the interval from further going on with the operations at the wreck, because, as I said before, these operations would be justifiable, except as against the Crown—and the consent of the Crown has been given—and as against the true owners. If, however, the applicants do not represent the true owners, they were not justified in interfering with these operations. The course, therefore, which I consider under all the circumstances, to be the proper one, and which would do the least injury to any one, would be this: to continue the interdict, but order that the interdict be discharged unless the applicants shall within two months from this date produce proof to the satisfaction of the Court that they are the agents of the owners of the cargo of the *Thermopylae*, the applicants undertaking to pay damages to the respondents in case they shall not be able to prove that they are the agents of such owners.

Sir H. Juta asked whether his lordship would not be prepared to allow

the respondents to continue the operations during the intervening two months upon their undertaking to keep an account of their funds.

De Villiers, C.J., said that the good weather would make the claim for damages of the respondents all the stronger. He had been weighing the probabilities, and it seemed to him that the probabilities were in favour of the view that the applicants did represent the owner. As they were willing to pay damages, he thought that the proper course was to continue the interdict.

Sir H. Juta said that, if necessary, the respondents could give security.

His Lordship said he thought the matter was one rather for arrangement between the parties.

Mr. Searle said that, in view of a letter which had been received from the Salvage Association, it was quite possible that some arrangement might be made whereby the respondents should continue the operations on the basis of a percentage of the treasure recovered.

Sir H. Juta suggested that the question of costs should stand over for the two months.

Mr. Searle pointed out that the registered capital of the syndicate was very small—he was informed about £1,200.

De Villiers, C.J., said that the order of the Court would be as follows: Interdict to continue, and respondents to pay costs, but interdict to be discharged and costs to be repaid, unless Messrs. Thomson, Watson and Co. shall, within two months from this date, produce proof to the satisfaction of the Court that they are agents of the owner of the cargo of the *Thermopylae*, Messrs. Thomson, Watson and Co., undertaking to pay damages to the respondents in case they shall not be able to prove that they are such agents of the owner.

[Applicants' Attorneys: Reid and Nephew; Respondents' Attorneys: Silberbauer, Wahl and Fuller.]

#### CAPE TOWN TOWN COUNCIL V. COLONIAL GOVERNMENT AND TABLE BAY HARBOUR BOARD.

Mr. Searle informed his lordship that the position in regard to this matter, which related to certain land near the new Somerset Hospital, which had formed the subject of an action for a declaration of rights, was that his clients (the Town Council) were quite willing that the Harbour Board should take the land in any case, and, therefore, it seemed to him that there was really no objection to the appeal going on without any further order in the matter. Supposing the appellants were successful, they would get the land without compensation.

[De Villiers, C.J.: The difficulty is that there will be a judgment only upon part of the case. I understood that the parties were clearly agreed as to the basis of the judgment, and that the only question remaining was as to the names of the referee, so that I, therefore, said nothing as to the claim in re-convention.]

Sir H. Juta (for defendants) said that his lordship had said that should there be no agreement he would deliver a further judgment.

Mr. Searle submitted that, as it was arranged that the Harbour Board should keep the land, the necessity for a further order of Court would fall away.

[De Villiers, C.J.: Yes, but this judgment gives you the land. The position is that this is only conditional, it is only under certain conditions that they would keep the land. As the case now stands, the land is vested in the Council. Seven days were given in which to come to an agreement, and if those seven days have passed without an agreement being arrived at, the judgment stands, and I cannot alter it. The result, therefore, is that the judgment of the Court is that plaintiffs are entitled to have the land.]

Sir H. Juta said that an agreement had been entered into, but he could not inform his lordship when it was entered into. The agreement between the board and the Council was that the Board should keep the land, so that if they had to pay the Council compensation they simply paid them.

Mr. Searle read a letter from one party to the other under date of March 2 embodying certain terms of agreement.

De Villiers, C.J.: If the parties are agreed, it is not necessary to give a judgment on the claim in re-convention. My sole reason in mentioning the matter was that I did not like the record to be incomplete.

SAPEIRA V. FERREIRA.

Mr. Searle said that this was a case regarding a furrow at Disseldorf. His Lordship had made an order in the matter and his (counsel's) clients now applied to have the award made a rule of Court. The Court's order was that the award be set aside unless respondents accepted an amendment reducing the maximum width of the furrow from 9 yards to 6. If the respondents accepted that then there would be no order on the application, save that respondents pay applicants' costs, save costs of affidavits relating to other matters than width of furrow. Respondents now wished the award to be made a rule of Court, and the only question he (counsel) was instructed to mention was

whether they were to take it that the agreements with regard to the former furrow would apply to the new furrow.

Mr. Gardiner (for applicant) said his client also wished the old agreements to apply to the new furrow.

His Lordship said he thought it followed from the reasons of his judgment that the old agreements should apply to the new furrow.

Award made rule of Court; no order as to costs.

GOUGH V. PORT ELIZABETH TOWN COUNCIL AND ANOTHER. { 1906. Mar. 27th.

Port Elizabeth Municipality—

Election of auditor—Equality of votes—Determination by lot—Statutory duty of Mayor.

*The 86th section of Act 27 of 1897 enacts that "in case of an equality of votes at any election of auditors, the Mayor shall determine by lot which of the persons for whom an equal number of votes shall have been given shall be elected." The applicant and D. had an equal number of votes, whereupon a fresh voting took place, with the result that D. had a majority of votes.*

*Held, that by being deprived of the benefit of a chance of being elected, the applicant was prejudiced, and it was ordered that the question be determined by lot; and that if the lot should fall on the applicant, the election of D. be set aside.*

This was an application calling upon the Town Council of Port Elizabeth and one James S. Dalgleish to show cause, firstly, why the election of Mr. Dalgleish, as one of the auditors of the municipality for 1906, should not be declared null and void, on the ground that he was not a ratepayer of the municipality, and that his name should have been excluded from the list of applicants; secondly, why applicant should not be declared appointed one of the auditors; and, thirdly, why the election of Dalgleish should not be set aside on the ground that the wrong procedure had been adopted.

From the affidavits it appeared that both Mr. Gough and Mr. Dalgleish were

candidates for the auditorship of Port Elizabeth, and that at a meeting of the Council on January 3 last, when a vote was taken, they tied for the second appointment, each receiving eight votes. The Council then proceeded to a fresh election, which resulted in the choice falling upon Mr. Dalgleish by a majority of votes. The applicant took objection to the election on two grounds—(1) that Mr. Dalgleish was not a ratepayer, as required by section 85 of Act 27, 1897, and (2) that the wrong procedure was adopted by the Mayor in ordering a fresh election, and that the tie should have been determined by lot, as provided by section 88 of the Act. The respondent, it seemed, carried on practice as an accountant at certain premises in Britannia-street, belonging to the estate Patterson, of which premises Messrs. Robert Crook and Co. are the lessees; his name did not appear in the assessment roll of 1905; he did not pay rates to the municipality direct that year, and he did not fill in the schedule sent round by the municipality to the occupiers of premises until some time this year. Applicant contended that Mr. Dalgleish was simply a lodger and that he had no qualification as a ratepayer while the latter claimed that he was liable to pay rates; that he possessed the qualifications of a ratepayer, that he was registered on the assessment roll for 1906; that he had sent in a schedule for 1906 setting out that his rental was £36 per annum, and that Messrs. Crooks had sent in a schedule setting out that their annual rental was £164. Applicant took up the position that this was merely an artifice adopted since the proceedings were commenced in order to provide what appeared to be a qualification for Mr. Dalgleish.

Mr. Schreiner, K.C. (with him Mr. Sutton) was for applicant, J. F. Gough; Mr. Searle, K.C. (with him Mr. P. S. T. Jones) was for respondents.

Mr. Schreiner said that the mode of determining who had to pay the tenants' rate in Port Elizabeth was peculiar and exceptional. The lessee of the property was, he contended, the party who should fill up the schedules, and not the sub-tenants. The person who tenanted the property was the occupier; he had to give the information under separate and distinct heads, setting forth the names of the owner, occupier, and all inmates, also annual rental, and term of lease (if there be one), and date of determination. Crooks and Co. were the lessees from Patterson's estate, as set forth in the schedule for 1905, and they had to pay the rental. There was nothing in the whole Act to make rates payable twice over, both from the lessee and the sub-tenant. The Act considered that immovable property, that was separately rated for tenants' rate, should be occupied by one or more per-

sons from the owner, and, as between the owner and those other persons, Crooks were, counsel contended, the occupiers. Crooks, in their 1906 schedule, put the rental down at £164, whilst the true rental was, as returned in 1905, £200.

[De Villiers, C.J.: But cannot the tenant make the persons who take rooms under him assist him in paying the rent?]

Mr. Schreiner: He can do that, but he cannot make them ratepayers.

[De Villiers, C.J.: Your argument would exclude the sub-tenant?]

Mr. Schreiner: My whole argument is that the sub-tenant is excluded.

Mr. Searle said that his first submission was that Dalgleish was a ratepayer.

[De Villiers, C.J.: Can a man who never paid rates be a ratepayer?]

Mr. Searle: Yes, my lord. I submit that it has been held over and over again that a ratepayer is a man who is liable to pay rates. As a fact, Dalgleish paid rates through his landlord; it is only a matter of assessment. Counsel went on to submit that a ratepayer was, as a fact, a man who is liable to pay rates, who may, as a fact, be rated. Whatever one may feel in regard to the question of procedure, it would be necessary first to determine whether Mr. Dalgleish was competent or not. Supposing that the Council were wrong, and that the names should have been put up by lot—his learned friend contended that Mr. Dalgleish's name should not have been put up to lot—he submitted that the whole thing could be decided in a few minutes. Counsel went on to say that the Town Council were anxious to obtain a definite decision on the point as to who were ratepayers. If these sub-tenants were occupiers, then, by the Municipal Act, they were ratepayers.

De Villiers, C.J.: The first question to be determined in this case is whether Dalgleish, who was elected as one of the auditors, was liable as an occupier, or not liable, to be placed upon the list of ratepayers. The terms of the 102nd section of the Act are somewhat involved, and the schedule which the Municipal Council had adopted is even more involved. I do not see that this schedule is adopted from a form attached to the Act, so that it is a form which has been made out by the Municipality itself. That form cannot be considered as part of the law, and I think that the form ought to have allowed for the possibility of a case occurring in which a sub-lessee, or a person claiming under a lessee is to be held liable as a ratepayer. But I am clearly of opinion that, as the only persons liable to be ratepayers under the Act are owners and occupiers, if Dalgleish was an occupier under the Act he was liable

to become a ratepayer. Clearly, he was an occupier; it does not matter whether he pays rent direct to the owner or to the person who is a lessee from the owner, he is an occupier, and as such he is liable to pay the rates. As far as his schedule is concerned, the one filled up by him in 1906 shows that the actual annual rental paid by him is £36. That is perfectly true; there is nothing inaccurate in that statement. He is the occupier who pays that annual rental, and, as such occupier, I see nothing in the Act to exclude him from the list of ratepayers, although as I have already observed, that section 102 is somewhat involved, and the schedule itself which has been framed by the Council might have been more complete than it actually is. That being so, I do not think that it becomes of much importance whether in January, 1906, Dalgleish had actually been placed upon the list of ratepayers for that year. He was shortly afterwards placed on the list, and should be regarded as a ratepayer with liability to pay tenants' rates, and with the right to be elected as auditor. But then comes the further question as to whether his election can stand, in the face of the express provisions of the 88th section of the Act 27, 1897. The section is as follows: "In case of an equality of votes at any election of auditors, the Mayor, Deputy Mayor, or chairman for the time being presiding at such meeting of the Council, shall determine by lot which of the persons for whom an equal number of votes shall have been given, shall be elected in case such persons cannot be both or each of them elected." In the present case it appears that the applicant and Dalgleish had an equal number of votes and the duty of the Mayor, or Deputy Mayor or the chairman for the time being was clear, it is a statutory duty imposed upon him in express terms as to what he is to do. It may well be that the course of action adopted by the Mayor may be more expedient, may be more convenient; it may be equivalent to what they believe to be justice to all parties, but it does not conform to the law, and it is time that Mayors, and other persons holding public positions of this kind, should learn that it is their plain duty to act as instructed by law, and not to be guided by their own notions of what is reasonable or expedient. When it was found that the applicant and Dalgleish had an equality of votes, a fresh voting took place, with the result that the applicant lost the benefit of the chance given to him by the 85th section of the lot falling on him. The illegality of the Mayor's action was a distinct prejudice to the applicant, who is entitled to be placed in the same position, as far as possible, as if the provisions of the Act had been

observed. The Court must therefore order that the Mayor determine by lot whether the applicant or Dalgleish has been elected; and if the lot should fall on the applicant the election of Dalgleish must be set aside.

Mr. Schreiner: Would your lordship include that this be done at a meeting of the Council, and that notice of the meeting be given to us?

[Do Villiers, C.J.: Oh, yes; it must be done at a meeting. The applicant, as I have said, was entitled to come into court to have this defect remedied, and he is entitled to costs.]

[Applicant's Attorneys: Herold and Gie; Respondent's Attorneys: Findlay and Tait.]

#### BELMONT V. COLONIAL SECRETARY.

#### Alien — Prohibition to enter Colony.

*An alien, who had left the Colony after being for some time domiciled here, was prohibited by the Colonial Secretary from re-entering the Colony, on the ground that while here she had harboured and been the companion of prostitutes.*

*Held, that she could not claim the right to re-enter the Colony, but as she had some property here she was allowed to land for the purpose of realizing her property upon her finding her personal security that in two months she would leave the country.*

Mr. Gardiner was for the applicant, and Mr. Morgan Evans was for the Crown. The application called on the Colonial Secretary to show cause, if any, why the applicant should not be allowed to land from the S.S. Aline Woermann, at present lying in Table Bay. The petition of the applicant set out that the petitioner was married to one Carl Belmont, who, however, was not at present in this colony, having left on November 15, 1905. Since their petitioner had been carrying on business as a restaurant keeper in Plain-street, Cape Town. She has resided in Cape Town since 1899, and had carried on business as a restaurant keeper the whole time, with the exception of one year, when petitioner was absent from Cape Town. Petitioner was still the proprietress of the restaurant, and of the

assets, and had creditors in respect of the said business, and had other matters pending. On the 5th March she left for a trip to German South-West Africa, having been told there was a good opening there for a restaurant. She did purchase a restaurant there. She returned here with one Dolly Clark, who was allowed to land, but permission had been refused petitioner.

The affidavit of C. W. Cousins, principal immigration officer, set out that the applicant was prohibited from landing under section 2 (e) of Act 47 of 1902. The applicant was not domiciled in this country, and could not claim exemption on that ground. The woman was known as the keeper of the Belmont Restaurant, the haunt of loose women, in which prostitution was regularly carried on. She was at present the proprietress of the Holborn Restaurant, Plein-street, the upper premises of which were habitually used for purposes of prostitution. The woman Dolly Clark was a person of loose character, and she was allowed to land because she was born here, and had spent her life here.

Counsel having been heard in argument,

De Villiers, C.J.: If the Act in question had never been passed, it is clear that the Court would not have interfered if the Colonial Secretary, acting on behalf of the Governor, had prohibited an alien from entering the Colony on the ground that he or she was not a fit or proper person to be allowed to enter. Although the third section says that the Act shall not apply to persons domiciled in South Africa, it does not follow that those who happen to be domiciled in South Africa, who are aliens, would be entitled to apply for admission in case the Governor thinks it is for the good of the country that they shall not be allowed to enter. But counsel for the respondent has stated that the Government has no desire to prevent this woman realising any property she may have in this colony. Therefore under the circumstances the Court will order that the applicant be allowed to land for the purpose of realising her property in this colony, she undertaking by her counsel that she will leave the Colony in two months from this date, the applicant to give her personal security in £500 that she will leave the Colony in the time specified.

[Applicant's Attorneys: Friedlander and Du Toit.]

## GEORGE CIRCUIT COURT.

[Before the Hon. Mr. Justice LAWRENCE.]

VAN DER POEL AND ANOTHER } 1906.  
V. DU PREEZ. } Mar. 27th.  
Apr. 21st.

Illegal contract—Agreement not to prosecute—*Par delictum*—Duress—Costs.

*P. stole two heifers from W., who, after incurring certain expenses in sending for them, estimated by the Magistrate at £1, found them in possession of T., to whom P. had sold them. W. consulted V., an attorney, on the subject, and P. was induced by them to hand over a horse and an ox to W., which were subsequently sold by V., in his capacity as an auctioneer, and realized £13 1s. 6d. There was a conflict of evidence as to the precise value of this consideration, but the Magistrate found, as a fact, that V. and W. led P. to believe that in consideration of the delivery of these animals he would not be prosecuted for the theft. A complaint, however, was subsequently laid by W., P. was convicted, and V., who assisted in the prosecution, was paid by W. £3 10s. fees out of the £13 1s. 6d. for his services in the matter. P., after serving his sentence of imprisonment, sued them for the proceeds of the sale of his horse and ox, on the ground of failure of consideration. The defendants excepted that the alleged agreement was illegal and that an action could not be founded on its breach. The Magistrate over-ruled the exception and gave judgment against the defendants, jointly and severally, for the amount claimed, less £1, which he allowed W. for his expenses as above.*

Held on appeal, that the parties were not in *pari delicto*, and the respondent having been subjected by the appellants to duress, that in the circumstances



he was entitled to recover from W. the proceeds of the sale, but that the liability of V. must be limited to the amount which he had received for his "professional assistance."

Held, also, that in the civil cases, notwithstanding this variation of the order, the costs of appeal should be paid by appellants.

This was an appeal from a judgment of the R.M. of George, heard before Laurence, J., on Circuit at George.

The applicant was heard in argument, and judgment was reserved.

Mr. Howes (for applicant) argued that the respondent (Du Preez) was not entitled to recover the value of a certain horse, saddle and bridle and an ox delivered to appellants inasmuch as such delivery was made in pursuance of an illegal agreement, viz., that the appellants should refrain from the prosecution of the respondent for the theft of certain oxen. He further argued that inasmuch as the contract alleged was between Wells and Du Preez, Van der Poel could not in any event be held jointly liable for restoration of the property or its value.

Mr. Bisson (for respondents) argued that although the property was delivered as consideration for an illegal agreement not to prosecute the respondent, it was recoverable on the double ground (1) that the parties were not *in pari delicto*, that is to say that Van der Poel had in the first instance approached the respondent with the suggestion of non prosecution and practically had forced him to acquiesce; respondent having, under the circumstances, no alternative but to submit, and (2) that there was a total failure of the consideration on which the property was delivered by Du Preez (viz., a withdrawal of the pending prosecution) appellants having immediately on receipt of the horse, and proceeded with the prosecution. He relied on Anson on Contract (p. 233, 10th edit.), setting forth the exceptions to the general rule and cases there cited, and contended that the present case, on the facts, fell within both exceptions and was a stronger one than *Atkinson v. Denby* (6. H. and N., 778—7, H. and N., 934).

*Postea* (April 21st).

#### IN THE SUPREME COURT.

Laurence, J., delivered judgment as follows:—This is an appeal from a judgment of the Resident Magistrate of George. The case came before me at the recent sitting there of

the Circuit Court. As it presented some difficult features, and I wished to consider the matter at leisure, and to consult authorities not locally available, it was arranged that judgment should be reserved and delivered in the Supreme Court. The material facts may be stated as follows: In the month of July, 1904, the respondent, Du Preez, stole two heifers, which he sold to one Truter. The heifers were the property of the mother-in-law of the appellant Wells, a farmer or bywoner in the district, and were at the time in his lawful possession. Wells, after some searching, traced the heifers, and, on information obtained from Truter, came into George and consulted the respondent, Van der Poel, an attorney of the Supreme Court practising in that town. Wells then went to the Magistrate's office to lodge a complaint. Before he had finished his statement, Van der Poel came in and asked the Chief Constable to allow the matter to stand over pending certain inquiries, which it was proposed to make of Du Preez. An interview then took place between the parties at Van der Poel's office. As to what took place at this interview there is a considerable conflict of evidence. The appellants, however, admit that questions were put to the respondent by Van der Poel as to what stock he possessed, and what price he would take for a certain horse, and that the object was to set a trap for him, with the object either of obtaining compensation for the expenses which Wells professed to have incurred in searching for the heifers, or of obtaining admissions from him which would strengthen the case against him, or with both those objects combined. The upshot was that, after a good deal of discussion, Du Preez delivered to Wells a horse, saddle, and bridle, and also an ox, for sale, and Wells handed them over for that purpose to Van der Poel, who is an auctioneer as well as an attorney, to be placed on a sale which was about to take place. They were, in fact, so sold, and the net proceeds, after deducting auctioneer's commission and charges, amounted to £13 ls. 6d. It is common cause—if the evidence of the respondent at page 3, and that of the appellant Van der Poel at page 32 of the record is to be believed—that shortly before the delivery, the respondent made some suggestion to the effect that the heifers would now belong to Truter—or, in other words, that he would be relieved from liability for any claim by him for recovery of the purchase price of the stolen heifers—but that this concession was refused by Van der Poel. The real question is whether, as the appellants contend, this property was handed over to Wells as agreed compensation for his expenses and loss of time in searching for the heifers, or whether, as Du Preez alleges, it was given on the condition or understanding that

the criminal charge should be abandoned. Wells, according to his evidence, put his expenses at about £30, but was willing, the plaintiff being a poor man, to accept £13 in full satisfaction, out of which he was to pay £3 3s. to Van der Poel for what the latter thinks fit to describe as his professional assistance in the premises. The expenses, which Wells specifies, are so indirect and remote that they can only be described as fantastical, and his evidence on the subject is so improbable and contradictory as to be quite unworthy of credence. The Magistrate was of opinion that his actual expenses might fairly be assessed at the sum of 20s. or 5s. a day for four days spent in the search. I see no reason to differ from this finding, and presumably he would have been awarded some such sum had he made proper application, under the statute on that behalf, to the Acting Magistrate before whom the respondent was subsequently prosecuted and convicted of the theft. The account given at the trial of the present action by the plaintiff and his two daughters of what occurred between the parties differs in some material respects from the version contained in certain affidavits sworn by them more than a year previously and shortly after his conviction. Notwithstanding these discrepancies, the Magistrate, after seeing the parties and hearing their evidence at great length, has come to the conclusion that the plaintiff's version is substantially correct, and that the defendants induced him to part with his property by holding out the expectation that he would by that course escape prosecution. The Magistrate has given his reasons very fully, and I am unable, in view of all the probabilities of the situation, to differ from his finding on the question of fact. It is indeed not impossible that there may have been some strange misapprehension, that the respondent believed that, by handing over his property, he would protect himself from prosecution, while the appellants thought that, in the absence of any explicit promise to that effect, it might be accepted and realised as compensation for the alleged expenses. In that case there would have been no *consensus ad idem*, and, the position of the appellant Wells not having been prejudiced, except possibly as to any small sum which he might have recovered by order of the Magistrate on application at the trial or otherwise, the respondent would, I take it, be entitled, subject to that qualification, to *restitutio in integrum*. However, as I have said, the Magistrate accepted the respondent's version, that there was such an explicit promise, "as the one approximating the truth," and, as I have said from that finding I regret that I feel unable to dissent. At the same time, it must be admitted that, on

this finding, the subsequent conduct of the defendants is difficult to explain, except on an hypothesis most discreditable to their character. For, no sooner had the property been handed over than the information was completed and Du Preez arrested and tried, Van der Poel assisting in the prosecution, and charging Wells £3 10s. for his services, viz., three guineas, as originally agreed, together with another 7s. for drawing the affidavit. The real object of the prosecution appears to have been to compel Truter to return the stolen property. Du Preez asserts that he endeavoured to bring the facts to the notice of the Acting Magistrate who tried the case, but that the latter declined to go into the matter, apparently regarding it as irrelevant to the charge. I have not had an opportunity of perusing the criminal record, but if his attention was in any way called to the transaction it is certainly regrettable that the Magistrate did not think it his duty to investigate it. Du Preez was convicted and sentenced to a year's imprisonment. After his release, in October last, he brought the present action. The summons claims from the defendants jointly and severally the sum of £13 1s. 6d. as the net proceeds of the purchase price of property handed to them by plaintiff to stay and prevent a criminal prosecution against him, on condition that no such charge should be brought, which condition had not been fulfilled. The claim, it may be pointed out, though rather ambiguous in form, is not for the purchase price of a sale by plaintiff to defendants, but for moneys had and received or property realised by them on his behalf. To this summons the defendants excepted, on the ground that the action was based on an alleged breach of an illegal agreement on which no action would lie. The Magistrate, after argument, overruled the exception, and, after hearing the evidence, gave judgment against the defendants jointly and severally for the amount claimed, less £1, which he allowed Wells for his expenses in searching for the stolen cattle. It may be here observed that, as the Magistrate found that the defendants had failed to prove the alleged agreement for compensation, and as there was no counter claim for these expenses, the deduction of 20s. from the amount claimed appears to have been incorrect; but as, on the other hand, there is no cross-appeal by the respondent, the matter need not be further considered. The main question is whether the Magistrate was right in overruling the exception, and, if so, whether the judgment against both or either of the parties can be upheld on the facts proved in evidence.

According to English law, to compound a felony—i.e., "to agree for

valuable consideration either not to prosecute, or to stay or stifle a prosecution, is a substantive misdemeanour." In an old case it was held that when an indictment for compounding a felony averred that the defendant had desisted from prosecution, and it appeared that, after the alleged compounding, he prosecuted the offender to conviction, the indictment was bad, and the defendants were acquitted; and a footnote by the reporters raises the question whether the indictment would have been good had the allegation that the defendant had not prosecuted the offender been omitted (*R. v. Stone and others*, 4 C. and P., 379). This doubt however, was resolved by the Court for Crown Cases Reserved in the case of *R. v. Burgess* (16 Q., B.D., 141), where it was held that "an indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon." In that case, which was heard before five judges, Lord Coleridge observed (at page 146) that "it being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said that, if the maker of it keeps his agreement, he is guilty of an offence, but if, in addition to making such an illegal agreement, he is guilty of the further fraud towards the other party, of breaking it, he is guilty of no offence at all. Thus stated the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself." A distinction has been drawn, not only between felonies and misdemeanours, but also between public and private injuries. Not only ordinary felonies, such as theft, but misdemeanours, such as perjury, or the offence of obstructing or interfering with a public road, being regarded as public injuries, an agreement not to prosecute has been held to be illegal, as contrary to public policy (*Keir v. Leeman*, 6 Q.B., 303 and 9. Q.B. 371; *Windhill Local Board of Health v. Vint.*, 45 Ch. D. 351). On the other hand, in cases where the aggrieved person had the choice of either prosecuting or suing civilly for a private injury sustained, such as an assault, such compromises have been held to be valid and binding. "We shall probably be safe in laying it down," it was said in *Keir v. Leeman*, "that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. . . . But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it" (c.f. Pollock on Contracts, 6 Ed. pp. 314-315). Without further discussing the English law on the subject, and the distinctions which have been drawn, it is sufficient to observe that in our own courts the principle has been clearly recognised that agreements

to take money in order to abstain from prosecuting for a crime are contrary to public policy, as tending to obstruct or impede the course of justice, and that, therefore, the general principle is that no action can be founded on such an agreement. In *Harris v. Executrix of Krige* (2 Juta, 399), the Supreme Court refused judgment on a promissory note which had been given to the plaintiff to avoid disclosure of the fact that certain previous notes had been forged by the maker; and this decision was followed by the Eastern Districts Court in *Bezuidenhout v. Strydom* (4 E.D.C., 224), where a note was given for the purpose of preventing the prosecution of the son of the makers for theft. If in the present case the respondent, instead of delivering his property, had given a promissory note for the amount in dispute, and the appellants had sued on such note, the point would be covered by authority; but I have been unable to find, either in the English or in the Colonial courts, any precisely parallel case, where the question has been decided whether money or money's worth paid in order to stay a prosecution can be recovered on the ground of failure of the illegal consideration for which it was paid, or whether, in the words of Lord Coleridge, the person who has not only made an illegal agreement, but has been "guilty of the further fraud, towards the other party, of breaking it," must be allowed to retain the proceeds of such a fraud. As I pointed out at once, when the appeal was opened, the case is one in which the principle *in pari delicto fortior est condicio possidentis* seems *prima facie* to apply; the rule as expressed in the civil law is *cum par delictum est duorum semper oneratur petitor et melior habetur possessoris causa* (Dig. 50. 17. 154, cited by the Chief Justice in *Aburrow v. Wallis* (10 Juta, 214); but the question has to be carefully considered whether the case is in fact one of *par delictum*, and, if so, whether it is one which falls within the rule or within certain exceptions by which its application has been qualified and restricted. A case at first sight somewhat similar is that of *Goodall v. Lowndes* (6 Q.B. 464), where the plaintiff, having been indicted for noncompliance with a bastardy order, entered into a compromise with the guardians and the indictment was dropped. Afterwards, discovering that the order was bad, he sued for money had and received; but the Court held that "if the compromise was illegal, plaintiff, being *in pari delicto* with the other parties offending, could not sue them for money which he had paid." But it may be pointed out in the first place that in that case the prosecution was dropped as arranged, and not pursued in breach of the agreement; and, in the second place, the Court expressly held that "the facts do not prove extortion by duress, nor warrant an ac-

tion for money had and received." The exceptions to the rule, as stated by Anson, in a passage cited by counsel, "would appear to group themselves in two classes: (1) Cases in which the plaintiff has been induced to enter into the contract under the influence of fraud or strong pressure," and is, therefore, not *in pari delicto*. (2) Cases in which the contract being unperformed money paid or goods delivered in furtherance of it have been held recoverable" ("Law of Contract," 5th Ed., 207). Pollock give his view of the law somewhat tentatively, but substantially, to the same effect (6th Ed., at pp. 368, 369). I may refer briefly to three cases as illustrating these general propositions. In the case of *Williams v. Hedley* (8 East, 308), it was held that money paid by the plaintiff to a common informer to compromise a penal action may be recovered back in an action for money had and received, as the party paying the composition did not stand *in pari delicto*, nor was *particeps criminis*, with the compounding informer. This case, however, is not a very strong authority, as it turned to a great extent on the language of the Statute of Elizabeth, attaching certain penalties to an informer who instituted a penal action, and afterwards made a composition. In the case of *Williams v. Bayley* (1 L.R.H.L., 200) it was held on the same principle as in the Colonial cases above cited, that an action could not be maintained on an undertaking to give a mortgage which had been made in order to prevent the prosecution of the defendant's son for forgery, the House of Lords holding that the father in such circumstances could not be regarded as a free and voluntary agent. As Lord Westbury put it (at p. 220): "If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. . . . That is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'Misprision of felony.' That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and further converted it into a source of emolument to himself."

But the most important decision, and that which appears to be most strongly

in favour of the respondent in the present appeal, is the frequently cited case of *Atkinson v. Denby* (6 H., and N. 778, and 7 H., and N. 934), in which it was held that where the defendant, one of plaintiff's creditors, refused to accept a composition unless the plaintiff paid him £50 before he executed the deed, the money could be recovered back. "It is true," said the Court of Exchequer Chamber, "that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." As Baron Bramwell put it: "If a man, upon a corrupt bargain, pays money or gives a bill of exchange, he cannot recover it back. But upon this general rule there has been engrafted what has been called judge-made law; but which, I think, is most salutary law. The qualification is this, that where, though the act is voluntary in one sense, the person for whom it is done has a species of power over the other, so that the latter does the act under coercion, then, though the contract is unlawful it is not a case of *par delictum*, because it is a case of oppressor and oppressed. That is the qualification of the general rule, and in such cases, though the payment of money is in a certain sense voluntary it may be recovered back (6 H and N., at p. 788). In that case the judgment of the four Barons of the Exchequer was upheld by the five Judges in the Exchequer Chamber, where Cockburn, C.J., made the observation above cited. For the reason given by Lord Coleridge, in *R. v. Burgess*, I can see no reason why the decision should have been different had the creditor, after receiving the bribe, refused to sign the deed. I do not propose to examine the cases falling under the other branch of the exception, "in which," as Anson puts it, "the contract being unperformed, money paid or goods delivered in furtherance of it have been held recoverable," even when the contract was illegal and the parties *in pari delicto*, as the law on the subject does not appear to be clearly settled, and the cases cited in support of the proposition differ in some material respects from the facts of the present appeal. But on the whole I can find no authority in our law for the proposition that persons in the position of the appellants, who have taken advantage of the position of the respondent to induce him to part with his property in such circumstances, can resist a claim for repayment; it appears to me that it would be inequitable and against all conscience to allow them to do so; and that the English case of *Atkinson v. Denby*, taken in connection with the observations of the Court in *Rex v. Burgess*, furnishes a strong authority in favour of the respondent. The matter is one of so much importance



that I could wish that it had been fully argued in this court before a full bench; but, on the whole, after prolonged and careful consideration, I have come to the conclusion that the Magistrate was right in overruling the exception, and that the facts as proved justified his finding in favour of the respondent. There remains, however, a good deal of difficulty as to the question of the liability of the appellant Van der Poel. The Magistrate in his reasons uses some very severe expressions as to his conduct. "There can be no doubt," he says, "that he co-operated in the deceit and fraud practised upon the plaintiff, and he cannot shelter himself under the aegis of his profession. His conduct of this case as a practitioner of my Court was sordid, mercenary, and unbecoming, and is deserving of the highest censure." As to this aspect of the case, I do not think it would be advisable for me to say more than that, when the record is returned, it would be quite competent for the Magistrate, if he thinks fit, to send a copy to the secretary of the Incorporated Law Society for the consideration of that body. It must, however, be observed that the action in form appears to have been one not *ex delicto*, for deceit, conspiracy or fraudulent misrepresentation, but rather *quasi ex contractu* for moneys had and received. The property was delivered to Wells, realised by Van der Poel as his agent, and the net proceeds paid over to Wells, out of which he paid Van der Poel £3 10s. as remuneration for his services. I think on the whole the position is practically the same as if Van der Poel had deducted this amount, so far as the latter is concerned; but that, in all the circumstances, while the judgment against Wells may stand for the full amount, the joint pecuniary liability of Van der Poel must be limited to the sum of £3 10s., being the portion of the proceeds which ultimately found their way into his hands. With regard to the question of costs, there was only one set of costs, and, owing to the very exceptional nature of the case, I have, after much deliberation, come to the conclusion that, although there must be a variation, of the order so far as Van der Poel is concerned, the costs of the appeal should be paid by the appellants. The result is that the Magistrate's judgment will be varied by limiting the liability of the appellant Van der Poel to the sum of £3 10s., being portion of the sum of £12 1s. 6d., for which the Magistrate found in favour of the respondent, and that, with the exception of this variation, the appeal will be dismissed, with costs.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

IZAK V. AMIEN. { 1906.  
Mar. 29th.

Mr. Benjamin (for plaintiff) moved for the provisional order of sequestration of the defendant's estate to be discharged. A settlement, said counsel, had been arrived at.

Provisional order discharged.

LEWIN BROTHERS V. CAPE TOWN TOWN COUNCIL.

Mr. Gardiner moved for judgment in terms of consent for certain award to be made a rule of Court, and costs of this application.

The Registrar pointed out that the deed of submission had not been filed.

Order granted in terms of consent, subject to production of deed of submission

BRADY V. S.A. TURF CLUB. { 1906.  
Mar. 29th.

Turf Club—Meeting of members  
—Due notice of meeting.

*The applicant, being a member of the S.A. Turf Club, moved to have all the proceedings at a meeting of members set aside, on the ground that notice of the meeting had been published in the papers six days before the day of meeting instead of ten days as required by the bye-laws of the Club.*

*Held, that in the absence of any proof that any member had been ignorant of the meeting who, if he had been present, would not have voted with the majority, the Court should not interfere.*

This was an application brought by Christopher Brady, attorney, Cape Town, upon notice of motion calling upon the respondent, as chairman of the South African Turf Club, to show cause why certain proceedings at the annual meeting of the club held at the Odd-Fellows' Hall, Cape Town, on the 26th February, should not be declared null and void, on the ground of the meeting having been improperly sum-



moned, and why certain instrument used by the club for wagering and betting, and known as the totalisator, should not be declared illegal, and why an interdict should not be granted restraining its continuance.

The affidavit of the applicant said that he was a member of the South African Turf Club. After referring to the Acts 20 of 1882 and 9 of 1886, whereby the Turf Club obtained grants of ground for a racecourse at Kenilworth, and were authorised to run horse races, deponent proceeded to call attention to the rules of the club in regard to the convening of meetings. Rule 18 provided that all meetings should be convened by advertisement, stating the business to be considered, to be inserted in one of the Cape Town daily papers on not less than two different days, one on the day of meeting and the other at least ten days before. This rule, he said, had not been complied with so far as concerned the meeting of the 26th February last, and he submitted that the meeting had not been lawfully convened or held. On the 15th January last he sent to the club a notice that he intended to propose certain resolutions at the ensuing annual meeting. The secretary duly advertised the proposed resolutions, as he was bound to do, but the notice, which appeared in the "Cape Times," omitted to state when and where the meeting was to be held, and no reference was made to any other business which was to be brought forward. The first advertisement, notifying the time and place of meeting, appeared in the "South African News" on the 19th February. Deponent submitted that this last-mentioned notice failed to comply with rule 18. It was pointed out to the secretary, and subsequently to the respondent, that sufficient notice of the meeting had not been given, and deponent also made a public protest in the press. On the 26th February a notice appeared in the "Cape Times" stating that the meeting was to be held that day. Deponent said that all these notices failed to comply with the rule 18; two of them were inside the ten days stipulated, and failed to state the business of the meeting, while the other, which was outside the ten days' limit contained no reference to the time or place of meeting. At the meeting in question the chairman overruled the objection taken by deponent. He (deponent) was informed that the total number of members of the club was 390 and that 177 persons attended the meeting in question. A considerable amount of business was transacted at the said meeting, including, amongst other things, the appointment of committee and the agreement in connection with the Milnerton Estates, and other matters, of which no specific notice was

given, save the resolutions which he was to propose. He prayed that the proceedings at the said meeting be declared *ultra vires*, unlawful, and irregular. As to the second part of the application, deponent said that the club had exceeded its powers in undertaking the running of a totalisator, by means of which they had become professional bookmakers and had monopolised the betting by excluding the professional bookmakers from the course. According to the balance-sheet for the past year, the receipts from the totalisator had been £22,872. He submitted that the totalisator, as run and worked by the club, was unlawful in more respects than one. He was credibly informed that the club took a commission of 10 per cent. out of the money that passed through the totalisator, so that for every £1,000 which passed through the machine £100 was drawn by the club. It was a system of gambling or betting, the conductor of which never lost, but always won or gained. He and many other members of the club objected to the totalisator as run by the club. So far as he was aware the public's opinion had never been asked or invited in regard to the system. He said that the system of working the totalisator was contrary to the law of this colony and the members and all persons frequenting the racecourse while the said machine was running subjected themselves to penalties, fines, and imprisonments.

The answering affidavit of the respondent stated that the control of all matters relating to the management of the club was entrusted to the committee of the club. No member had at any time objected to the rules and regulations which they had framed for the conduct of the club's affairs. At the meeting in question he presided, and at the outset he said that he noticed that the legality of the meeting had been questioned, and he ruled that the meeting was duly convened, and that it was not necessary to give notice of routine business, but only of special and extraordinary matters. After a little discussion the applicant apparently acquiesced in this ruling. Thereafter the business of the meeting proceeded; the applicant took part in the proceedings and moved the resolutions standing in his name, and these were rejected on a vote. Deponent submitted that the applicant was now estopped from taking an objection to the legality of the proceedings at the annual meeting. As to the question of the totalisator, deponent referred to the former occasion on which the machine used to be in vogue on the racecourse, and he added that on each occasion on which the question of the admission of bookmakers had been put to the members they had been against it. In his (respondent's) opinion, and in the opin-

ion of the majority of the committee, the totalisator had been worked with beneficial results, because it had enabled the club to increase the stakes for which races were run, and he was satisfied that the change had resulted in a considerable diminution of the amount of money wagered on horse-racing. There was now less inducement to owners to run their horses for betting rather than for the stakes. The receipts from the totalisator for the year had been £22,872 15s., as against £7,591 6s., receipts for the previous year, and the increased receipts had enabled the club to increase the stakes by £13,698 12s. 6d. over the amount given in the previous year. The abolition of the totalisator was not a question that to the best of his knowledge and belief had been brought up by any member of the club. Applicant had never tabled any resolution against the totalisator, but he had been actively engaged in endeavouring to procure the readmission of the bookmakers to the course. The committee had refused permission to certain bookmakers who persisted in going on the course after being warned not to do so. The club had not taken any cognisance of private betting among members of the club if such took place. The totalisator was recognised as an essential adjunct in many countries in connection with a racecourse. To permit the totalisator was at least as much within the scope of the authority of the committee as to allow bookmakers on the course. He submitted that the *pari mutuel*, being a system of mutual betting, was recognised and not declared to be illegal, under section 21 of Act 36, 1902. With reference to the statement that it was impossible for the totalisator to lose, through frauds and other reasons, the persons working the totalisator had lost a considerable sum of money. Counsel also read affidavits of a corroborative nature by Rudolf Cloete (a member of the club), and Henry Graham Cloete (secretary of the club).

The replying affidavit of the applicant said that the whole purport of the three affidavits filed by the other side on the question of the first part of the application was (1) that he was stopped, and (2) that he had no *locus standi* to bring this matter before the Court. On the point of estoppel, he denied that he acquiesced in the proceedings at the said meeting. As to his *locus standi*, he submitted that, as a member of the club, he had the right to come into court, and ask that the club should be stopped from acting unlawfully and illegally. As to the totalisator, he was strongly opposed to a monopoly system of betting, and to being dictated to as to how he should invest his money. The system did not prevail in England, the greatest centre

of racing, and it had been declared to be illegal.

Dr. Greer for applicant; Mr. Molteno for respondents.

Dr. Greer passed briefly under review the various Acts bearing upon the club, and the privileges given to it.

De Villiers, C.J., put it to counsel that there were no affidavits from other members of the club that they were not present at the meeting in consequence of notice not having been given.

Dr. Greer assented, and added that what the applicant went on was that certain rules were framed directly under the Act of Parliament, which had not been carried out in this particular instance.

[De Villiers, C.J.: But should he not further show that, in consequence of the rules not being complied with, several members, or some members, had no knowledge of the meeting, and would have voted against the resolutions adopted there had they been present.]

Dr. Greer: It might, my lord, have been advisable to have done so, but I submit, on the strict legal interpretation, he is taking his stand on that.

[De Villiers, C.J.: Yes, but the Court has often held in matters of this kind that a mere irregularity or illegality is not enough, unless that irregularity of illegality had some result. If it had no result, if it resulted in no mischief to any one, has the Court ever set aside proceedings of this nature?]

Dr. Greer admitted that he did not know that it had ever been done, but he submitted that in this particular instance the bye-laws were more binding than the bye-laws of an ordinary society, because they were framed under and by virtue of an Act of Parliament. Counsel went on to argue that insufficient notice was given, and urged that such an important matter as the agreement with the Milnerton Estates, which might change the whole venue of the races, should have appeared in the notices. Counsel referred to the notices which were published, and urged that they did not comply with Rule 18, both as to the matter and dates of publication. Dealing with the question of whether the applicant was estopped from taking further proceedings, counsel urged that he did nothing at the annual meeting, which deprived him of his right to move as a member of the club to have the proceedings at the meeting declared void. On the question of the totalisator, Dr. Greer referred to the statutes, and said there was a certain section of the Act of 1902 which excepted the Jockey Club from the operation of the Act.

[De Villiers, C.J.: Yes, but it does not except them from the operation of the Act 27 of 1882.]

Dr. Greer: No, my lord; I was just going to deal with that presently.

[De Villiers, C.J.: Under Act 27 of 1882, was not Mr. Cloete prosecuted.]

Dr. Greer: Yes, my lord.

[De Villiers, C.J.: I think there was an appeal to the Supreme Court.]

Dr. Greer: Yes, and it was disallowed.

[De Villiers, C.J.: The Court held that it was a case of betting in a public place, and as the agent for the persons betting, Mr. Cloete was liable.]

Dr. Greer: That is so.

[De Villiers, C.J.: Did they go on betting after that, carrying on the totalisator?]

Dr. Greer: Apparently, my lord, because the totalisator is going now.

[De Villiers, C.J.: I remember a Bill was brought into the house to legalise the totalisator. Well, it was one of the provisions, but it was dropped out.]

Dr. Greer said that Mr. Cloete was prosecuted for contravening section 7 (sub-section 13) of the Act of 1882.

De Villiers, C.J., said that he did not understand how it was possible that, in defiance of a decision of the Supreme Court, the totalisator could have been carried on so long without a prosecution. In the course of the argument, he also remarked that the present applicant did not seem to be influenced by any motives of morality; he was merely opposed to one particular mode of betting.

Mr. Molteno submitted that with regard to the first part of the application, it was clear that Mr. Brady was now es-stopped from coming to the Court. There had been a case decided by the High Court in Natal, where a man was warned off the Durban course. He brought an action against the committee of the Durban Club for damages, but he had not availed himself of the right of appeal to the Jockey Club, and the High Court dismissed the action, saying that plaintiff had not availed himself of his own rights, and had not appealed. So in regard to the present application, Mr. Brady, if he thought the decision of the chairman was wrong, ought to have claimed under Rule 19 to take the voice of the members present as to whether he were wrong; he did not do that, and now, after the members of the committee had given judgment against him in the matter of the admission of bookmakers to the course, he wished to recuse the judge. As to the second part of the application, this was a matter of very great importance. It was an application which, as matters now stood, practically involved the life of the management of the Turf Club. His lordship would see, on looking at the accounts, that tens of thousands of pounds were involved. Mr. Brady, having failed to get the other members of the club to allow the bookmakers to come on the course, did not come to the Court and ask for a declaration that betting was altogether

illegal, but he asked the Court to declare that a specific kind of betting was illegal, for the purpose of forcing on the club the re-admission of the bookmakers, which the majority of the members of the club did not wish to have; he asked in the second portion of his application for a declaration of rights on motion against the club, and in the third section for a perpetual interdict, but the Court should order that the buildings, which had cost a large sum of money, should be pulled down. He (counsel) submitted that, whatever the merits of the case might be, this was not the form of proceedings which should be brought before the Court to determine such a question. He thought that such an application upon motion was unprecedented.

[De Villiers, C.J.: If there are no facts in dispute, why should not the Court on motion decide?]

Mr. Molteno: But there would be a large number of facts in dispute.

[De Villiers, C.J.: Supposing, on the statements made in your affidavits, it is clear that the totalisator is an illegality, cannot the Court then on motion—]

Mr. Molteno: I am going to submit to the Court that it is not illegal.

[De Villiers, C.J.: I am only now on the question as to whether, as you say, it is wholly unprecedented to have a motion of this kind instead of an action. I say that if the Court were to hold upon your statements or the statements in your affidavits that the totalisator is illegal, it could make a declaration on motion?]

Mr. Molteno: Of course, I would admit that there would have to be a very large number of facts before it for the Court to issue an interdict. In further argument, counsel said that the Act of 1902 specifically legalised the totalisator.

[De Villiers, C.J.: As far as I read it, it says that nothing in the Act shall make it illegal.]

Mr. Molteno submitted that, if applicant had wanted to test the legality of the totalisator, he should have laid an information under the Police Offences Act, and had a case in the Magistrate's Court.

[De Villiers, C.J.: That has been done.]

Mr. Molteno: Not under the Act of 1902.

[De Villiers, C.J.: But the Act of 1902 does not make the totalisator legal.]

Mr. Molteno read the first section of the Act.

[De Villiers, C.J.: "Nothing in this part contained" shall extend to it. Therefore, you must read this Act as if it does not apply to the totalisator; it does not say that, "nothing in this Act contained" shall apply.]

Mr. Molteno: It says under the earlier section: "All laws, in so far as they may be inconsistent with or repugnant

to the previous Act are hereby repealed.” Proceeding, counsel said it was quite clear that if a case were brought into the Magistrate’s Court against these people for an infringement of the Police Offences Act, the defence raised under section 21 would be set up at once, and the Magistrate would hold that the legislature had sanctioned, deliberately, betting by means of the totalisator, or any other betting on a racecourse.

De Villiers, C.J., said that all it meant was, that no person could be prosecuted under this Act of 1902 for using the totalisator, nor could Mr. Cloete be prosecuted under this Act, which made the penalties so severe. He asked counsel whether this club had been carrying on the totalisator since the judgment given by the Court upon the appeal, at all events without legislative sanction.

Mr. Molteno said that he presumed so.

[De Villiers, C.J.: Upon what principle was it done? Upon what principle do the police act in matters of this kind? If there is a law, and the Court has decided that there is an illegality, do the police and everybody else wink their eyes at an illegality?]

Mr. Molteno said that the former attempt to stop the totalisator was made by a Mr. Day, a law agent in Cape Town, and apparently the decision was given that the totalisator was an infringement of the Act of 1882. He took it that after that the totalisator went on, and nobody interfered.

Counsel went on to say that it was clearly the intention of the legislature to exempt from the provisions of the Act, duly constituted race clubs under the rules and regulations of the Jockey Club of South Africa. He had always taken it that under section 21 of the Act the working of the totalisator was rendered specifically legal. He submitted that the legislature did allow, and did permit, wagering on a racecourse, and the wording of the section showed that the totalisator was the very thing aimed at.

Dr. Greer, in reply, said that section 37 was, at any rate, as extensive as—if not more so—than the original subsection 13 of section 7, under which the conviction was upheld in Day v. Cloete. There was another ground upon which he was prepared to argue, and it was that there was nothing in their own Acts to start this machine. Under Act 20 of 1882 the club were entitled to do certain things, but it could not be contended that the totalisator was a necessary part of racing. It was provided that the bye-laws must not be repugnant to the general law of the Colony. His learned friend had produced no notice to the Colonial Secretary that it was proposed to institute the totalisator. Counsel submitted that the substituted section 37 of the Act of 1902 was wide enough to cover a case of this kind.

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De Villiers, C.J.: This application has a three-fold object—to have it declared that the proceedings of the general meeting on February 26 last were wholly illegal; secondly, for an order declaring that the process or system of betting and wagering by means of the totalisator is contrary to law and contrary to the purposes for which the club was constituted; and thirdly, to have the system of betting by means of the totalisator abolished and discontinued, and to have the accessories removed from the property of the club. In regard to the first part of this application, I quite agree that the notices convening the meeting were not in strict compliance with the 18th bye-law, which provides that all meetings should be called by advertisements stating the business to be considered, inserted in one of the Cape Town daily papers, on not less than two different days, one of them being the day of meeting and one at least ten days before such meeting. On the day of the meeting there was due notice, but there was not due notice not less than ten days before the day of the meeting. Therefore, in strictness, there was not a compliance. If there had been any proof tendered to the Court that in consequence of non-compliance with this bye-law members who would otherwise have wished to record their vote against the proceedings were prevented from being present, that would be a ground for interference by the Court. It is high time, in my opinion, as I have repeatedly said, that persons who acquire duties and privileges under an Act of Parliament should obey all its provisions, and not only that, but that they should be guided by their own regulations, made in pursuance of the Statute. We have cases continually before us in which either, through inadvertence, or intentionally, provisions of this kind are not complied with, and it is well that it should be understood that anyone shown to be injured by reason of a non-compliance with such provisions, is entitled to come into court to have the proceedings set aside. In the present case, however, it appears to me that the applicant ought to have been prepared with some evidence that, in consequence of non-compliance with this regulation, some persons have been injured. There is nothing to show that anyone was not present by reason of this want of sufficient notice, and therefore I think, on that ground, the first part of the application should fail.

Then we come to the question of the totalisator, which seems to be the more important question, and I am bound to say it strikes me as somewhat extraordinary that, after the decision of the Court, in which it held that the totalisator is an infringement of the existing law, the totalisator was continued to be employed on the racecourse. There



seems to have been no prosecution; the authorities closed their eyes, and thought it was a useful institution—I don't say they were wrong. I am not going into the merits of the matter at all. I am simply looking at it from the point of view of obedience to the law—but it does seem strange that there has been no prosecution whatever, and that this totalisator was carried on in defiance of the decision of the Supreme Court. But then came the Act of 1902, and the 21st section of that Act provides that "nothing in this part contained shall extend to any person receiving or holding any money or valuable thing, by way of stakes or deposit, to be paid to the winner of any race or lawful sport, game, or exercise, or to the owner of any horse engaged in any race, or to any owner or occupier, or person duly authorised to act for him, of any racecourse or other ground used for horse racing, keeping, or using, on any day on which any race is being held under and in accordance with the rules and regulations for the time being in force of the Jockey Club of South Africa, any buildings, sheds, structures, or any enclosed spaces on or within such course or ground for the purpose of betting between persons there assembled, on races there and on that day to be so held." Then I find in the fifth part of the Act there is this provision: "Sub-section 13 of section 7 of the Police Offences Act is hereby repealed, and the sub-section following shall be substituted therefor, that is to say (13) betting in any street or open place or playing therein at any game for a wager or stake, or playing at or with any table or instrument of gaming." The important question arises whether, bearing in mind that the original sub-section has been repealed, to have a different section substituted, it cannot fairly be held that the 21st section legalizes the use of the totalisator at race meetings under the rules of the Jockey Club. If the words had been "nothing in this Act contained," there would have been no doubt upon the point, but Mr. Greer properly pointed out that it says "nothing in this part contained"—that is the third part—leaving the fifth part apparently still applicable. It is an important question, and I consider it would be advisable that this question should be decided by action and before a full Court, in order that the further questions which were raised as to whether the totalisator can be employed in accordance with the Statute, independently of the question of betting, and whether the betting by means of a totalisator as now conducted is in a public place may be decided before the full Court. The decision which I have arrived at is this: That application (1) should be refused, but that the applicant should proceed by action for the purpose of establishing

his claims; (2) and (3), in the notice of motion, the notice of motion will stand in the place of summons, costs of this motion to abide the result. The declaration will refer only to claims (2) and (3) and not include claim 1.

[Applicant's Attorney: C. Brady;  
Respondents' Attorneys: Fairbridge,  
Arderne and Lawton.]

#### *Ex parte* CONRADIE.

Dr. Greer was for the applicant and Mr. J. E. R. de Villiers was for the respondent. The application was on notice of motion for the appointment of trustees in the insolvent estate in the place of Cornelius Benicke and G. W. Steytler, whose appointment had not been confirmed.

De Villiers, C.J., refused the application, but as the case was caused by the magistrate not giving his decision as he ought to have done, it was a case in which the costs should come out of the estate, the respondents declared duly elected as trustees.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

INSOLVENT ESTATE WEYMAR ) 1906.  
V. LE ROUX. ( Mar. 30th.

Delivery—Insolvency of seller—  
Interdict.

*The applicant, through his agent, purchased from W. some sheep, which were to be delivered on the due date of a promissory note which was given by R. for the price. At the time of the purchase the sheep were shown to the agent along with other sheep, but they were not counted out, nor were they placed in his possession or under his control. On the insolvency of W., before delivery had been effected, the applicant obtained a rule, calling on the respondents, the*



*trustees of W., to shew cause why they should not be interdicted from selling the sheep.*

*Held, that the rule should be discharged.*

This was an application brought by J. J. Moore, attorney, Caledon, in his capacity as trustee in the insolvent estate Weymar, on notice calling upon Barend Johannes le Roux to show cause why certain rule *nisi* should not be discharged.

The Court recently granted, on an *ex parte* application by the present respondent, a rule *nisi* calling upon Mr. Moore to show cause why he should not be restrained from selling a certain sheep, alleged to have been purchased by the then petitioner from the said Weymar, pending an action to be instituted by Le Roux. No return day was fixed. The trustee was anxious to dispose of the stock, and, therefore, moved to set aside the rule.

The original petition, on which the rule was granted, set out that petitioner bought from Weymar 200 sheep and 100 lambs for £200, payable by promissory note given to the said Weymar. Petitioner was not prepared to take away the sheep, and he arranged on certain terms as to the wool to leave them under the care of Weymar until a later date, when he was to remove them. He found subsequently, when Weymar surrendered his estate, that he had brought up in his schedule 227 sheep and part of the sheep purchased by petitioner, and when the estate was placed under sequestration, he found that the sheep had been removed to the farm of one De Wet. The sole trustee in Weymar's estate afterwards announced his intention of selling the sheep, hence the application for an interdict.

Further affidavits were now read on both sides, from which it appeared that the transaction arose out of an indebtedness by Weymar to Guthrie and Theron, attorneys and auctioneers, in the sum of £184. On being pressed for payment, Weymar went into Caledon, and had an interview with Mr. Theron, as a result of which it was arranged that Weymar should sell 100 lambs at 10s. each and 200 ewes at 15s. each, Mr. Theron then informing Weymar that he bought for Mr. Le Roux. The trustee now declined to carry the contract, leaving it open to Le Roux, if he thought fit, to sue for damages.

Mr. Gardiner was for applicant; Dr. Greer was for respondent.

[De Villiers, C.J. (to Dr. Greer): Where is the evidence of delivery?]

Dr. Greer submitted that when Le Roux went to Weymar's farm on the 6th August, the day after Guthrie and Theron had concluded the sale for him,

he saw the sheep, and approved of them, and in the sale and approval there was delivery at the time.

[De Villiers, C.J.: Is approval enough to make delivery? Should there not be some control, some possession, some temporary possession? Le Roux did not exercise control over the sheep.]

Dr. Greer submitted that there was a temporary possession in this case, and that, when he, Le Roux, went to the farm, the sheep, which had already been bought under the deed of sale, were shown to him.

[De Villiers, C.J.: Was nothing done to separate the sheep which he had bought from the rest of the sheep?]

Dr. Greer said he thought he was right in saying that the whole of the sheep on the farm, except a few which belonged to another farmer, were shown to Le Roux. He submitted that it would not be necessary for Le Roux to actively take over possession of the sheep for the purpose of establishing delivery.

Without calling upon Mr. Gardiner,

De Villiers, C.J.: At the time when the rule was granted I naturally assumed from the terms of the affidavit, upon which I granted the rule, that there had been a delivery of the sheep at the date of the purchase. There was nothing in the affidavit then read to show that Le Roux himself was not personally present as the purchaser. It now appears that some creditors of Weymar had written to him, and that they acted on instructions from Le Roux, and in order to secure a debt owing to them they induced Weymar to sell the sheep ostensibly to Le Roux, who was to give a promissory note, and that promissory note was given to him to endorse, and after it was endorsed it was given back to Guthrie and Theron in payment of their debt. That seems substantially to have been the transaction, and there was nothing in the petition to lead me to suppose that that was the true nature of the transaction. I am satisfied now, after hearing all the affidavits read, that the intention was to give delivery on the due date of the promissory note. The sheep were to be kept in the possession of Weymar and there is not, in my opinion, sufficient proof that at any time there was delivery of the sheep to Le Roux. They were not separated from the rest of the flock; all the sheep were simply pointed out, but the mere pointing out of sheep, without saying which sheep were intended to be sold, would not constitute delivery. Chief Justice Maasdorp, in his Institutes (Vol. 2, p. 20), mentions, amongst the modes of acquiring property: "By the transferrer placing the thing before the transferee, with the object of trans-

ferring the possession, in which case the delivery is said to be *longa manu traditio*." That is not what took place here. Delivery can only be shown by such act as would amount to a practical or symbolical taking possession of the property by the purchaser. The case of *Haupt's Trustees v. Haupt and Co.* (1 Searle, 287) is a very different case from the present. In that case there had been a lease of the land on which the articles were, a lease to the defendants in the case, and the keys of the house had been handed over to the defendants. The defendants were, therefore, in possession of the property which had been leased to them, and thereupon they appointed their brother, a lessor, as their manager, to manage the farm which the defendants had hired. Clearly, proof of a taking possession, and thereafter handing back the possession to the person who had handed it over. In the present case nothing of the kind occurred. The sheep were simply shown; they were not counted out; nothing was done by Le Roux to assert his ownership over them, and, in my opinion, it is clear, from what transpires from the subsequent affidavits, that it was only intended that delivery should be given on the day on which the promissory note fell due. Under these circumstances, ownership never passed, and the applicants are not entitled to any relief. The rule must, therefore, be discharged, with costs.

[Applicant's Attorneys: Dempers and Ryneveld; Respondent's Attorneys: Van Zyl and Buissinne.]

CURATOR BONIS OF WATSON ( 1906.  
V. ESTATE PETERSEN ( Mar. 30th.

Lease — Condition against sub-letting — Colourable agreement—Cancellation of lease.

*The defendant was lessee of certain licensed premises under a lease which contained a condition against sub-letting and a provision that the lease could be cancelled upon breach of any condition. The defendant entered into an agreement with one F., whereby the management of the business was entrusted to F., but in fact the defendant retained no interest in the premises beyond the right to receive monthly payments from F. The agreement contained every essential*

*ingredient of a sub-lease, although not so called.*

*Held, that the plaintiff, as lessor, was entitled to claim a cancellation of the lease.*

This matter came on for hearing upon an exception taken by plaintiff to the plea of defendant arising out of an action for certain lease of premises at Colesberg to be cancelled, and for an order of ejectment against defendant.

Plaintiff's declaration set out that he entered into a certain lease with George Petersen (since deceased), whereby he let to the latter certain dwelling-house, with canteen rooms adjoining, the tenancy to commence on the 29th January, 1903, and to determine on the 29th February, 1908. It was provided that the lessee should not sub-let the premises without first obtaining the consent of the lessor. If the contract were broken, the plaintiff was to have the right to take possession of the property and buildings without proceeding by an action. Plaintiff alleged that in August, 1905, he discovered that in May, 1903, in breach of the contract, the premises had been sub-let by defendant to one Farmer for the period ending February, 1908. Defendant in his plea admitted that in May, 1903, he entered into an agreement with one Farmer, and also that in June, 1905, that agreement was cancelled so far as Farmer was concerned, and a similar agreement was entered into with one Jackson, but he said that the agreement did not constitute a breach of the lease entered into with the plaintiff.

Mr. Gardiner for plaintiff and ex-cipient. Mr. P. S. T. Jones for defendant and respondent.

Mr. Gardiner: Our whole point is that the agreement with Palmer was a lease.

[De Villiers, C.J.: Why do you want the lease?]

We do not want the lease, but the sub-lease (see the declaration, par. 4). Palmer is called the "manager," but he is virtually a sub-tenant. He pays £27 10s. a month to Peterson's estate. Peterson's estate has no interest in the business, and I submit that this is a case of sub-letting against the terms of the lease.

Mr. P. S. T. Jones: Bishop was merely a manager, and had no sub-lease. The agreement with Davis could not be enforced at law as a lease. It is true that Bishop's salary was not fixed, but it was ascertainable. "*Id certum est quod certum reddi protest.*"

[De Villiers, C.J.: But suppose that there were no profits? The question is whether this was a contract of sub-letting entered into to evade the terms of the lease or not.]

If there were no profits Bishop would get nothing. The ordinary consequences of a contract do not apply. The points in this case, I submit, should be tried by action, and not indirectly by way of exception.

De Villiers, C.J.: The plaintiff is the owner of the premises, and he leased the property to the defendant. In the contract of lease it was provided that the lessee should not sublet the leased premises without the consent of the lessor. It was also provided that should the lessee not fulfil the conditions of the contract, the lessor was entitled to cancel it and take possession of the property. The declaration, therefore, prays for an order that the contract be cancelled, on the ground that the defendant did sublet the premises to one Farmer in contravention of the condition and the declaration further prays for an order of ejectment. To this declaration a plea has been filed which denies that the defendant sublet the premises, but he admits there had been an agreement with Farmer, and he produces the agreement, which was in writing, and he relies upon this agreement as not being a sub-lease, and therefore that the plaintiff is not entitled to a cancellation of the lease. To this plea the plaintiff has excepted on the ground that it discloses no answer to the declaration, and the question is whether this agreement in writing amounts to a sub-lease. In my opinion it was a colourable arrangement by which Farmer obtained all the benefits of a sub-lessee without being so termed in the agreement. He was to be a manager for the defendant, who was not, however, to be entitled to any share of the profits as such. Whether there were profits or not, the defendant was to have a monthly payment for the use of the premises, while he was not liable for any of the debts or expenses of the concern. If the payments were not punctually made the defendant could put an end to the agreement precisely as if it had been an agreement of sub-lease. In my opinion the agreement contains an

agreement of sub-lease, and the exception must therefore be allowed with costs.

[Exceptor's Attorneys: Syfret, God-linton and Low; Respondent's Attorney: S. S. Hutton.]

ABDURAHMAN V. ARGUS PRINTING CO.

Summons—Amount of claim—  
Exception.

*It is a good exception to a summons in an action for defamation that it claims damages without stating the amount claimed.*

Mr. Searle, K.C., was for the defendant (who took exception) and Dr. Greer was for the plaintiff. Counsel for the defendant said that exception was taken on the ground that the summons did not disclose any specific amount of damages. The summons merely claimed damages for an alleged libel on the 15th July, 1905, to the effect that the plaintiff had been convicted of a certain crime and received a certain sentence. That was wrong, and it was also malicious and slanderous, and £100 damages was claimed in the declaration. The summons did not comply with the rules of the Court.

De Villiers, C.J.: The defendant was quite justified in taking this exception, because it is well that any irregularity of proceedings should be checked at once. It seems to be an extraordinary summons to claim damages without stating the amount. The summons is not as near as may be to the form given in the rules of Court. I think that the plaintiff should amend his summons, so that an irregularity of this kind may not remain on the records. The Court will allow the exception, the plaintiff allowed to amend his summons by inserting a claim for £100, the costs to abide the result.





# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

METROPOLITAN TRAMWAYS  
CO., LTD. V. TOWN COUNCIL  
AND CAPE TOWN AND DISTRICT  
GAS, LIGHT, AND COKE CO. } 1906.  
Apr. 2nd.

Pleading — Misjoinder — Negligence.

*A declaration alleged, in effect, that the plaintiff had been damaged by an explosion caused by the negligent act of the second defendant, in laying a gas main through and over a disused and unventilated sewer under the control of the first defendant and by the negligent act of the first defendant in giving its consent to such laying.*

*Held, that there was no ground for an exception of misjoinder of the defendants.*

This was an argument on exceptions taken by the defendants to the plaintiff's declaration.

The declaration was as follows:

1. The plaintiff is the Metropolitan Tramways Company, Limited, a company duly incorporated under Act No. 22 of 1895 for the purpose of running electric tramways through the streets of Cape Town and elsewhere.

2. The defendants are: (1) The Cape Town Council incorporated under Act No. 26 of 1893 and subsequent Acts,

hereinafter called the defendant Council; (2) the Cape Town and District Gas, Light and Coke Company, Limited, carrying on business in Cape Town and elsewhere, hereinafter called the defendant company.

3. For many years past and prior to the year 1892 there existed in Cape Town a certain sewer, which was laid by the defendant Council from the upper portion of the town and thence from the top of Adderley-street down and underneath the said street to the sea; the said sewer was always under the direct control and supervision of the defendant Council, and it was the duty of the said Council at all times to take due and proper care that the same was in a proper state of repair and not in any condition whereby it might become a source of danger to anyone lawfully using the public streets of Cape Town.

4. Up to the year 1897 or thereabouts the said sewer had been used by the defendant Council for the discharge of sewerage matter into the sea; but in or about the said year the said user ceased, and the said sewer was used by the defendant Council for storm water purposes, and thereafter was disused altogether, and was blocked up by the defendant Council at a point in Adderley-street opposite Darling-street, and also at another point in the said street below the Railway-station.

5. In or about the year 1892 the defendant company with the knowledge, consent, and approval of the defendant Council, laid across and underneath Adderley-street a high pressure main or pipe for the conveyance of gas, and the said main intersected the said sewer at a point near the Railway-station; the said main was thereafter, with the defendant Council's knowledge and consent, used for the conveyance of coal gas and water gas from the defendant company's works at Woodstock to the said company's works at Long-street, whence the said gas was distributed to premises in Cape Town requiring the



same, as part of the business of the said company.

6. The said gas main was laid in such a manner as to intersect the crown of the aforesaid sewer and was at a certain point in or near Adderley-street in direct communication with the interior of the said sewer.

7. In or about the month of June, 1905, the said sewer was in a condition dangerous to the public and to persons lawfully using Adderley-street.

8. The said dangerous condition arose from the acts, neglect and default of the defendant Council in blocking up the said sewer at the points opposite Darling-street and below the Railway-station, and leaving no proper ventilation therein, and in permitting and consenting to the laying of the gas main intersecting the said sewer and having access thereto as aforementioned; and it also arose from the leaky condition of the defendant company's gas main and pipes as hereinafter described.

9. It was the duty of the defendant company to keep the said gas main and other gas mains or pipes laid and used by them in due and proper order, to prevent the escape of any gas therefrom by way of leakage from the mains or otherwise, and it was the duty of the defendant Council to take due and proper steps to inspect the said gas mains and pipes from time to time and to ascertain whether they were in proper order, and to insist upon the said company putting and keeping the same in proper order.

10. Not regarding their duty in that behalf the defendant company prior to June 15th, 1905, allowed its gas mains or pipes to become in a leaky condition either in the neighbourhood of Adderley-street at or near the point where the said high pressure main intersected the said sewer; or at some other portion of the defendant company's system of pipes. And in consequence of the above neglect for some time prior to June 15th, 1905, gas was allowed to escape from the defendant company's mains or pipes into the said sewer, and the said Council not regarding its duty in that behalf failed and neglected to keep the said sewer free of gas, and to prevent gas from the mains or pipes of the defendant company filling the sewer; and neglected to inspect the said mains and pipes to ascertain whether they were in proper order and to insist that they be kept in proper order.

11. On or about June 15th, 1905, the gas that had escaped into the sewer ignited from some cause unknown to the plaintiff company, and in consequence of such ignition an explosion occurred in Adderley-street, and the tram lines of the plaintiff company were ripped up, broken, and destroyed, and the works of the plaintiff company in

the said street injured, for a considerable length.

12. By reason of the damage caused to Adderley-street by the said explosion the said street had to be closed for traffic for a considerable period; the work of renovating the said tram lines had to be undertaken by the plaintiff company at great expense, and during the period that the said street was closed the plaintiff company was prevented from earning profits by the carriage of passengers which it would otherwise have earned, and incurred considerable additional expense in and about the management of its business; and also incurred certain extra expenses in costs of supervision of traffic and certain legal and other costs and charges in connection with a Commission appointed by the Government to investigate the cause of the said explosion; the plaintiff company annexes hereto marked A, B and C particulars of the damage sustained by it owing to the said explosion, and in consequence thereof.

13. All things have happened all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff company to recover from the defendants or one or other of them the aforesaid sums of £1,044 0s. 0d., £2,033 0s. 0d. and £700 being damages sustained by reason of defendants' negligence, but the defendants neglect and refuse to pay the said sum or any portion thereof.

The plaintiff company claims from the defendants jointly, or from one or other of them:

- (a) The sum of £1,044.
- (b) The sum of £2,033.
- (c) The sum of £700.
- (d) Interest *a tempore moræ*.
- (e) Alternative relief.
- (f) Costs of suit.

Exception was taken to the declaration on the following grounds: (1) That the declaration is bad in law, vague, and embarrassing in that (a) the plaintiff company is not entitled to claim in the manner and form adopted by it therein; (b) two separate and distinct parties are joined as defendants in respect of separate alleged defaults or alleged acts of wrong-doing, but no joint default or act of wrong-doing is alleged against them; (c) the said parties cannot in law be sued in one, and the same suit and for the recovery of the same remedy from the defendants jointly, or one or other of them in respect of the matters complained of; (d) it is not alleged what default or act was the proximate cause of the damage alleged, nor which of the two defendants made any default or committed any act to which it was due; (e) it is not alleged that any default or act of the defendant Council was the proximate cause of the ignition of the

gas or of the damage complained of. Wherefore the defendant Council prays that the said declaration be set aside, with costs.

Mr. Schreiner, K.C. (with him Mr. McGregor) was for the first excipient, the Town Council; Mr. Benjamin (with him Mr. Russell) was for the second excipient, the Gas Company; Mr. Searle, K.C. (with him Sir H. Juta, K.C.) was for the respondents and plaintiffs.

Mr. Schreiner: It is not alleged that it was the duty of the Town Council either to block up this sewer or to ventilate it properly. Nor is it stated whether the misfeasance lay with us or with the Gas Company. Then paragraph 9 of the declaration indistinctly alleges want of negligence; but why was it the duty of the Town Council to inspect the gas mains running through this sewer? As to paragraph 10, it is not shewn that the Town Council was bound to keep the sewer free of gas.

Paragraph 11 does not charge either the plaintiff company or anybody else with having ignited this gas. Negligence is alleged, but what negligence? Whose negligence? Then, again, the claim is novel. We say that the declaration is vague and embarrassing.

[De Villiers, C.J.: Had separate actions been brought the costs would have been increased.]

That might be; but the evidence taken in the one case might have been available in the other. In our law actions of this kind are under the *Lex Aquilia*. In English law there are special rules as to joinder of actions. Parties cannot be joined unless they are acting in concert (*Thompson v. London C.C.* 80, L.T. 512). If there was a joint act between the defendants it must be an unlawful act. Had it been averred that it was unlawful for us to consent to the laying of the gas main the declaration might have been good.

[De Villiers, C.J.: How are you prejudiced by this form of pleading?]

We ought to know whom we have to fight. Grueber (250) on the *Lex Aquilia* shows that a plaintiff cannot sue defendants jointly in a case like this. A man must say from whom he seeks to recover.

[De Villiers, C.J.: Why cannot he recover against both?]

Against both is one thing; against each is another. We cannot plead to the averments of this declaration: even in England parties cannot be joined save under the same cause of action.

[De Villiers, C.J.: In this case the one party is sued for allowing the escape of gas into the sewer, and the other for allowing pipes to be laid where they could do damage.]

They do not say that we were bound to inspect the gas mains under any specific provision, but they attempt to cast a general duty upon us. They say that we blocked up the sewer without

providing for its proper ventilation. That is not a wrong *per se*. Then they say that the mains of the Gas Company were leaky, but that has nothing to do with our alleged default. So far from showing cause for any joint action the declaration puts the Town Council and the Gas Company in antagonism all along. No precedent can be cited for any such pleading in our Courts (Rule 330 (a)). To say that "we are jointly, or one or other of us is liable," is bad pleading. The plaintiff must claim against each specifically or allege that the defendants have acted in concert. The *Lex Aquilia* does not allow that.

[De Villiers, C.J.: If one party consents, does not that render him liable?]

Not unless the consent be to an unlawful act; and that is not alleged.

[De Villiers, C.J.: Was it not your duty to leave your sewer in such a condition that no harm was likely to arise from your consent?]

No duty was cast upon the Council to inspect mains and sewers. A man must say on what he relies in order to prove a duty. He cannot simply say "It is a duty." Averments of duty are not allegations of fact. As to joint tort-feasors see Clerk and Lindsell on Torts (p. 61, 3rd edit.). Separate tort-feasors cannot be joined in an action but only joint tort-feasors. *Pote v. Liquidators of Eastern Province Bank* (Buch. 1878, p. 56). It is embarrassing to have to fight two parties without knowing with which we may ultimately have to deal.

[De Villiers, C.J.: They can appear separately.]

They do, and they plead separately.

[De Villiers, C.J.: Then I do not see how you are embarrassed.]

If the plaintiff meant that the defendants were joint tort-feasors he would have pleaded that they were liable *singuli in solidum*.

Mr. Benjamin (for the Gas Company) said that he had nothing to add.

Mr. Searle (for respondents) was not heard in reply.

Without calling upon Mr. Searle.

De Villiers, C.J.: The declaration in this case is certainly not artistically drawn, and if I believed for one moment that the interests of justice would in any way suffer by allowing the declaration to remain as it stands, I should uphold the exception. I cannot, however, perceive what possible prejudice there can be to the defendants to be joined in the same action in the manner in which they are joined in the present case, nor do I see how the interests of justice can in any way suffer. On the contrary, I believe that in joining the two defendants in the manner in which they are joined costs may be saved and no injury done to anyone. Supposing the declaration had stated brief-

ly the following facts: That an explosion occurred in Adderley-street by reason of which the plaintiffs were injured; that the cause of the explosion was the laying of a gas main by the defendant company with the consent of the defendant Council over the crown of the sewer, and such a laying of the gas main, as well as the giving a consent thereto, was an act of negligence on the part of both; clearly there would be a joint act on behalf of both the defendants, for which they would both be responsible. Now these words are not used identically in the manner in which I have used them, but the general purport of the declaration is to that effect. No doubt there is a good deal more alleged than I have stated in the few brief words, but if there is some cause shown for joining both defendants in the same action, then the fact that other matters are introduced, as they have been introduced in the present case, really does not affect the case. Each defendant will only be called upon to answer what is alleged against him. The defendant Council cannot be called upon to answer for the gas pipes, except where the gas-pipes enter the sewer. If it can be shown at the trial that, under all the circumstances disclosed in this action, it was first of all a negligent act on the part of the company to lay the main through the crown of the sewer, and that it was a negligent act on the part of the defendant Council to give its consent to the laying of such main, then the plaintiff will at all events have proved part of the case, and be entitled to his remedy. Whether the plaintiff will succeed in proving the negligence is another matter that will depend very much upon the evidence of experts as to the manner in which gas pipes are laid, as to the manner in which they are allowed to enter sewers—I know nothing of these matters—it may well be that experts will be called to show that there is no negligence whatever, but on the other hand if experts should be called to prove that it was an improper and negligent way of doing the work, that the tendency of pipes in such circumstances is to leak, that a leakage into a sewer which has no outlet, and which is not properly ventilated, would be a danger to the street, well, I say there would be good cause of action shown on behalf of the plaintiff. I am of opinion, therefore, there is some ground stated in the declaration for joining both the defendants, the one doing what is alleged to be a negligent act and the other, whose consent is required for doing that, giving its consent. As to the costs of this exception, I think it would be well to allow that question to stand over until the trial. It may well be that at the trial it will be shown that there is no ground whatever for

alleging such negligence on the part of both, and in that case it would not be a proper thing to join defendants in the manner in which they are joined in the action. The Court will, therefore, over-rule the exception, but the costs will be costs in the cause.

Mr. Schreiner suggested that the question of costs should stand over, and that it should be mentioned at the trial.

Mr. Searle said that he did not see why the costs should not be costs in the cause; it seemed a reasonable view.

Mr. Benjamin said he took it that if only one of the defendants were held liable, he would not have to bear the whole of the costs of the application.

De Villiers, C. J., said that, of course, he would only have to bear the plaintiff's costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low. For the Town Council: Fairbridge, Arderne and Lawton. For the Gas Company: Van Zyl and Buissinné.]

#### HOOLE V. MALUSI.

Dowry cattle—Native custom—  
Interpleader suit.

*The appellant bought an ox from S., a native, who had received the ox from the respondent, another native, as dowry cattle, upon his marriage with the daughter of S.*

*Held, that as the marriage did take place, M. was not entitled as against the appellant to claim ownership in the ox.*

This was an appeal against the decision of the A.R.M. of Mqanduli in an interpleader action in favour of the defendant declaring that certain dowry cattle still in existence could be followed up. The original action was taken by Malusi against one Singe for the return of a certain dowry of cattle, or their value, and the defendant in that case subsequently sold an ox to one Hoole. Judgment was given against Singe for £35. The ox in the possession of Hoole was seized in execution of a writ, and the question was now raised whether this ox could be validly sold by Singe to Hoole. About two years ago the plaintiff, according to Kafir customs, married the defendant's daughter, and paid the dowry to the defendant. The wife deserted the plaintiff after living with him for 21 months. The Magistrate's reasons for judgment were as follows: "Judgment was given by the R.M. of Mqanduli in a case of *Malusi v. Singe* for the return

of original dowry cattle, or their value, and the defendant in that case disposed of one of the dowry cattle to Hoole for a debt contracted at the latter's store. Judgment in the interpleader suit was entered in favour of defendant (plaintiff in the former case), on the grounds that according to native custom where dowry cattle are still in existence they can be followed up. The beast in question was a pledge in the first instance given by defendant in this case to defendant in the former case, and was, whilst in the possession of Singe, pledged as security for a debt. He considered that Hoole (plaintiff) was not entitled to succeed in the action."

Mr. Benjamin was for the appellant, there being no appearance for the respondent.

Counsel pointed out that here the marriage had actually taken place, and the cattle had been properly attached. The Magistrate had relied upon a case where the ownership of the cattle did not pass until the marriage took place. It would be noticed that in the first case the Magistrate gave judgment merely for the value and not for the return of the cattle.

De Villiers, C. J.: In this case it appears that in 1903 Hoole purchased an ox from Singe for £10, and paid the price. He received delivery of the ox, and remained in possession of it until 1905, when an action was brought by one Malusi against Singe for the return of the original dowry or their value, and the Magistrate says: "The defendant in that case disposed of one of the dowry cattle to Mr. Hoole for a debt contracted at the latter's store. Judgment in the interpleader suit was entered in favour of the defendant (plaintiff in the former case), on the ground that, according to native custom, where dowry cattle are still in existence, they can be followed up. The beast in question was a pledge in the first instance, given by defendant in this case to defendant in the former case, and was whilst in the possession of Singe pledged as security for a debt. I, therefore, considered that Mr. Hoole, the plaintiff, was not entitled to succeed in this action." The Magistrate appears to have been entirely wrong as to what the decisions had previously been. The Court has never decided that the dowry cattle after marriage has taken place cannot be disposed of. The case of *Peacock v. Ben Rango* (19 Supreme Court, p. 323) was a case where the marriage had never taken place. That clearly appears from the judgment, and it was held that, until the marriage takes place, the father had no interest in the cattle beyond keeping them as security until the marriage. The inference from that is that when the marriage did take place the father did acquire the interest,

and could dispose of the cattle. Well, if that is so, Singe had the right after the marriage of his daughter had taken place to dispose of the ox to Hoole, and in the subsequent interpleader suit Hoole should not be deprived of his right to the ox. For these reasons I am of opinion that the Magistrate erred in his judgment, and the appeal must be allowed with costs in both courts.

LOVE V. FUTELA. { 1906.  
Apr. 2nd.  
., 4th.

#### Native custom—Dowry cattle.

*The respondent, a native in the Transkei, delivered three head of cattle to the reputed father of his intended bride in anticipation of the marriage, but she having been informed that she had been born before her mother was married, refused to marry the respondent.*

*Held, that as the marriage did not take place, without any fault on the respondent's part, the property did not pass.*

*Peacock v. Ben Rango (12 C.T.R., 545) affirmed.*

Mr. McGregor was for the appellant, and there was no appearance for the respondent. This was an appeal from a decision of the R.M. of St. Mark's, in favour of the plaintiff (Futela), who, in an interpleader action, claimed three head of cattle, which he had given in dowry, the engagement of marriage having been cancelled. Counsel submitted that Futela, as prospective bridegroom, when he entered the interpleader action, had broken off the engagement. He had no *locus standi* when he sued on that occasion.

*Cur. Adv. Vult.*

*Postea* (April 4th.)

De Villiers, C. J.: This is an appeal from the Court of R.M. of St. Mark's in an action in which the Magistrate gave judgment for the respondent in an interpleader suit. The question there arose as to whether the respondent was entitled to claim certain three head of cattle as his own. It appears that three head of cattle had been given by him to his prospective father-in-law, the father of the girl he was about to marry. But the marriage never took place, and, according to the decision of the Court in the case of *Peacock v. Ben Rango* (12 C.T.R. 545) the property does not



pass to the prospective father-in-law until the marriage takes place. That was decided on appeal by a full Court. But, then, reliance is placed in appeal on another decision of the Court, viz., the case of *Nombombo v. Stofile* (12 C.T.R. 596) in which a native, being engaged to be married to a native girl, delivered certain cattle to the father of the girl, but afterwards broke off the engagement without any fault on her part, and claimed back the cattle. There it was the person who had given the dowry cattle, who had broken off the engagement without any fault on the part of the girl, and it was held that it was not competent for him, by breaking the engagement in that way, to prevent the property from passing to the girl's father. Then, it is contended in the present case that it is really a collusive arrangement between the bridegroom and bride to defraud the creditor by pretending that there was a breach of the engagement. Well, that is a suggestion which finds no support in the evidence. The Magistrate who heard the case certainly did not take that view. The time at which the breach of the engagement took place was certainly after the previous action had been brought, but the girl's letters are produced, from which it is clear that she was the one who broke the engagement, and the reason why she broke it off was that it had been said by people, including, apparently, her intended himself, that she was not the daughter at all of the man to whom the dowry had been given. And the Magistrate seems to have believed that she was not his daughter, and that she had been born before her mother married Sihlati. The Magistrate held that, according to native custom, the dowry would not be payable. It does not appear whether the doctrine that a child becomes legitimate by subsequent marriage is part of the Kafir law. Apparently, the Magistrate took it for granted that she had been born before her mother married Sihlati. This is what the Magistrate says on this point: "It is to my mind clear that plaintiff's dowry cannot be attached to satisfy a judgment debt due to defendant by a brother of the prospective father-in-law since defendant obtained judgment against James Sihlati, and after the seizure of the three head of cattle the engagement between plaintiff and Louisa has been broken off by her for the reason that it is now reported that she is not the daughter of Timothy Sihlati, but the daughter of his wife born before the marriage, and plaintiff is, therefore, not only entitled to the three head of cattle in question but all the other cattle he has paid as dowry to Timothy Sihlati." It does not appear that the engagement was broken by the respondent, and, therefore, the case of *Nombombo v. Stofile* does not apply. The appeal

must be dismissed. As there is no appearance for respondent, it will not be necessary to consider the question of costs.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

SMITH V. SCHUTZ AND { 1906.  
DE JAGER. { Apr. 3rd.

Magistrate's finding on facts upheld.

This was an appeal from a judgment of the R.M. of Colesberg in an interpleader action brought by the appellant against the respondents to determine the ownership of certain eight cattle attached in execution of a writ against appellant's father. The judgment of the Court below was that six oxen be released and declared not executable, and that the remaining two oxen be declared liable to the attachment, each party to pay his own costs.

Mr. Upington was for appellant (Charles George Smith); Mr. Gardiner was for respondents.

Mr. Upington said that the appeal involved the ownership of certain eight cattle, which were attached in a suit brought by the two respondents against the father of the appellant. The matter came before his lordship a considerable time ago (15 C.T.R. 766). In the court below the Magistrate adjudged six of the oxen—five bearing the brand of the appellant and one the brand of his sister—to be the property of the plaintiff, and ordered each party to pay his own costs. His lordship gave judgment for the costs in the court below to be paid by the defendants (the present respondents). With regard to the remaining two cattle, which appeared to have borne the brand of the appellant's father (defendant in the previous suit), his lordship referred the matter back to the Magistrate for further information, which had now been obtained. Counsel proceeded to read the record in the original case, and the record of further evidence taken before the Magistrate, and the additional reasons furnished by the Magistrate for holding that the two oxen were liable to attachment, being of opinion that these cattle were the property of appellant's late father. In argument, Mr. Upington said that there was absolutely



no evidence given in the court below that the two oxen were the property of the late Mr. Smith. The Magistrate went solely on inference, and in the face of a large mass of uncontradicted and reliable evidence. There was nothing more probable than that one of the oxen in dispute should have been given by the late Mr. Smith to his son Charles (the claimant), on the latter's return from commando in 1902. The Magistrate might think it improbable, but any ordinary human being would consider such a present to be highly probable.

Mr. Gardiner said that, since the matter had been sent back to the Resident Magistrate, it was clear that the contradictions between the mother's story and the claimant's story were so manifest as to justify the Magistrate in disregarding their evidence. Counsel proceeded to comment on the discrepancies in the evidence in regard to the circumstances under which appellant was alleged to have derived the oxen. The onus was, he contended, upon claimant to prove his title, and that onus he had failed to discharge.

Mr. Upington, having been heard in reply,

Hopley, J., said that since the first hearing of the appeal the matter had been sent back to the Magistrate. The two oxen, about which the Magistrate was not in the first instance satisfied that they belonged to the claimant, were oxen which bore the mark of the debtor (father of the claimant), and were upon his farm. It was perfectly clear that the onus lay upon the claimant of proving that these cattle were not his father's, but his own. He (the learned Judge) should not have been at all inclined to criticise the Magistrate's judgment if he had held that upon the whole of the evidence these animals were proved to be the claimant's, but the Magistrate had taken upon himself—and it was a serious thing to take upon one's self—the position that he did not believe a word of what this family said, in other words, that he thought they had all come to the Court with a trumped-up story, and committed perjury for the purpose of trying to establish the claim against the judgment creditors. The Magistrate saw and heard the witnesses; he was the one to be satisfied. It seemed to him (the learned Judge) that it was a question of fact. The Magistrate saw and heard the witnesses, he pronounced the evidence to be wholly untrustworthy and incredible, and, if the evidence were untrustworthy and incredible to his mind, it was impossible for his lordship, sitting there as a Court of Appeal, to say that the impression on the Magistrate's mind was a wrong one. The appeal must fail, with costs, and also with the costs which stood over to abide the result.

FUMBA V. DICKERSON.

Carrier—Negligence—Way bill.

*F. had undertaken to carry certain grain for D. by wagon, a distance of some 80 miles. F. had signed a way bill, admitting that he had received the grain in good order and condition, and undertaking to deliver it in like condition. On delivery, the grain proved to have been damaged by rain.*

*Held, that the terms of the way bill did not render F. liable as an insurer, and that the fact of the grain having been damaged was not per se proof of negligence.*

This was an appeal from a decision of the A.R.M. of Tabenkulu, by which the plaintiff was awarded £22 10s. as damages, and £3 15s., goods sold and delivered, the damages being in respect of the failure of the defendant's agent to deliver certain goods to the plaintiff in good order. Originally the plaintiff (Dickerson) successfully sued for damages, and on an appeal his lordship (Mr. Justice Hopley) altered the judgment to one of absolution from the instance, leaving it open to the plaintiff to prove actual negligence on the part of the carrier (15 C.T.R. 768). In the second case, the Magistrate, in his reasons, stated that the plaintiff sued the defendant for £30 as damages, and £3 15s., goods sold, through reason of loss sustained from the negligent performance of a contract. The defendant was a transport driver in the locality of East Pondoland, and he agreed to deliver the grain in good order. The plaintiff maintained that the grain arrived at its destination in a damaged condition through damp, and from the evidence he (the Magistrate) had no doubt that the grain was damaged upon its arrival. The plaintiff, through his agent, had made arrangements for the arrival of the grain, and had obtained purchasers for it. The wagon had taken about twelve days accomplishing a journey which should have been done in about half that time. It would appear that the driver had been dallying on the road. With ordinary care the grain should not have got wet on the road—notwithstanding the fact that it was raining while the wagon was on the road. He found there was negligence on the part of the driver, for which his principal must be held liable, and there would be judgment for the plaintiff for £22 10s., as damages, and £3 15s., goods sold.

Mr. Roux was for the appellant (defendant), and Mr. Benjamin was for the respondent.

Counsel having been heard in argument on the facts.

Hopley J., said the original case, he believed, was founded on negligence, and in the original case it was pointed out that although it was shown that some mealies were damaged, yet there was no evidence of negligence. It now turned out that negligence was alleged, and the summons set out that the plaintiff had suffered damages in the sum of £30 through the negligence on the part of the defendant to deliver the mealies in like and good order. The defendant denied the negligence, and said that the mealies were delivered in good order and condition. It seemed that in the rainy season in those parts, when rain was threatening, and soon after fell, the cargo of mealies and corn was taken over from Dickerson to be carried some eighty miles. Now, it appeared that there was a well-found wagon and a good buck sail, which had the approval of the respondent. The respondent shortly after the wagon left saw the rain fall. The question now would be how far the evidence went to show any neglect on the part of the defendant. The driver and the leader stated that they kept the buck sail over the load all the way, just as they started, and they stated that they did nothing wrong to make this load get wet or be damaged. That was the evidence on the point of neglect, so that if it rested on evidence alone the Court would be bound to say that there was no neglect, and that the ordinary diligence was exercised by the carrier. But he had been asked to hold that the carrier was liable, because he admitted by a written way bill to have received this grain in good order, and that the contract was to deliver in like good order; in other words, that the way bill was an absolute undertaking to deliver in like good order. His Lordship did not think a way bill bore any such interpretation. The proper interpretation, he thought, was that when a man undertook to deliver in like good order and condition, he meant after due diligence on his part to ensure a consummation of the contract. It was further argued that the mere fact of the load being damaged was conclusive proof of negligence on the part of the carrier, but His Lordship could not agree with that contention. He thought that the plaintiff's agent acted unreasonably in requesting the carrier to take back the cargo. The Magistrate found, on insufficient evidence, that there was neglect on the part of the carrier, and the judgment should be reversed. The appeal would be allowed, and the judgment altered to one for the defendant, with costs.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DICKENS V. LAKE. { 1906.  
Apr. 4th.  
„ 18th.

Rain-water — Natural flow — Obstruction.

*The owner of land is not entitled to place any obstruction in a channel by which the water would naturally flow over his land, if by means of such obstruction he injures his neighbour by throwing more water on, to and over this land than would flow there naturally.*

*When, however, a channel has for 30 years or more existed on such man's land for the conveyance of rain-water collected from a neighbouring road, he is not liable if, in a storm, he diverts part of the water into such channel, even though the result should be that through the bursting of the channel the neighbour's land is injured.*

This was an appeal from a judgment of the R.M. of Somerset East, in an action brought by the appellant against the respondent to recover £20 damages for alleged flooding of plaintiff's garden by reason of an obstruction put in a certain watercourse. The Magistrate had given absolution from the instance, with costs.

From the pleadings it appeared that plaintiff's allegation was that defendant wrongfully placed a certain weir or obstruction in the watercourse in Pauling-street; that this was placed there some years ago; that just before October 10 last the obstruction was raised, and in consequence the water was dammed back, and that on October 10 last, in consequence, the plaintiff's garden was flooded, and his crops were damaged. The defendant took up the position that the flooding was due to a culvert placed in the watercourse by Mr. J. G. Lawton (lessee of the land occupied by plaintiff), and to an unprecedented rainfall on October 10.

Mr. Benjamin was for appellant (Samuel Dickens); Mr. McGregor was for respondent (Charles Dawson Lake).

Counsel for the appellant submitted that if the defendant placed an obstruction in this watercourse to cause the water to dam back on to the plaintiff's property, then the plaintiff was entitled to an action for damages. Unfortunately, the Magistrate did not appear to have found on that question. All the evidence went to show that there was an obstruction raised by the defendant in this stream, which caused the water to dam back to the plaintiff's property. The Magistrate should have found what was the effect of the obstruction. With regard to the damage there was really no serious cross-examination of the plaintiff's witnesses.

Mr. McGregor said that the Magistrate might have found that the real flow of the water was down the furrow to the middle of the defendant's garden, but under the present condition of things the natural configuration had been superseded by artificial arrangements by the Municipal authorities. By these artificial means the Municipal authorities might have brought a rush of water to a special point,

Mr. Benjamin having replied.

*Cur. Adr. Vult.*

*Postea* (April 18th).

De Villiers, C.J.: The plaintiff in this action claimed damages for injury done to his crops by an overflow of water, which, he alleges, was caused by a weir placed by the defendant in a public watercourse in Pauling-street, Somerset East, adjoining his property. But for this weir, the plaintiff says, the water would have flowed on to, and through the defendant's own property instead of being diverted from its natural course into another watercourse flowing on to the plaintiff's land. If it had been clearly proved in the Court below that the effect of the weir was to divert water from its accustomed flow over the defendant's land on to the plaintiff's land, and that, but for this diversion, there would have been no overflow over the plaintiff's land I would have had no hesitation in allowing this appeal. I cannot agree with the Magistrate in the view that a very heavy rainfall gives the same rights of protection from injury to a landowner as the inroads of the sea. It may well be that by our law, as by the law of England, a person who erects a seawall for the protection of his land against the inroads of the sea and by so doing causes the tide to injure his neighbour's land would not be liable for such injury. The flow of water, however, occasioned by rains follows the natural configuration of the land, and every owner of land over which such water naturally flows must be subject to the disadvantages in the same manner as he enjoys the advantages of the relative position of his

land in regard to his neighbours. He cannot be allowed, because there is an exceptionally heavy rainfall, to create an obstruction in the flow so as to divert the water into the lands of others where it would not naturally flow. In the present case it appears that at the time of the overflow there were two channels by means of which storm-water in Pauling-street made its escape. The one was an artificial course, but it had been more than thirty years in existence, and the object of the weir was to divert part of the storm-water into this artificial channel and allow the remainder of the water to flow over the weir on to the older and natural channel through the defendant's land. It appears further that higher up in Pauling-street the defendant's neighbour, Lawton, had constructed a solid masonry wall along Pauling-street to prevent the rain water from flowing, firstly, over his land, and, next, over the plaintiff's land. The effect of this wall undoubtedly was to send more water on to the defendant's land than would flow there naturally. Accordingly, when, on the 10th of October, 1905, very heavy rains flooded the town of Somerset East, the plaintiff, in order to prevent the whole of this accumulated flow from flowing into the one channel, raised the height of the weir by placing sand bags thereon. The result was that all the water did not flow in the one channel, through his land, but was spread into the two channels. The Magistrate has found that the defendant suffered as much damage from flooding as the plaintiff did. He has also found that the weir was not the sole cause of the damage to the plaintiff's crops. The evidence, in fact, left it extremely doubtful whether the weir had the effect of increasing the flow of water on to the plaintiff's property. The rainfall was very great, and great damage was done to the gardens of others than the plaintiff and defendant. The water seemed to have flown over the weir, and to have filled the channel which has been spoken of as the natural channel for the water. The channel nearer the defendant's boundary was also well filled, and it was mainly owing to an escape of water from this channel that there was an overflow into the plaintiff's land. This channel, which has been in existence for more than thirty years, may be regarded as one of the natural channels for the escape of water from Pauling-street. According to the evidence of the defendant's wife, which the Magistrate seems to have believed: "The sluits were all overflowing on the 10th of October, and there was a rush of water everywhere." She also says that the water flowed over the sand-bags which had been placed on the weir. After the damage was done, the old channel near the defendant's boundary was selected by the Municipal Council, apparently without any objection on the

part of anyone, as the site for the substantial cement drain to carry off the rainwater from Pauling-street. Under all the circumstances I am of opinion that the plaintiff has not proved the necessary facts to enable him to recover, and the appeal must, therefore, be dismissed, with costs.

[Appellant's Attorney: F. B. Andrews. Respondent's Attorneys: Syfret, Godlonton and Low.]

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## SUPREME COURT

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[Before the Hon Sir JOHN BUCHANAN.]

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ROVATTI V. ROVATTI.      { 1906.  
   { Apr. 5th.

This was an appeal from a judgment of the Resident Magistrate of the Cape in an action originally brought by Domingo Rovatti, of Station-road, Observatory, against his wife and another (Mrs. Sasso) for the return of a Maltese terrier, or its value, £20.

The matter had previously been before the Court (15 C.T.R. 834). At the first hearing in the Magistrate's Court, exception was taken on the ground that Mrs. Rovatti was married in community, and that exception was upheld, and the case against the second defendant was dismissed, absolution from the instance being granted. An appeal was lodged, and during the course of the appeal it came to the knowledge of the Court that a deed of separation had been entered into between plaintiff and his wife, the first defendant. That deed of separation had not been put in at the Magistrate's Court, and his lordship, in order to save the expense of a new action, ordered that the action should go back to the Magistrate to be tried on the merits as regarded the first defendant. The appeal, as regarded the second defendant, was withdrawn. The matter went back, and was tried by the Magistrate, and he took evidence in the claim against the first defendant, and he found in that case in favour of defendant, granting absolution from the instance.

The Magistrate, in his reasons for judgment, said that he gave judgment for Mrs. Rovatti (the defendant), because he believed her statement that the dog in question was the offspring of a bitch presented to her by her brother-in-law (Otto Rovatti, now of Johannes-

burg), and that the dog in question was kept in the house with her. That being the case, and there being a deed of separation, he held that she was entitled to the dog.

Dr. Greer was for appellant; there was no appearance for respondent.

Dr. Greer submitted that there was overwhelming evidence in favour of the plaintiff's claim. The dog was clearly removed surreptitiously by the defendant from the plaintiff's premises.

Buchanan, J.: There are two questions which arise in this case on the merits, and the first is as to the ownership of the dog before the separation, and the second is in whom the property was vested in by the deed of separation. The Magistrate, after hearing the evidence of the witnesses, has found that originally the dog was given and belonged to the wife of the defendant. In the deed of separation this dog is not specifically referred to, but this paragraph appears: "Each of the said appearers shall take to, and for his or her use, the property brought in by each of them to the support of their marriage." Well, it is hard to say that the dog was to be brought in for the purpose of the support of the marriage. It would be more on the footing of property forming a wife's *personalia*. But even taking it as having come into the community of property, I think, by this clause in the deed of separation, it belongs to the wife. Then, again, the deed of separation goes on to say that all furniture and effects contained in the house in which the parties were living should be taken by the wife, and that all furniture and effects contained in the barber's shop should be taken by the husband. This dog was found in the house, and certainly was not part of the furniture of the barber's shop, so that by the deed, and upon the facts, defendant is entitled to this dog. The appeal must be dismissed with costs.

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VAN WYK V. HOLLANDER.      { 1906.  
   { Apr. 5th.

Divisional Council election —  
Irregularity—Civil Commissioner—Review—Rule 190.

*A Divisional Council election for the district of F. having resulted in a public disturbance, the Civil Commissioner adjourned the further polling for three days. The applicant now applied to have this act of the Civil Commissioner brought under review under Rule 190, on the ground of gross irregularity.*

*Held, that as the Civil Commissioner had held no court nor made any formal enquiry into alleged irregularities, no review could be granted under Rule 190.*

*Moll v. Civil Commissioner of the Paarl (7 C.T.R. 454) followed.*

This was an application by Van Wyk, a candidate in the Divisional Council election at Fraserburg last October, to have certain proceedings reviewed. Mr. McGregor was for applicant; Mr. Close was for respondent.

Mr. Close said that before his learned friend opened the case, he wished to take an exception to the form of procedure adopted by the plaintiff. This matter was brought to the Court by way of review of a summons under the 190th rule of Court, and he contended that that procedure was not contemplated in regard to this particular kind of case. This was a case in which the Civil Commissioner of the district of Fraserburg held a certain inquiry under section 56 of the Divisional Council Act (No. 40 of 1889) in regard to the proceedings at an election for a member of the Divisional Council.

Mr. McGregor said that perhaps he should state, briefly, the circumstances under which the proceedings were brought. In October last there was an election for the Divisional Council of Fraserburg, and the two candidates were Mr. Van Wyk and Mr. Hollander. On the 18th October, a certain Wednesday, there was a good deal of discussion. The returning officer was Mr. Reitz, jun. The allegation of one side was that there was something equivalent to a riot, or a row. Under the circumstances, rightly or wrongly, Mr. Reitz then adjourned the polling until Saturday, the 21st October, and on the 21st further proceedings were taken, and further votes were recorded. Votes to the number of 15 were recorded for his client on that day. Immediately thereafter the respondent (Mr. Hollander) and his agent both noted objections to the Magistrate. The gist of the plaintiff's complaint now was that the Magistrate did not call any of these people before him. Thereafter notice of proceedings was given under section 59 of the Act of 1889.

Mr. Close said that section 56 of the Act provided for the powers of a Civil Commissioner in the proceedings which he actually took. His contention was that those proceedings did not take place in a court of justice, that the inquiry was held by the Civil Commissioner, not by the R.M., and that it was not in any sense a court of inquiry.

The present procedure was one of review. That procedure was only applicable to the hearing of review from courts of justice.

[Buchanan, J.: It ought to have been brought by motion, you say?]

Mr. Close: Yes.

[Buchanan, J.: What would be the difference?]

Mr. Close: I am not prepared to say what the difference would be. Counsel went on to say that there was a riot or disturbance at the polling. There were threats to throw these people out—and then the returning officer, acting under section 50, postponed the poll, but the very section which gave him the right of postponing, fixed that right to the following day, and he postponed for three days.

Mr. McGregor having been heard in reply,

Buchanan, J.: A very nice question of law is raised by the exception taken by the respondent to the procedure adopted by the plaintiff in this case. A Divisional Council election took place in the district of Fraserburg, and certain irregularities are alleged to have occurred at the poll. The person who complains of the irregularities issued a summons out of the 190th rule of Court for a review of the proceedings at the poll, and the question is raised whether this procedure is applicable to this case. Rule 190 gives the right to any party in any suit or action, civil or criminal, in any inferior court of this colony, who may desire to bring the decision of that court under review, to do so. In this case no court seems to have been held of any kind, the procedure of which can be brought under review. Under the Divisional Council Act (section 56), the Civil Commissioner, who, I believe, is the returning officer at these elections, is required in the most speedy and inexpensive manner practicable to inquire into allegations of irregularities at the poll. The persons who complain have the right to appear before the Civil Commissioner and the Civil Commissioner may, if he likes, summon witnesses and inquire further into the matter. In this case there has been no summoning of witnesses and no court of any kind has been held. The next section of the Divisional Council Ordinance allows the Civil Commissioner if, in making inquiries he wishes a point of law to be stated, to have that stated and submitted to a Judge in Chambers and the decision of the Judge in Chambers is final. In this case there has been no case stated or sent to a Judge in Chambers. By a previous decision of this Court, heard by a full Court—the case of *Moll v. Civil Commissioner of the Paarl* (7 C.T.R. 454)—it was distinctly held by the Chief Justice that this 190th Rule of Court only



applies to proceedings in any suit in any inferior Court of this Colony. There the application was made under the Parliamentary Elections Act (Franchise and Ballot Act, section 25), which requires the Civil Commissioner to attend in his court to inquire into certain matters, and His Lordship and the full Court there held that the Civil Commissioner then sitting in his Court was not a sitting of a Court within the meaning of the 190th Rule. That decision lays down a principle which I am bound to follow, and if the question of a Court was strong in that case, it is certainly much stronger in this case, where no mention of a Court is made. The only question before me now is whether a proper procedure has been adopted by the applicant in this case. With this decision before me, I must hold that the objection taken to the procedure is well-founded and must be sustained. It is perhaps unnecessary to go further, but I wish distinctly to say that if the proper procedure had been taken I do not wish it to be inferred for a moment that any person whose political rights have been infringed by the action of the Civil Commissioner has no right of appeal to the Court for redress. On the contrary, I think that if he had taken proper proceedings, as was pointed out in Moll's case, he would have such a right to obtain redress. The objection must be sustained, with costs.

[Appellant's Attorneys: Walker and Jacobsohn. Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

#### VAN DER WATT V. MCDIARMID.

This was an appeal from a judgment of the Resident Magistrate's Court at Elliot in an action brought by the present appellant to recover certain sums of money, amounting in all to £91 4s. The Court below had given judgment for the present respondent.

From the record it appeared that plaintiff sued the respondent in the Magistrate's Court for a sum of £7 being as and for the hire of a certain wagon and 12 oxen which defendant hired for a journey to Indwe; £75 4s. as and for damages sustained by plaintiff by reason of the defendant wrongfully and unlawfully and without the consent of the plaintiff taking the wagon further than Indwe, and keeping the wagon and oxen until the 26th September, instead of until the 5th September, and £9 balance due on sale of a certain horse to the German Government by defendant on behalf of plaintiff. Part of the damages claimed was in respect of certain four oxen which had died or been lost while in defendant's custody, and on account of which £40 was claimed. Defendant, in his plea, set up the defence that plaintiff agreed with him that he

should go by way of Cala and Barkly East, and he denied the alleged breach of contract. As to the oxen, he said that one animal knocked up on the way through no negligence on his part, and that three died from the effects of snow-storm and other causes. As to the horse, he said that he sold the animal, not for £18, as had been alleged by plaintiff, but for £17 10s., and he had set off the balance due to plaintiff against moneys which he (defendant) had lent to him. In reconvention defendant claimed £35 0s. 4d., for moneys lent, moneys disbursed, food supplied to the plaintiff's boys, pound fees, and so forth. He said that there was a half-share of proceeds of the trip due to plaintiff, amounting to £12 18s.

The Magistrate, in his reasons for judgment, said that the plaintiff was well aware of the purposes for which his wagon and oxen were required. Unfortunately, owing to the inclement weather, the undertaking proved a most disastrous one to both parties, who were partners in the trip, but that was beyond the control of the defendant. The loss of the oxen was due to the weather, and through no fault of the defendant. Judgment was for the defendant.

Mr. Benjamin was for appellant; Mr. Van Zyl for respondent.

Mr. Benjamin observed that the decision of the Magistrate was a most singular one. He gave judgment for the defendant, but not for any amount. Again, there was absolutely not a word of evidence to show that the parties were partners. He submitted that the judgment of the Magistrate was one of the most slovenly ever delivered in this country. The reasons were certainly careless. There was no finding upon fact, and now it was cast upon his lordship to find upon every fact of the case. There was not a tittle of evidence to show that the parties were partners in the trip. Counsel then proceeded to argue on the facts of the case.

Mr. Van Zyl having been heard in reply,

Buchanan, J., said the plaintiff sued in the Magistrate's Court on a contract for the hire of a certain wagon and twelve oxen. In all he claimed £91 4s. Against this the defendant pleaded certain payments as a set-off and also a claim in reconvention. The defendant admitted he hired the wagon and oxen, but he denied the liability for the loss of the oxen, and admitted his liability in £8 10s. for a horse. The Magistrate heard all the evidence, and then gave judgment generally for the defendant, but he did not balance the items which were proved as he ought to have done. The proper course would have been to send the case back to the Magistrate to adjust the accounts, but to save expense his lordship would not do so. The Magistrate found there was no

neglect on the part of the defendant, and the evidence supported the finding. The Magistrate should not simply have given judgment generally for the defendant, and the judgment would be altered to one for the plaintiff for £11 19s., with costs in both courts.

TSHAYIVITI V. TSHAYIVITI.

This was an appeal from a judgment of the Court of the Resident Magistrate, Victoria East, the plaintiff successfully claiming to be heir to certain stock.

Mr. Benjamin was for the appellant (defendant), and Mr. Gutsche was for the respondent.

Mr. Gutsche took exception on the ground that the case was decided by a magistrate between natives, and according to native law there was no appeal to the Supreme Court under Act 18 of 1864. Counsel referred his lordship to the case of *Tabata v. Tabata* (5 Juta, 328), which, he submitted, showed there was no appeal from the judgment of the magistrate under the jurisdiction conferred upon him by the Act.

Mr. Benjamin said there was a gross irregularity on the part of the Magistrate. According to the plaintiff, there were only seven oxen claimed, and the Magistrate gave an order for the return of nine. Counsel submitted it was a case for review. He further submitted that the Magistrate had erred, because there was nothing to show that deceased had lived in a proclaimed location.

Mr. Gutsche said his learned friend could not substantiate any gross irregularity.

Buchanan, J., said he thought it quite right of Mr. Gutsche to call attention to the fact that there was no appeal in this case.

Counsel on both sides having been heard in argument.

Buchanan, J.: The Native Succession Act, 1864, makes the Magistrate sole arbiter of questions arising under native law between natives. In this case the question brought for the Magistrate's decision was, who, according to native law, was the heir of the deceased native. This Act applies only to deceased natives, who had certificates of citizenship, or to deceased natives, who had lived in a proclaimed location. It is not alleged in the summons either that the deceased had a certificate of citizenship or that he had lived in such a location, but, incidentally the proceedings in the Magistrate's Court, the sheriff's return of the summons and the evidence given by some of the witnesses indicate that the parties all belonged to a native location. It seems to me most probable that the deceased native did not reside in a location called Mabandla's Loca-

tion. Then again, if the Magistrate had no jurisdiction in the case, one would have expected the parties on the spot to have taken exception, but such exception was not taken in the court below. I think it most probable that this is a proclaimed location, or the Magistrate would not have heard the action. However, if it is not a proclaimed location then, of course, he has no jurisdiction under the Act. That point will stand over. Assuming for the present that it is a proclaimed location, I think the Magistrate's decision in this case should not be interfered with. Assuming that he had jurisdiction, he had the witnesses before him, he heard the evidence, and indeed the heirship is admitted. He says: "It is conclusively proved that the plaintiff was the sole heir to the estate, and admitted by the defendant, and, such being the case, he was entitled to the property claimed, and I gave judgment accordingly, with costs of suit." Mr. Benjamin now says that the property claimed in the suit is ten head of cattle, and that as a matter of fact there are only eight head of cattle in the estate. The question of how much property there is actually in the estate may or may not be in doubt. I notice that the surety bond given by the persons in whose possession the cattle are mentions less head, but to make perfectly clear that no injustice should be done, the judgment will be that plaintiff be declared sole heir of the estate, and, as such, entitled to the property of the said estate. This judgment is given subject to its transpiring that it is a proclaimed area. The case will be sent back to the Magistrate to report to the Court whether this is a proclaimed location or not. It will be unnecessary to argue the case before the Court again. If it is a proclaimed location, under section 6 of the Act, the judgment will stand; if it is not a proclaimed location, the judgment will be set aside. If the appellant be successful, then the appeal will be granted, with costs; if unsuccessful, the appeal will be dismissed, with costs.

[Appellant's Attorneys: Van Zyl Buissinné. Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

applies to proceedings in any suit in any inferior Court of this Colony. There the application was made under the Parliamentary Elections Act (Franchise and Ballot Act, section 25), which requires the Civil Commissioner to attend in his court to inquire into certain matters, and His Lordship and the full Court there held that the Civil Commissioner then sitting in his Court was not a sitting of a Court within the meaning of the 190th Rule. That decision lays down a principle which I am bound to follow, and if the question of a Court was strong in that case, it is certainly much stronger in this case, where no mention of a Court is made. The only question before me now is whether a proper procedure has been adopted by the applicant in this case. With this decision before me, I must hold that the objection taken to the procedure is well-founded and must be sustained. It is perhaps unnecessary to go further, but I wish distinctly to say that if the proper procedure had been taken I do not wish it to be inferred for a moment that any person whose political rights have been infringed by the action of the Civil Commissioner has no right of appeal to the Court for redress. On the contrary, I think that if he had taken proper proceedings, as was pointed out in Moll's case, he would have such a right to obtain redress. The objection must be sustained, with costs.

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tion. Then again, if the Magistrate had no jurisdiction in the case, one would have expected the parties on the spot to have taken exception, but such exception was not taken in the court below. I think it most probable that this is a proclaimed location, or the Magistrate would not have heard the action. However, if it is not a proclaimed location then, of course, he has no jurisdiction under the Act. That point will stand over. Assuming for the present that it is a proclaimed location, I think the Magistrate's decision in this case should not be interfered with. Assuming that he had jurisdiction, he had the witnesses before him, he heard the evidence, and indeed the heirship is admitted. He says: "It is conclusively proved that the plaintiff was the sole heir to the estate, and admitted by the defendant, and, such being the case, he was entitled to the property claimed, and I gave judgment accordingly, with costs of suit." Mr. Benjamin now says that the property claimed in the suit is ten head of cattle, and that as a matter of fact there are only eight head of cattle in the estate. The question of how much property there is actually in the estate may or may not be in doubt. I notice that the surety bond given by the persons in whose possession the cattle are mentions less head, but to make perfectly clear that no injustice should be done, the judgment will be that plaintiff be declared sole heir of the estate, and, as such, entitled to the property of the said estate. This judgment is given subject to its transpiring that it is a proclaimed area. The case will be sent back to the Magistrate to report to the Court whether this is a proclaimed location or not. It will be unnecessary to argue the case before the Court again. If it is a proclaimed location, under section 6 of the Act, the judgment will stand; if it is not a proclaimed location, the judgment will be set aside. If the appellant be successful, then the appeal will be granted, with costs; if unsuccessful, the appeal will be dismissed, with costs.

[Appellant's Attorneys: Van Zyl Buissinné. Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

SEARLE AND CO. V. WARNER { 1906.  
AND CO. { Apr. 6th.

Mr. Upington (for defendants in the suit) moved for the appointment of a commission to take the evidence of Quartermaster-Sergeant Ashford, of the Army Service Corps, who was about to leave Cape Town by a vessel timed to depart on Tuesday week. The action was one in which plaintiffs sued for £15 damages sustained in the stacking of certain coal in a lane adjoining their premises.

Mr. Gardiner (for plaintiffs in the suit) did not object to the appointment of a commission, but he submitted that the costs should be borne by the applicants, inasmuch as when the case was called during the February term plaintiff and his witnesses and counsel were ready, but the other side were not ready, counsel not having been briefed.

Commission *de bene esse* granted Mr. Advocate P. S. T. Jones to be commissioner, question of costs to stand over until the trial.

### ADMISSION.

Mr. Lewis applied for the admission of Julius Vernon Levin as an attorney and notary.

[Buchanan, J.: What is the urgency in the application?]

Mr. Lewis: I cannot say that there is any particular urgency in the matter, but the applicant wishes to enter upon his profession as soon as possible. He is already practising as a law agent with the approval of the Law Society.

Application granted, oath to be taken before the R.M. of Bredasdorp.

WATSON V. JENSEN. { 1906.  
{ Apr. 6th.

Set off—Liquidated and unliquidated claim—Magistrate's jurisdiction.

*W. sued J. in an R.M. Court for £28 8s., due as wages for work and labour done, and also for £9 13s. in lieu of a month's notice. The claim was reduced to £20, to bring it within the Magistrate's jurisdiction. In reconvention J. claimed £10 18s. 3d. as damages for injury done to*

*machinery and 17s. 6d. as a set off for two days' work not done by the plaintiff. The Magistrate gave judgment in convention for £20 and in reconvention for £11 15s. 9d., which he set off against the full sum of £38 1s., which he considered to be due to the plaintiff.*

*Held on appeal, that the Magistrate had rightly given judgment in convention for £20: but had erred (1) in setting off any claim for damages on either side. (2) In setting off the sum awarded to defendant against the full sum of £38 1s. instead of against the reduced claim of £20.*

This was an appeal from a judgment of the Resident Magistrate of Barkly East in an action brought against appellant by respondent to recover wages for services rendered and damages for wrongful dismissal.

From the record, it appeared that the plaintiff, a jumper driller, had in the early part of last year gone up from Cape Town to Barkly East, and had been engaged by defendant to work his percussion drill. Plaintiff continued at work until about the 13th September, and his services were then dispensed with without notice. Defendant now alleged negligence on his part in the management of the machine, whereby he said he had suffered damages. Plaintiff brought an action for wages and work and labour done, and damages for dismissal without notice, and reduced his claim to £20 so as to bring it within the jurisdiction of the Court. Defendant claimed in reconvention for damages to his drill occasioned by plaintiff's neglect and default, and reduced his claim to £20 for the purposes of jurisdiction. The Magistrate found for plaintiff in convention in three sums amounting to £38 1s., and for plaintiff in reconvention on certain items amounting to £11 15s. 9d., and he gave judgment for plaintiff in convention for £20, with costs, setting off the amount of £11 15s. 9d. on which he had found in favour of defendant against the sum of £18 1s. abandoned by plaintiff.

Mr. J. E. R. de Villiers was for appellant; Mr. Benjamin was for respondent.

Mr. De Villiers submitted that the Magistrate was not entitled to set off the amount for damages which he had found in favour of the defendant against the sum which had been waived by the plaintiff.



[Buchanan, J.: You say that £11 15s. 9d. ought to have been set off against the sum of £20?]

Mr. De Villiers said he submitted that the Magistrate should have found for £20 for plaintiff in convention, and £11 15s. 9d. for plaintiff in reconvention, and such order as to costs as he might have considered reasonable. It was clearly an illiquid demand.

Mr. Benjamin submitted that the Magistrate had found for liquidated amounts on the claim in reconvention. He contended that the amounts were capable of being set off against the claim in convention, and submitted that the Magistrate was correct in the judgment he had given. He relied on the case of *Walmesley v. James* (15 Supreme Court Reports, 120).

Mr. De Villiers submitted, on the authority of *Sey v. Thomas* (12 C.T.R. 237) it was clear that the amounts in the claim in reconvention were not liquidated.

Buchanan, J.: Plaintiff in this case, a jumper driller, sues in the Magistrate's Court for a sum of £41, according to account annexed to the summons. He reduced his claim to £20, so as to bring it within the jurisdiction of the Court. In reconvention, defendant filed a claim for £50, which claim he too reduced to £20, to bring it also within the jurisdiction of the Court. The plaintiff's claim was made up of a claim for wages and for work done, and also for £13 in lieu of a month's notice, which is in the nature of damages. The Magistrate found that for work and labour done, there was £28 8s. due to plaintiff, and damages for want of notice £9 13s., making £38 1s. in all. The claim in reconvention, however, is altogether in the nature of a claim for damages with the exception of one item allowed by the Magistrate, 17s. 6d., which is a set-off against two days' work not done by plaintiff. That 17s. 6d. can clearly be set off against the claim for wages in the claim in convention, but as there is a sufficient surplus, after deducting the 17s. 6d. to sustain the Magistrate's judgment, the Magistrate's judgment in convention for £20 must stand. Then the question comes as to the judgment in reconvention. The Magistrate has allowed on the claim for damages in reconvention £10 18s. 3d., eliminating the 17s. 6d. for wages. But, having then found for this amount for the defendant, he set this off against the surplus of damages for the plaintiff. Now, in my opinion, had this sum of £10 18s. 3d. been a liquidated claim, it might have been so treated by the Magistrate, because a liquidated claim does, by operation of law, extinguish so much of the plaintiff's claim as may be liquidated, and, consequently, if the £10 18s. 3d. had been liquidated it could have been set off. But an unliquidated claim for damages cannot be so set off.

A claim for damages does not become liquidated until some Court or other tribunal has assessed the amount. In this case, therefore, as the £10 18s. 3d. cannot be set off against the plaintiff's claim it must, I think, be set off as against the £20, for which judgment has been given, not against the surplus against which the Magistrate has set it off. The claim in reconvention illustrates what can be set off and what cannot be set off; 17s. 6d. being for wages, can be set off against the claim for wages, but the £10 18s. 3d. being purely for damages cannot be set off. Consequently, the appeal will be allowed with costs, and the judgment of the Court below altered to judgment for the plaintiff in convention for £20, and for the plaintiff in reconvention for £10 18s. 3d. Defendant must pay the costs in the Magistrate's Court. The effect will be judgment in the Court below for plaintiff for £9 1s. 9d., with costs.

[Appellant's Attorneys: Van der Byl and De Villiers. Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

#### BEETJE V. VENTER.

Magistrate's jurisdiction—Tembu-land.

*By Proclamation No. 140 of 1885, Magistrates in Tembuland have jurisdiction in all civil suits within their respective districts.*

This was an appeal from a judgment of the Resident Magistrate of Elliot in an action brought by the appellant against the respondent for delivery of a certain house at Elliot. Mr. Van Zyl was for appellant; there was no appearance for respondent.

Plaintiff's ground of claim was that he was a builder, and that he had been in lawful possession of the house in question, which he had built and erected. On the 4th January last, he alleged, defendant wrongfully and unlawfully broke open the windows and doors of the house, and forcibly took possession thereof. When the case came on for hearing, exception was taken to the summons on the ground that the Court had no jurisdiction in an action for spoliation, and could not order specific delivery. The Magistrate upheld the exception.

Mr. Van Zyl submitted that the Magistrate had been under a mistaken impression that the Act 20, 1856 (subsection 3, section 8), which dealt with the jurisdiction of Magistrates, applied to the Native Territories. There was full power in the Magistrate at Elliot to deal with this case.

Buchanan, J.: This case comes in appeal from the Resident Magistrate's Court at Elliot. By the Tembuland Annexation Act, provision is made for legislation in that territory by Governor's proclamation. The Governor has legislated by proclamation and the present proclamation governing the country is No. 140, 1885. The Magistrate's jurisdiction in Tembuland is that which is fixed by this proclamation. As far as I can ascertain from the proclamation, the Magistrate had jurisdiction in all civil suits and proceedings between persons residing within the respective districts of Tembuland. The exception taken in the Court below is founded on the limited jurisdiction exercised by Magistrates in this colony. Now that limit does not extend to Tembuland, and, therefore, the Magistrate was wrong in refusing to hear the case under the jurisdiction conferred upon him by the Governor's proclamation. The appeal must be allowed with costs, and exception of want of jurisdiction overruled and case remitted to the Magistrate to hear on the merits, costs in the Magistrate's Court to be in the discretion of the Magistrate.

[Appellant's Attorneys: Michau and De Villiers.]

#### RABINOWITZ V. JOHNS.

This was an appeal from a decision of the Court of the Resident Magistrate of Namaqualand, giving absolute from the instance in a case in which the plaintiff sued the defendant for £15 on a promissory note. The defendant admitted his signature on the note, but denied the debt. The defendant bought a horse for the plaintiff, and as it was found to be in bad condition within a month after the sale the defendant denied any liability and offered to return the horse. The plaintiff denied that he gave any guarantee with the horse. The Magistrate, in his reasons for judgment, said it was clear from the evidence that the plaintiff agreed to sell the defendant a sound horse, and when the plaintiff called on defendant subsequently he then agreed to take back the animal.

Mr. Benjamin was for the appellant and Mr. P. Buchanan was for the respondent.

Mr. Benjamin said the Magistrate had not based his decision on the relative credibility of the witnesses before him. Counsel submitted that the Supreme Court was quite as well qualified to draw inferences from the evidence as the Resident Magistrate, and after reviewing the evidence, counsel contended that the inferences on the record were entirely in favour of the plaintiff.

Without calling upon Mr. Buchanan,

Buchanan, J.: This action is brought on a document signed by the defendant, in which he agreed to pay to the plaintiff £15 for a horse. The evidence shows that the plaintiff, who is a speculator, had certain horses for sale. The defendant wished to buy a chestnut horse, but the plaintiff could not sell that one, and the plaintiff said he would send him another horse. According to the evidence before the Magistrate, the plaintiff was to deliver this horse, but he did not do so. The defendant sent a man for the horse, and the horse sent back was one which had a sore back, and was in a faulty condition, and the defendant refused to accept it. He wanted to send it back again, but the plaintiff was moving about from place to place, and he consequently could not do so. Afterwards the plaintiff came to the defendant's place, when the defendant refused to accept the horse. The Magistrate who heard the evidence believed the plaintiff agreed to take the horse back. The whole case depends upon the credibility of the witnesses, and on how the Magistrate found on the facts. I think it is clear this horse was not pointed or shown to the defendant before he gave the note, and when he received this faulty animal he refused to accept it. I think the Magistrate was right, and the decision will not be interfered with. The appeal will be dismissed, with costs.

[Appellant's Attorneys: Van Zyl and Buissinné. Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

#### MEYER V. DENYSEN.

This was an appeal from a decision of the Court of the Resident Magistrate of Namaqualand in a case in which the plaintiff claimed £20 damages for breach of contract, and was awarded £5, with costs. The defendant, it appeared, agreed to sell a horse to plaintiff, and to deliver it on a certain date in consideration of £30, to be paid to him. He failed to deliver the horse on the specified date, and the plaintiff had incurred expenses in purchasing a horse elsewhere. The Magistrate, in his reasons for judgment, said it was clear from the evidence that there was a definite contract for the delivery of the horse by a certain date. The defendant did not keep his part of the bargain. The plaintiff had been put to a deal of inconvenience, and some expense, and he found for him in £5 and costs.

Mr. Benjamin was for the appellant, and Mr. J. E. R. de Villiers was for the respondent.

Counsel having been heard in argument on the facts.

Buchanan, J.: The plaintiff bought a horse from the defendant. The horse was not seen by the parties; it was run-

ning in the veld some three days from the place where the contract was entered into. The plaintiff stipulated that this horse was to be delivered to a Mr. Loynes at Garies, also a considerable distance from defendant's residence. He was to examine the horse, and if he approved the purchase was to be completed and the price paid. The plaintiff alleges that he wanted this horse by the 9th September, and that he told the defendant so. The defendant said he could not deliver it at that time, and the defendant says he did not promise to deliver in a specified time. I will assume that he did promise to deliver the horse at a specified time, and did not do so. The purchase of the horse was not a completed transaction until the horse was approved by Mr. Loynes. When the defendant went back to his farm the horse was running in the veld, and he had to send for it. It was not brought to defendant's residence until the 8th September. On the 12th September the horse was sent to Garies, and when the horse arrived Loynes authorised another person to inspect it, who did so and approved of the purchase. The purchase price was then paid and delivery taken without any objection being raised. The plaintiff says he suffered damages because the horse was not delivered at an earlier date, when he then wanted to go hunting. Now what damages did the plaintiff sustain? Plaintiff says he wanted the horse to go to hunt. But he says he suffered some inconvenience and was put to some expense in sending messages to other members of the hunt, etc. But another member of the party supplied plaintiff with a horse. The plaintiff could have refused to take the horse, but his agent accepted it and paid for it without demur. I think, under the circumstances, the Magistrate was not justified in giving any damages to the plaintiff. The appeal will be allowed with costs, and judgment altered to one of absolution from the instance, with costs.

[Appellant's Attorneys: Van Zyl and Puissinné. Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

#### MATHU AND ANOTHER V. GOOSEN.

Mr. Gardiner was for the appellant, and Mr. Van Zyl was for the respondent. Mr. Gardiner explained that there was another matter, that of Joyner v. Goosen, which would affect the present case, and he suggested to his lordship that both matters might be heard together, and be postponed until the trustee in Joyner's estate decided whether or not to proceed in the second case.

Mr. Van Zyl objected to this course, and

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Buchanan, J., said the second appeal would stand over until the trustee in Joyner's estate had an opportunity of deciding whether he would go on or not.

The appeal of Walker and Another v. Goosen was from a judgment of the R.M., Maclear, awarding the plaintiff £40 in a claim for rent under an agreement.

In the case of Mathu an action was brought by Goosen (respondent) for the recovery of rent, and for an order of ejectment. The plaintiff was the owner of a farm in the district of Maclear. On the 30th May, 1902, the plaintiff and defendant entered into an agreement, the plaintiff to let and the defendant to hire certain lands for a period of five years, commencing on the 1st June, 1902, the rent to be £40 a year. The defendant paid the rent due on June, 1903, and June, 1904, and then refused to pay in June, 1905, whereby the plaintiff contended that he was entitled to a cancellation of the agreement, and he claimed £40 for rent and possession of the farm. In the agreement it was to be clearly understood that the lands hired by the lessees were only those belonging to the lessor. The lessees were to have the right to extend the lands hired by them. The defendants tendered £20, and as to the balance pleaded the general issue, and stated that there was no authority to break up new lands. The veld had been leased to Joyner. About May last plaintiff took from the defendant certain of the old lands, and let them to one Venter, and the value of the lands was £10 per annum, and to that extent the defendant claimed rebate. The defendant claimed £10 in reconvention and for a declaration of rights. Judgment was entered for the plaintiff for £40, and absolution from the instance was granted on the claim in reconvention, the defendant to pay the costs. The Magistrate in his reasons said the rent due was not disputed, but the defendants disputed the title, and contended that half of the lands leased belong to one Joyner. In his opinion, the claim of a third party could not enter into the matter. It was the duty of the lessor to put the lessee in possession or pay damages. The defendant had not proved the claim in reconvention.

Without calling upon Mr. Van Zyl, Buchanan, J.: Goosen, a farmer, in the Court below sued the present appellants, Mathu and another, two natives, for £40, rent due under a document of lease. It appears that the natives had hired this land three years ago, that they paid the rent for two years, and the rent for the third year they paid to their own attorney, who held it pending these proceedings. They now object to paying £40 for the third year, on the ground that portion of

the land leased by them is claimed by one Joyner. Goosen had let land to Joyner also, and Goosen had sued Joyner in the Magistrate's Court for the rent of these lands also. In that case the Magistrate has held that the lands let to Joyner are not the same lands as those let to the natives in this case. But whether they are or not, the natives having leased from Goosen, cannot dispute the landlord's rights to rent for these lands; they have had occupation of the lands, but they say they fear that Joyner might sue them for rent. I think that this fear on their part is not well founded, and they have no legal defence against paying Goosen, their landlord. In addition to this, there is a claim in reconvention, in which, in the first place, the natives seek to recover £20 a year within the two years, and £40, rent which has already been paid. This stands on the same footing as the other claim. They have no right to recover this from the landlord to whom they paid it, after having had possession of the land. They also claim £10, because they say portion of the land leased to them is taken away, and leased to one Venter. On this question, there is a distinct conflict of testimony. The Magistrate does not go very fully into the point, but he says in his reasons: "I did not consider the defendant's claim in reconvention proved, and so gave absolution from the instance." On the case as it is presented now before the Court, I see no legal grounds for interfering with the Magistrate's decision. He certainly is right, I think, both on the law and the facts, in holding that the £40 is due. I think the Magistrate's judgment is sound on the evidence, and the appeal must be dismissed, with costs.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorneys: Michau and De Villiers.]

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

MARE V. MICHAU AND { 1906.  
HOFMEYR. } Apr. 9th.

Surety—Married woman—Renunciation of benefits—Signature on back of a promissory note.

*Mrs. M. had signed her name on the back of a promissory*

*note made by her husband without having renounced benefits.*

Held, that as by Sec. 20 of Act 19 of 1893, a married woman who becomes surety for her husband need not renounce benefits, she must be held liable as a surety.

Priest v. Stegmann (15 C.T.R., 407) distinguished. Klopper v. Van Straten (4 C.T.R., 101) followed.

This was an appeal from a judgment of the R.M. of Cradock in an action brought by the present respondents for payment of £190 upon a promissory note.

From the record it appeared that in the Court below the defendant denied liability under the note, and said that she had not renounced the legal exceptions. The Magistrate gave judgment for plaintiffs. The note in question was dated July 5. and payable on the 5th October, was signed by Paul Jacobus Mare, but the space reserved for the signature of surety and co-principal debtor had not been filled in. On the back, however, was his wife's signature—J. A. Mare. Mrs. Mare, in her evidence in the court below, said that she had carried on a separate business as a boarding-house keeper for four years, and her husband had been farming. She admitted having signed the note, but said that she had received no value, and that when she signed the note it was blank. Her husband had surrendered his estate as insolvent.

Mr. Gardiner was for appellant, Julie Aletta Mare; Mr. Benjamin for respondents.

Mr. Gardiner said that this case was covered by a decision given by his lordship in 1901 in the case of *Clarke v. Wolf* (11, C.T.R. 201). He contended that there was no liquid liability upon the appellant. He proceeded to quote from Byles on bills. He submitted that in the present case appellant did not sign as drawer or acceptor, and, therefore, she would have incurred the liabilities of an endorser to the holder in due course. Michau and Hofmeyr, he urged, were not holders in due course, because, according to the Bills of Exchange Act a holder in due course only came in after negotiation of the bill. In this case there had been no negotiation of the bill. If there had been any liability on the part of Mrs. Mare, it was that of an aval. She had not renounced the legal benefits, and, therefore, she could not be held liable. Counsel also referred to *Priest v. Stegmann* (15, C.T.R. 407),



but said that that case was quite different from the present one.

Mr. Benjamin said that his learned friend, by a very ingenious argument, had asked his lordship to accept the view that under section 20 of the Bills of Exchange Act a person who put his or her name on the back of a note, as defendant in this case did, was not an endorser. That view, he submitted, would not be upheld. Defendant in this case clearly endorsed the note. His learned friend had quoted from the English law on a point where the English law did not recognise any liability at all. He could not see how the present case could be distinguished from the case of *Priest v. Stegmann*. Under the 20th section of the Act, it was not necessary for appellant to renounce the legal exceptions. She had clearly incurred the responsibilities of an endorser. The extracts which his learned friend had quoted from Byles only applied to the state of things under the English law.

Mr. Gardiner having been heard in reply,

Buchanan, J.: The plaintiffs in this case sued upon a promissory note made by one Paul J. Mare in favour of the plaintiffs or order. At the back of this note there is written by the defendant her signature. The question we have to decide is what liability the defendant incurred by writing her signature at the back of the note in question. This case differs from the case of *Priest v. Stegmann*, in which case a woman was held liable for her husband where she had endorsed a promissory note as surety and co-principal debtor. In that case the defence set up was that she had done so without expressly renouncing the benefits of the *Senatus Consultum Vellianum* and the exception *de authentica si qua mulier*, and that she had she had had no notice of the dishonour of the bill. The Court there held that she was not in the position of a surety merely, but that she had become liable as co-principal debtor, and consequently being in the same position as the maker was not entitled to take advantage of want of notice, and, further, held that under section 20 of the Bills of Exchange Act, through such a signature, she was not entitled to rely on the exceptions which prevailed under the old law. We have not now to discuss the policy of the law which protected women—especially married women—against the persuasions of their husbands from making their property liable for the debts of their husbands. The question is what alterations were made in the law by the Bills of Exchange Act? Now it is necessary to consider what is the position of the defendant in this case. If this had been an application for provisional sentence, the previous decisions of the Court show that the endorsement on a non-negoti-

able promissory note would not *prima facie* have rendered her liable to the payees. There was not a liquid liability by the endorser to the payees upon which provisional sentence could be obtained. But the action in the Magistrate's Court was not an action for provisional sentence, but an action on the contract itself. In that case the liability of the defendant could be discussed more fully than it could have been if it had been an action for provisional sentence only. The previous decision of this Court in *Klopper v. Van Straten* laid down that a woman endorsing a note in this way *prima facie* rendered herself liable as an aval or surety to the payee. By the 54 section, where a person signs a bill otherwise than as drawer, he or she incurs the liabilities of an indorser to a holder in due course. "A holder in due course" as defined by the Act would hardly meet the description of plaintiffs. But as plaintiffs are legal holders of the promissory note, which *prima facie* she has indorsed as aval or surety, it seems to me to follow that under the 20th section as an endorser the protection afforded by the old *Senatus Consultum* has been swept away. I think the Magistrate was right in holding, under these circumstances, with the previous decisions of the Court before him, that the defendant was liable on this note as surety for her husband, and it is no defence to say that she has not renounced the benefits referred to. The 20th section is as follows: "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract, provided that to the validity of a bill, accepted or indorsed by a woman, the renunciation of the benefits *Senatus Consultum Vellijani* and *Authentica si qua Mulier* shall not be requisite. In this case the defendant had full capacity to contract. She has not renounced the benefits. But this renunciation, it is now enacted, shall not be requisite. That is the only defence set up in the Court below, and on that point the Magistrate found against her. I think the Magistrate was right, and the appeal must be dismissed with costs.

[Appellant's Attorney: S. S. Hutton.  
Respondent's Attorneys: Michau and De Villiers.]

#### HENDRICKS V. CUTTING.

Interpleader—Sale on credit—  
Passing of property.

This was an appeal from a judgment of the R.M. of Wynberg in an interpleader suit to decide the ownership of a certain Raleigh cart which had been seized in execution against one Du Toit.



The question was whether Hendricks, who made the cart, for one Abdol Falal, had sold it under a suspensive or resolute condition. Falal appeared to have sold the cart to one Du Toit, and Cutting obtained a judgment against Du Toit, and took out execution and seized the cart. Hendricks then came and claimed that the cart was his property. The Magistrate had found that the cart was liable to execution as belonging to Du Toit.

The Magistrate, in his reasons for judgment, said that the cart was attached in order to satisfy a judgment in the case of Cutting (judgment creditor) and Du Toit (debtor), the cart being then in the possession of Cutting, who had seized it by way of security from Du Toit. The cart was now claimed by Hendricks, who said that it was sold to Falal on condition that it remained his property until such time as the purchase price had been paid off. Falal denied the condition, and asserted that he became the owner of the cart on delivery. The evidence as to the suspensive condition was very conflicting, but it appeared to him (the Magistrate) that delivery had taken place, and that ownership had passed to Falal, who had subsequently sold the cart to Du Toit.

Mr. P. S. T. Jones was for appellant; Dr. Greer was for respondent.

Mr. Jones submitted that the reasons given by the Magistrate for his judgment were not borne out by the evidence. The Magistrate did not find that the document between Hendricks and Falal was not a genuine document, but rather seemed to suggest that it was genuine, because he said that the ownership in the cart had passed to Falal before this document was written. His (counsel's) contention was that the Magistrate had founded his judgment upon a wrong principle, because he seemed to have thought that when the cart was delivered in the yard ownership then and there passed. At no time, however, had any arrangements been made as to the purchase price. In this case delivery could not have any effect until the document had been signed. In order that delivery should pass there must be either cash or some arrangement as to credit. Hendricks would never have acquiesced in the sale if he had known the circumstances. If there was anyone who could give a proper explanation as to the whole transaction, it was the defendant, but he did not give that explanation. As there was no evidence to impeach the document, counsel submitted it must be held to be binding.

Without calling upon Dr. Greer,

Buchanan, J.: As between Hendricks and Falal, the whole of the record goes to show that as long as the cart was in Falal's possession the property therein remained in Hendricks, and therein it

could not be taken in execution. But, unfortunately, while the property was in possession of Falal he sold it to one Du Toit, and the record shows that this sale was with the knowledge of Hendricks, for when Hendricks was told of the sale he acquiesced in it, and said it was good. Du Toit afterwards was unable to pay for the cart, and he said he would hand back the cart to Falal. But meanwhile, unfortunately, perhaps for Hendricks, Du Toit had become indebted to Cutting, and the cart had been delivered by Du Toit to Cutting as security for the debt. Du Toit had bought the cart with the knowledge of the owner, and gave the promissory note in payment. He had not actually paid for the cart, but the sale being on credit the ownership passed to Du Toit. While in Du Toit's possession the cart was taken in execution of a judgment obtained by a creditor. The Magistrate was right in the result of his decision, though in his reasons the evidence does not support his view of the original contract between Hendricks and Falal. I do not think the judgment should be interfered with. The appeal will be dismissed with costs.

[Appellant's Attorneys: J. F. E. Bernard. Respondent's Attorneys: Friedlander and Du Toit.]

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

IN CHAMBERS.

ISHMAEL V. ALLY. { 1906.  
Apr. 12th.

Interdict—Proof of debt—*Meditatio fugæ*.

*Where it was sought to restrain certain banks from parting with moneys, the property of the respondent, on the ground that the respondent owed money to the applicant and contemplated leaving the Colony.*

*Held, that no interdict could be granted, as there was no proof how much the respondent owed, and if applicant could show that he contemplated*

*leaving the Colony, applicant had his remedy under the 8th Rule of Court.*

This was an application brought by Shaik Ishmael upon notice calling upon Kariem Ally to show cause why a certain rule temporarily interdicting the moneys of applicant standing in certain banks to applicant's credit should not be set aside.

From the affidavits it appeared that the rule was granted on an *ex parte* application by Ally, who alleged that Ishmael owed him a sum of £724 8s., that Ishmael had offered him £150 in settlement of his claim, and had threatened that unless he accepted that amount he (Ishmael) would withdraw his moneys from the African Banking Corporation and the Standard Bank, and go to India. Ally was a speculator, who had been carrying on business in Strand-street, Cape Town, and Ishmael was a butcher who has been carrying on business at 100, Hanover-street. The debt, Ally alleged, was for sheep that he had supplied to Ishmael. Ally admitted in his petition that his estate was at that time under a provisional order of sequestration. Ishmael now filed an affidavit, in which he denied that he was indebted to Ally in the sum of £724 8s., or any other sum. He admitted that he had had transactions in sheep with the applicant, but said that he had paid for the sheep that he had bought. He repudiated the alleged offer of £150, or threat to leave for India. He also said that a sum of £400 or thereabouts standing to his credit in the bank had been interdicted, and he was prevented from carrying on his business. He added that he had no intention of leaving the Colony for India, or elsewhere. Ally, in a replying affidavit, repeated the allegations contained in his petition, and denied that the transactions he had had with Ishmael had been for cash. He said that owing to the very short period allowed to him to answer the respondent's allegations he had not been able to produce direct proof of the transactions, the proof being contained in certain consignment notes in the hands of stationmasters at Ceres-road, Tulbagh-road, and elsewhere.

Mr. M. Bisset was for the present applicant (Ishmael); Mr. J. E. R. de Villiers was for respondent.

Mr. Bisset submitted that Ally had no *locus standi* whatever to appear in any proceedings. As the respondent himself admitted, in his affidavit, his estate had been provisionally sequestrated.

[Maasdorp, J.: I am afraid that won't help you very much; it will only stay proceedings.]

Mr. Bisset said that the respondent's estate had been provisionally sequestrated at the time of the original application. Respondent had no *locus standi*

to make such an application, and it should have been brought either by a *curator bonis* or a trustee. The creditors were not responsible for the proceedings which Ally had taken. If the applicant sustained any damages as a result of the rule, there would be no one that he could sue except a man of straw, whose estate had been provisionally sequestrated.

Dr. Greer (interposing) said that he was instructed by certain creditors, upon whose petition the provisional order had been granted, to ask the Court to continue the interdict pending proceedings to be taken by the creditors.

Mr. De Villiers submitted that the application of the creditors would remove the chief objection raised by counsel for Ishmael. It had, he urged, been impossible in the brief interval allowed to his client to obtain direct proof of the transactions. He submitted that applicant would now have ample security for any damages that he might incur.

Dr. Greer said that he appeared on behalf of certain judgment creditors, Gent Olivier, of Tulbagh, and Kriel, Roux and Co., also of Tulbagh. He contended that the creditors whom he represented should have had notice of the proceedings. He asked that the matter should be allowed to stand over until Tuesday next, so that the creditors might properly come before the Court.

Mr. Bisset submitted that the real point in the case was whether Ishmael intended to leave the jurisdiction, and that there was absolutely no proof of such an intention.

Maasdorp, J.: It is quite clear that the Court will not interfere to stop a man from carrying on his ordinary business, simply because he happens to be indebted to any person in a certain sum of money, nor will the Court, for that reason, deprive him of property lawfully belonging to him. In this case it seems that the Court has granted relief to Ally because of the very strong allegations made in his petition that Ishmael had threatened to leave the country and take with him all the property which he was possessed of. That would have been, in itself, an act of fraud, and done for the purpose of delaying and defeating creditors, and in order to prevent such a fraud, the Court granted a provisional interdict, restraining certain banks from paying out to Ishmael the moneys deposited to his account with them. Now, the question arises whether, upon the facts which have now been brought to the notice of the Court, such a case has been made out upon which the Court in the first instance would have granted an interdict. Interdicts are an extraordinary use of the powers of the Court, and they are only granted when the right of the applicant is absolutely clear, and where there is

danger of irreparable loss. The question arises whether, upon the facts, as they now appear before the Court, there is complete proof of a debt due by Ishmael to Ally. Upon the original petition, the statement in respect to such debt was in itself very meagre and vague. We now have a statement on the part of the respondent that he did owe certain moneys to the applicant, but he has actually paid off in cash certain large amounts, and that those payments were really in respect of his total indebtedness. Here we have the respondent going into some detail by the production of documents showing what his indebtedness was, and what the payments in respect of it were. It is quite reasonable now to expect that the applicant should bring in specific information to clearly establish his claim, but it appears to me that he has wholly failed to do so. He says himself that he is not in a position now to produce direct proof of his debt. Well, no Court would grant any interdict at all unless it considered that there was direct proof of debt. To my mind, there is nothing to show conclusively that the respondent is indebted to the applicant in the amount claimed by him. It appears that a portion of the indebtedness was paid off, and there would be only a balance due now. The whole of the account must appear before the Court so as to establish clearly what such balance is before the Court would interfere by way of interdict. Now, another ground upon which the Court seems to have proceeded in this case was that there was an intention to defraud by the debtor threatening to leave the country, with all his property. That has now been denied by the respondent, and there is no supporting evidence given by the applicant to substantiate his original statement. The ordinary procedure where a debtor threatens to leave the country without paying his debts is to have him arrested, and that procedure would still be open to the applicant if he can satisfy the Registrar of the Court, or the Court, that there is a clear intention on the part of the respondent to leave the country. Under all the circumstances, without reference to the provisions of the Insolvent Ordinance, I come to the conclusion that, if the case had appeared before the Court in the first instance as it now appears, it would have been held that the whole matter was too vague to support an interdict. It does not seem to me that there would be no right on the part of a person whose estate has been provisionally sequestered to appear before the Court in the manner in which Ally has appeared here to protect his property during the period of provisional sequestration. I think that not only could Ally appear, but any creditor; if he put before the

Court certain facts—he might say that by means of fraud an irreparable injury would be done to the estate—the Court might grant him relief, and, consequently. I do not hold that the mere fact that Ally's estate has been provisionally sequestered would prevent him from coming to the Court to ask the Court to protect his estate in the manner in which he has done in this case. But I come to the conclusion that there is no clear case made out, and no irreparable damage has been proved, because redress can still be obtained by means of arrest and the interdict must, therefore, be discharged. With reference to the creditors, I may say that if they have any cause to appear before the Court on legal grounds, it may still be open to them to do so. They themselves have not supplemented the information given by the respondent, and their case is consequently no better than that of the respondent. The interdict must be discharged with costs against Ally. No costs have been incurred so far as the creditors are concerned.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorneys: Friedlander and Du Toit.]

#### *Ex parte* RAICKOVIC AND OTHERS.

Dr. Greer moved, on the petition of Raickovic and five others, for an order upon the immigration authorities requiring them to allow the petitioners, who are detained on board the steamship Fifehire, to land at Table Bay Docks. Mr. Howel Jones appeared on behalf of the Colonial Government, and opposed the application.

The applicants, in their petition, said that they arrived in this colony on the 4th inst., having come as cattle men from the Argentina. They were able to read and write in Montenegrin, which was a living language, and they had sums in their possession varying from £6 to £26. They were all subjects of the Principality of Montenegro. Attached to the petition was a letter from Sir John Jackson and Son, Ltd., signed by Mr. C. Brooks (agent), certifying that the firm were willing to give the applicants work at Simon's Town. Petitioners therefore submitted that the authorities had no right to restrain them from landing on these shores.

Mr. Jones said that he wished to take a preliminary exception that the applicants had no *locus standi* in this court. The point had been decided more than once by this Court that aliens, as these persons were, had no right, by force of action, to enter British territory. They had absolutely no right of action. Counsel quoted the cases of *Raner* (14, C.T.R., 247) (on behalf of an alien 'S'), and *Mina Belmont* (16 C.T.R., 231).

Dr. Greer asked for the indulgence of the Court, as he had not had sufficient time to prepare his case.

Maasdorp, J., asked Counsel why he had not prepared his case properly, before he brought on the application.

Dr. Greer said there was a danger that the applicants might be taken away again at any moment, hence the urgency of these applications. The applicants, he went on to contend, were detained, but there was nothing to show that they were undesirable persons. The Court had no evidence before it that the applicants fell within the six classes of persons defined in section 2 of the Act of 1902, as prohibited immigrants, and the inference was that persons who did not come within those classes were entitled to enter the Colony.

Mr. Jones (in answer to the Court) said that he was prepared to produce affidavits in case the Court should be against him on the point he had taken.

Dr. Greer submitted that the respondent's position would be very different if the Colonial Secretary had made an affidavit that he had exercised the discretion that resided in him, and refused the applicants permission to land. Under the circumstances, he urged that the Court should enforce the law as it stood.

Maasdorp, J., said that, in face of the authorities cited in respect of aliens, he would, if counsel for the applicants wished it, allow the matter to stand over in order to enable him (Dr. Greer) to go into that question, otherwise, unless other authorities were cited, he should consider himself bound by the authorities already given, and dispose of the case simply on the ground that an alien had no right to make such an application. He did not wish to finally dispose of that point if counsel desired to look into the authorities and renew the application.

Dr. Greer said that there was a danger of the applicants being sent away in the meantime, should the case be adjourned.

[Maasdorp, J.: I do not suppose that the Government will spirit the men away without letting you know.]

Dr. Greer: I take it that the matter having been mentioned to the Court, the Government officials will stay their hand.

Mr. Jones pointed out that that was not a matter that was in the hands of the Government. They had nothing to do with the re-shipping of these prohibited immigrants. That matter was really in the hands of the agents. When the ships were ready to sail, then the men were taken away. There was a large number of them at the Docks.

The matter was then ordered to stand over, and counsel for applicants was given leave to mention it again.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS { 1906.  
Apr. 17th.

Mr. Sutton moved for the admission of William Richardson Burch as an attorney and notary.

Application granted; oaths to be taken before the R.M. of Uitenhage.

Mr. J. E. R. de Villiers moved for the admission of Charles Michiel Marais as an attorney and notary.

Application granted, and oaths administered.

Mr. Roux moved for the admission of Louis Theodore Berrange as an attorney and notary.

Application granted, and oaths administered.

Mr. Alexander moved for the admission of Hendrik Jacob du Plessis as an attorney and notary.

Application granted, and oaths administered.

Mr. Burton moved for the admission of Peter Eduard de Wet as a conveyancer.

Application granted.

Mr. Burton said that applicant was not in court just at the moment to take the oaths.

Mr. Lewis moved for the admission of Benjamin Ginsberg as a conveyancer.

Application granted, and oaths administered.

## PROVISIONAL ROLL.

HAHLEY AND OTHERS V. { 1906.  
MCDOWELL. Apr. 17th.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

## CANE V. CANE.

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

## HAMMOND AND CO. V. MACKINTOSH.

Mr. Upington moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Other matters arising out of Mackintosh's estate were ordered to stand over until the motions were heard.

**ENSLIN V. WEITSZ.**

Mr. Gutsche moved for provisional sentence on a judgment of the R.M.'s Court at Aberdeen for £29 10s. 6d. and £3 9s. taxed costs, and also for a certain inheritance to be declared executable. The executors had already been temporarily restrained from paying out to defendant.

Mr. Burton pointed out that there was a motion on the list to make the rule absolute.

Provisional sentence granted. Other part of application ordered to stand over pending hearing of motion.

**FINKELSTEIN V. ROBERTSON.**

Mr. Payne moved for provisional sentence on a promissory note for a balance of £120, with interest.

Order granted.

**RENSBURG V. ADENDORFF.**

Mr. Bailey moved for provisional sentence on a promissory note, and for interest and costs.

Order granted.

**GOUWS V. DE VILLIERS.**

Mr. Benjamin moved for provisional sentence on an acknowledgment of debt for £163, with interest, and on a cheque for £10, the cheque having been dishonoured.

Order granted.

**GRAY V. EARL.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £4,000 with interest, less £53 5s. 6d. paid on account. the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated and for the rents due to be declared executable.

Order granted for provisional sentence and property declared executable.

**TUDHOPE V. FINK AND OTHERS.**

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, with £1 4s. insurance premiums, and interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**LAWLOB V. BURTON.**

Mr. Payne moved for provisional sentence on a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**STEYTLER AND CO. AND OTHERS V. SIEBERT.**

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ESTATE STEYTLER V. SCHNEIDER.**

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ASHLEY V. SIGNAL HILL QUARRY CO.**

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**TRILL V. PRIOR.**

Mr. Payne moved for provisional sentence on a mortgage bond for £800, with interest, less £7 paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**STEYTLER V. ALARD AND MEIRING.**

Mr. Payne moved for provisional sentence on a mortgage bond for £600, with interest, less £12 paid on account. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**POTGIETER V. BUGDOLL.**

Mr. Sutton moved for provisional sentence on a mortgage bond for £400, with interest; bond due by reason of the non-payment of interest. Counsel also applied for the property hypothecated to be declared executable, and for the rents to be attached by the Sheriff.

Order granted.



**BARRON V. WHITAKER.**

Mr. Struben moved for provisional sentence on a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable, and rents accruing to be attached.

Order granted.

**S.A. PRODUCE CO. V. WEINBERG.**

Mr. Lewis moved for judgment on certain bill of exchange for £42 8s. 7d., payable at the Standard Bank at Hope Town; also for interest and costs.

Order granted.

**FEDERAL SUPPLY AND COLD STORAGE CO. V. TESKE.**

Mr. Long moved for a decree of civil imprisonment against defendant on an unsatisfied judgment of this Court for £64 2s. 8d.

Defendant did not appear.

Order granted

**ESTATE BRUHNS V. REDHOUSE.**

Mr. M. Bisset moved for provisional sentence on a promissory note for £416, with interest and costs. Counsel explained that the matter had previously been before the Court, but was then ordered to stand over owing to a defect of service. The defendant lived in the Vryburg district, on the borders of the Transvaal, and was in the habit of crossing the borders in order to avoid service. Judgment had been obtained against defendant in the Transvaal Courts, but he thereupon removed his goods into this colony. Service had now been effected on his son, at defendant's farm. Counsel read an affidavit by the attorney in the plaintiff estate.

Maasdorp, J., said that a letter had been received from defendant's son denying that his father resided in this colony, and declaring that he resided in the Transvaal.

Order granted.

**ROSENBERG V. LUNTZ BROS.**

Mr. Benjamin moved for provisional sentence on a judgment of the First Special Judicial Commissioner at Johannesburg, Transvaal, for £57 16s., together with costs.

Mr. J. E. R. de Villiers took exception, on the ground that the judgment of the Special Commissioner was superannuated. The judgment was given eight years and two months ago, and under the Transvaal law it actually be-

came superannuated in twelve months. Counsel called the attention of the Court to the Transvaal law as to the Landrost Courts and the High Court.

Mr. Benjamin submitted that the question raised was one of foreign law, which should have been put on affidavit.

The matter was ordered to stand over for the production of affidavits on the question.

**OLIVIER AND OTHERS V. ALLY.**

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**OOSTHUIZEN V. NAUDE.**

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £600, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Counsel added that the defendant's estate was, he believed, about to be surrendered, but he submitted that plaintiff would not be estopped from obtaining provisional sentence, but only from selling the property.

Maasdorp, J., granted provisional sentence, and declaring the property executable, but said that the latter part of the order would be suspended pending an application by defendant to surrender his estate.

**HIDDINGH V. SCHWARTZ.**

Mr. Gutsche moved for provisional sentence on a mortgage bond for £2,100 with interest, less £55 paid on account. The bond became due by reason of non-payment of interest. Counsel also moved to have the property specially hypothecated declared executable.

Order granted.

**HIDDINGH V. JOUBERT.**

Mr. Gutsche moved for provisional sentence for £650, with interest, on a mortgage bond, which became due by reason of non-payment of interest, and that property be declared executable.

Order granted.

**ESTATE DE VILLIERS V. RUBENSTEIN.**

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £3,000, with interest, and that the property specially hypothecated be de-

clared executable. The bond became payable by reason of non-payment of interest.

Order granted.

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**PRETORIA MAATSCHAPPY V. SNYMAN  
AND OTHERS.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £2,750, with interest, and that the property be declared executable. The bond became due by reason of non-payment of interest.

Order granted.

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**COLONIAL GOVERNMENT V. NQUANDINI.**

Mr. Howel Jones moved for provisional sentence on an unsatisfied judgment of the Magistrate's Court of Stutterheim for £3 10s. and costs, for quit-rent and stamp duty, and that the property be declared executable.

Order granted.

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**GOODMAN V. DE KLERK.**

Mr. Swift moved for provisional sentence on a mortgage bond for £600, and £5 insurance premium paid, with interest, and that the property specially hypothecated be declared executable. The bond became due through non-payment of interest.

Order granted.

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**BADENHORST V. DE WIT.**

Mr. Roux moved for provisional sentence on a mortgage bond for £125, with interest, and that property specially hypothecated be declared executable. The bond became due through non-payment of interest.

Order granted.

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**PRIOR V. WRIGHT.**

Mr. M. Bisset moved for provisional sentence for £450, on a mortgage bond, with interest, that the property be declared executable, and that the rent be attached. The bond became due through non-payment of interest.

Order granted.

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**DU PLESSIS V. MICHELSON.**

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**HILL V. HENDBICKS.**

Mr. Rowson moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

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**BOUWER V. DE VRIES.**

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

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**VAN NIEKERK V. SMAILES.**

Mr. Payne moved for provisional sentence on a mortgage bond for £1,200, with interest, and that the property be declared executable.

Order granted.

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**DONNELLAN V. FORD.**

Mr. Lewis moved for provisional sentence on a mortgage bond for £350, with interest, and that the property be declared executable. The bond became due through non-payment of interest.

Order granted.

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**GIE V. SCHEMPER.**

Mr. Du Toit moved for provisional sentence for £300 on a mortgage bond, with interest and costs, and that the property be declared executable. The bond became due through non-payment of interest.

Order granted.

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**AFRICAN HOMES TRUST V. DE LA CRUZ.**

Mr. Long moved for provisional sentence on a mortgage bond for £400, with interest, less £6 paid on account, and 15s. insurance premium, and that the property be declared executable.

Order granted.

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**WARREN V. BLACK.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £500, with interest and costs, and that rents be attached and the property declared executable. The bond became due through non-payment of interest.

Order granted.

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**ESTATE PAULING V. CHAVIN.**

Mr. Sutton moved for provisional sentence on a mortgage bond for £350, with interest, and £6 10s. insurance premium paid, that the property be declared

ed executable and the rents attached. The bond became due through non-payment of interest.  
Order granted.

LANDSBERG V. BOLILAND.

Mr. Swift moved for provisional sentence on a mortgage bond for £200, with interest, that the property be declared executable, and the rents attached. The bond became due by reason of non-payment of interest.  
Order granted.

SPENGLER V. AUNIEN.

Mr. De Waal moved for provisional sentence on a mortgage bond for £24, less £6 paid on account.  
Order granted.

PILLANS V. BECKTON.

Mr. De Waal moved for provisional sentence on an amount of interest on a mortgage bond with costs.  
Order granted.

HAYES V. REYNOLDS.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £12, being an amount of interest due.  
Order granted.

HEROLD AND GIE V. WINTERBACH.

Mr. Lewis moved for judgment on a promissory note for £91 7s. 10d., with interest and costs.  
Judgment as prayed.

HUGO V. CLOETE.

Mr. Van Zyl moved for judgment on a promissory note for £100, with interest, and for provisional sentence for £1,080 due on a mortgage bond, which became due through non-payment of interest.  
Judgment and provisional sentence as prayed.

DYASON V. NIGRINE.

Mr. Bailey moved for provisional sentence on a promissory note for £31 and interest, and for judgment under Rule 329d for £1 11s. 2d.  
Provisional sentence and judgment as prayed.

ELLISTON V. JOHNSTON.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

ILLIQUID ROLL.

ESTATE VILLET V. COLLINS. { 1906.  
Apr. 17th.

Mr. D. Buchanan moved for judgment under Rule 319, in default of plea, for £2,349, and that the property be declared executable.  
Order granted.

STEWART V. ESTATE HYLAND.

Dr. Greer moved for judgment under Rule 329d for £44 2s., fees and charges for medical service rendered to the deceased in his last illness.  
Order granted.

VAN ZYL AND BUISSINNE V. PRITCHARD.

Mr. Van Zyl moved for judgment under Rule 319 for £38 7s. 7d., £18 18s., and £16 10s., advances made to the defendant, and work done, with interest and costs.  
Order granted.

CRAWFORD V. BIRD.

Dr. Greer moved for judgment under Rule 329d, for £40 6s. 9d., for goods sold and delivered, and money advanced.  
Order granted.

LOUW V. HARRIS.

Mr. Inchbold moved for judgment under Rule 329d, for £20, with interest and costs.  
Order granted.

KRUGER V. PRETORIUS.

Mr. Close moved for judgment under Rule 329d, for an order of ejectment of the defendant from a certain farm.  
Order granted.

GREENBERG V. RUBENSTEIN.

Mr. Benjamin, for the defendant, moved, under the Rule of Court 25, for leave to sign judgment against the plaintiff for not proceeding with his action within the time prescribed by rule.  
Order granted.

**STANDARD BANK V. WOOD.**

Mr. D. Buchanan moved for judgment under Rule 329d for £161 5s. 11d., on an overdraft, with interest and costs.  
Order granted.

**FAIRBRIDGE, ARDERNE AND LAWTON V. SCHAUVEREIN.**

Mr. Bailey moved under Rule 329d for judgment for £51 3s. 11d., for professional services rendered.  
Order granted.

**MICHAU AND DE VILLIERS V. RETIEF.**

Mr. J. E. R. de Villiers moved for judgment under Rule 329d, for £48 18s. 6d., for professional services rendered and disbursements, with interest and costs.  
Order granted.

**GOLDSTEIN V. MAY.**

Mr. Benjamin moved for judgment under Rule 329d for £30 10s. for professional services rendered and costs.  
Order granted.

**SAUERLANDER V. DAPIND.**

Mr. Van Zyl moved for judgment under Rule 329d for £202 4s. 7d., cash advanced by plaintiff, with interest and costs.  
Order granted.

**COLONIAL GOVERNMENT V. TAYLOR AND MYLES.**

Mr. Howel Jones said the defendants were barred from pleading, and he now moved for judgment under Rule 329 for £50 and costs as damages. The amount had been tendered by the defendants, but had not yet been paid.  
Order granted.

**YORKSHIRE ESTATE V. REYNOLDS.**

Dr. Greer moved for judgment under Rule 329d for £110 for calls on certain shares, with interest and costs.  
Order granted.

**ARISTO CO. V. GOLD AND LEVENSON.**

Dr. Greer moved for judgment under Rule 329d for £48 1s. 5d., balance paid by plaintiffs on behalf of defendants, with interest and costs.  
Order granted.

**DREYER V. PARKES.**

Mr. McGregor moved for judgment in default of plea under Rule 319. The action was one in which plaintiff claimed for £99 10s., on account of the sale of certain donkeys, £66 18s. for goods sold, and for the return of a wagon, or its value (£40).  
Order granted.

**BUIRSKI V. BARRON AND OTHERS.**

Dr. Greer moved for judgment under Rule 329d. for £744 2s. 9d., for professional services rendered, less £72 10s. 6d. paid on account.  
Order granted.

**REHABILITATIONS.**

Mr. Du Toit moved for the rehabilitation of William Richard Thomson, under section 117 of the Insolvency Ordinance. Three-fifths of the creditors had consented.

Application granted.

Mr. Du Toit moved for the rehabilitation of Lambertus Johannes Dreyer under section 117 of the Insolvency Ordinance. Three-fifths of the creditors consented.

Application granted.

Mr. Watermeyer moved for the rehabilitation of Phillipus Lodewickus Swart under the 117th section of the ordinance. There was a consent of three fifths of the creditors, and there was nothing unfavourable in the trustee's report.

Application granted.

Mr. Roux moved for the rehabilitation of Nicolaas van Wyk under the 117th section of the ordinance. There was nothing unfavourable in the trustee's report. The trustee attributed the failure of the partnership to the laxity of the applicant's partner.

Application granted.

Mr. Alexander moved for the rehabilitation of Samuel Ginsberg. All the creditors consented under section 117 of the Ordinance.

Application granted.

**GENERAL MOTIONS.**

KRUGER V. KRUGER. { 1906.  
Apr. 17th.

This was an application to have the respondent declared insane and incapable of managing his affairs, and to have a curator or curators appointed for the care of his person, and to administer his affairs. Mr. Roux was for applicant;

Mr. Van Zyl appeared as *curator ad litem*.

Wm. John Dods, medical superintendent at Valkenberg Asylum, having given evidence,

Mr. Van Zyl said that he did not oppose the application.

Mr. Roux suggested the appointment of Mr. Jacobus Marthinus Theunissen, attorney, Prince Albert, as curator of the respondent's person and property.

An order was granted declaring the respondent insane and appointing Attorney Theunissen as curator of respondent's goods and person.

#### COURTENAY V. COURTENAY.

Mr. Benjamin moved for a decree of divorce in default of the defendant's compliance with an order of restitution of conjugal rights. Counsel read an affidavit filed by defendant, in which he made wholesale reflections upon his wife's chastity both prior to and since his marriage. He stated that he married plaintiff in Worcester, England, and that she was then keeping a cheap restaurant. He was lured into the place by hearing her charming voice from the street. Defendant went to allege that his wife was unfaithful on her voyage out, and that she had been guilty of misconduct in East London (where she disembarked), at Cathcart, Queen's Town, and elsewhere. Defendant mentioned the names of several people with whom he accused his wife of improper conduct. He stated that he had been in the employ of De Beers Mines at Kimberley since 1903, and that he should have come to Cape Town to give evidence, and defend the case had he had sufficient funds. He, therefore, asked the Court to allow him to give his evidence on commission in Kimberley. Deponent also made statements about having lost thousands of pounds in connection with a certain sauce, of which he was proprietor. Counsel added that he had other affidavits, but

Maasdorp, J., interposed and said: You need not read them. The man is not in his sound senses I should say. It is quite clear that he does not intend to comply with the order of Court, judging by the contents of the affidavit, and the letters he has put in.

Mr. Benjamin (in answer to the Court) said that he had to apply for a decree of divorce, custody of the minor children, and an order upon defendant to contribute £2 per month for maintenance of each child until such child reached the age of 16 years, and also for costs of suit.

Maasdorp, J., granted an order as prayed, and directed defendant to make the first payment on the first day of next month.

#### RAY V. RAY.

Mr. Benjamin moved for an order of restitution of conjugal rights, failing which a decree of divorce. Defendant, counsel said, was in Australia. The matter had been ordered to stand over, because the affidavit of service was not supported by a certificate from the Colonial Secretary of Australia. This document had now come to hand, and the matter was in order.

Order of restitution granted, defendant to return to or receive the plaintiff on or before the 2nd July, failing which, to show cause on the 14th July why a decree of divorce should not be granted.

#### KONING V. KONING.

Mr. Sutton moved for a decree of divorce in default of the defendant's compliance with an order of the restitution of conjugal rights.

Ordered to stand over for proof of publication of the rule.

#### STYLE V. STYLE.

Mr. Douglas Buchanan moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree of divorce granted, and defendant declared to have forfeited benefits of the marriage.

#### GULTIG V. GULTIG.

Mr. De Waal moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree granted, plaintiff to have custody of minor children, and defendant declared to have forfeited benefits of marriage. Defendant to pay costs.

#### *Ex parte* VAN LINGEN.

Mr. J. E. R. de Villiers moved for a *rule nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* MOORE.

Mr. Payne moved for a *rule nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

#### *Ex parte* BATE.

Mr. Inchbold moved for a *rule nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.



*Ex parte* FOTHERINGHAM.

Mr. Pyemont moved for a *rule nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* THE IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. { 1906.  
Apr. 17th.  
May 8th.

Transfer dues—Date of purchase  
—Reclaimed and reclaimable  
land—Act 5 of 1884, Sec. 2.

The Colonial Government had agreed with C. & Co. to allow them to reclaim certain land near the shore of Table Bay, on condition that such land should become the property of C. & Co., if reclaimed within 10 years. Some 6 years before the conclusion of this agreement, C. & Co. had entered into an agreement with another company, whereby they sold some 70,000 square feet of ground "lately reclaimed from the sea," and other certain land thereunto adjoining and covered by the sea, which the vendors had a right to reclaim. Further sales of the property took place, until finally the rights of C. & Co. vested in the applicants. These sales were all made with the consent of the Government. Finally, in June, 1905, the Government granted to C. & Co. the original land reclaimed by them, together with a portion which had been reclaimed by their original successors in title, but refused to make a separate grant to the applicants of the land not reclaimed by them, on the ground that they had consented to the applicants taking over all rights from their predecessors in title. The applicants now desired to obtain transfer of all the reclaimed ground, but in order to do so, it was necessary to pay transfer dues, which the Civil Commissioner could not accept without the customary declarations of purchaser and seller. Applicants asked to have a special date, as the date of sale to

them, fixed by the Court for transfer purposes. Under Act 5 of 1884, Sec. 2, transfer duty is payable only upon freehold and quitrent property.

Held, that as applicants had purchased a right to obtain freehold property from the Government within a certain time, of which property the sellers were not at the time of sale in a position to give transfer, it was not competent for the Court to fix a date of sale for transfer purposes.

Mr. Schreiner, K.C. (with him Mr. Burton) moved for a certain *rule nisi* to be made absolute calling upon the Hon. the Treasurer, as representing the Colonial Government, to show cause why applicants should not be allowed to declare the 8th July, 1905, as the date of alienation to be ascertained for valuation of certain property. Mr. Schreiner said that this matter arose in connection with the reclamation of land in the Dock-road under an agreement of 1895, which was sanctioned by Parliament. The reclamation of the land was completed on July 8, 1905. Up to that date there was no grant of the land. During the time from 1895 to 1905 the original cessionaries of the land parted with their rights, first to one company and then to another company. The point that now arose was that the Imperial Cold Storage and Supply Co. applied to have the date ascertained and fixed, which should be taken to be the date of the actual alienation. His Lordship would understand that the peculiar point in the case was this—that until the completion of the reclamation there was really no land that could possibly be transferred. Transfer was not possible until there was a grant, and until that grant was made there could be no date fixed for transfer.

Mr. Howel Jones (who appeared on behalf of the Government to show cause) read a lengthy report on the whole matter prepared by the Registrar of Deeds. Mr. Jones went on to say that the position taken up by the Registrar of Deeds was simply that the whole difficulty that the petitioners might feel was provided for by the Transfer Duty Act of 1884, and that it was a most unusual course to come into court in this way, a course which the Court would not encourage when the facts were put before it. Petitioners sought to go behind the terms of the Act, and applied for an order fixing the date. What they should have done was clearly to go to the Civil Commissioner and tender the transfer duty to him.

His Lordship asked counsel how the property came into the hands of the petitioners.

Mr. Jones said that it was granted by the Government to Combrinck in 1899 by agreement, but the land was not actually transferred to Combrinck. Then Combrinck sold the land to the South African Supply Company on July 20, 1895. The Supply Company sold it again in 1902 to the Australasian Company, and that company, on May 28, 1903, sold it to the Imperial Company. Now, the Imperial Company wished the Court to fix a date upon which the sale took place. The reason why the Australasian Company did not transfer to the Imperial Company the property mentioned in sections 1 and 2 was because they did not get title on May 28, 1903, when the sale took place. Counsel cited different sections of the Transfer Duty Act, and contended that it was the Civil Commissioner with whom the applicants should have dealt, without coming to court. It was clear within six months of the sale that transfer should be paid. The parties had not even attempted to deal with the Civil Commissioner, and until they fulfilled that precedent condition they were not entitled to come to court.

Mr. Schreiner pointed out that his learned friend had overlooked the fact that it was impossible to obtain a transfer until there was a grant. The first transaction by Combrinck and Co. was shown to have taken place when the Hon. J. X. Merriman, as Treasurer-General, accepted the S.A. Supply and Cold Storage Company in place of Combrinck and Co., and that was the best title that could be given at the time. The Transfer Duty Act did not contemplate any duty payable upon a transfer other than on land held from the Government. This land was not held from the Government until the grant was given. The applicants could not go to a Civil Commissioner, who had no power under the circumstances to help them.

Maasdorp, J.: On the 10th day of July, 1895, the Colonial Government entered into an agreement with Combrinck and Co., whereby the Government agreed to allow the firm of Combrinck and Co. to reclaim from the sea a piece of land, which land shall after reclamation become the property of the firm, and a title thereto, embodying certain conditions, will in due course be granted to them. One of the conditions of the contract was that the whole work of reclamation shall be completed within ten years from the date of obtaining the sanction of both Houses of Parliament to the agreement, failing which, such portions of the area as shall then remain unreclaimed shall revert to the Harbour Board. It would therefore appear that as far as the reclaimed portion was concerned, the firm of Combrinck and Co. would be entitled to

claim a grant upon the expiration of ten years. On the 4th day of May, 1899, the firm of Combrinck and Co. entered into an agreement with a company called the South African Supply and Cold Storage Company, whereby, amongst other things, they sell to the company all that piece or parcel of land situate in Dock-road, Cape Town, containing 70,010 square feet or thereabouts, lately reclaimed by the vendors, including the North Wharf, together with the buildings and chambers used for refrigerating and cold storage, and all the fixed plant and machinery thereon. Secondly, all that piece and parcel of land now covered by water adjoining the property above described, stretching towards the Coaling Wharf, and containing 43,727 square feet or thereabouts. In another portion of the agreement, it is pointed out that these are portions of the property that a grant of which from the Government the firm of Combrinck and Co. shall under certain conditions become entitled at the expiration of ten years. In similar terms, the South African Supply and Cold Storage Company agreed, on the 27th of February, 1902, to sell this property to the South African and Australasian Supply and Cold Storage Company. The vendors agree to do all acts that may be necessary to secure for the company registered title to the land. It may also be mentioned that the property secondly mentioned above is now described as being partially reclaimed. On the 30th of October, 1902, an instrument is executed whereby the South African Company purports to cede and transfer to the Australasian Company the land in question. Again, on the 28th day of May, 1903, the Australasian Company, in similar terms, sells the land in question to the Imperial Company; and on the 8th of February, 1904, the former company executed an instrument purporting to cede and transfer the land to the latter company. From time to time the Government consented to the engagements entered into by the different companies. On the 8th June, 1905, the Government granted to Combrinck and Co. the land which formed the subject of their agreement, including the portion subsequently sold to the Imperial Co., and refused to make a separate and direct grant to the Imperial, as claimed by that company, upon the plea that the Government had consented to their taking over the rights to that portion from the other companies. It now becomes necessary for the Imperial Company to obtain transfer of the property, and before doing so, they are obliged to pay transfer duty, which cannot be accepted by the Civil Commissioner until they have made the requisite declaration of purchase. In this solemn declaration they will be under the necessity of declaring upon what day the property was

purchased, and the amount of the purchase price. The assignment of the day of sale in the declaration is mainly of importance because, under the 5th section of Act No. 5 of 1884, the transfer duty is payable within six months from the day of the date of the sale, and after the expiration of such six months, interest is payable upon such duty at the rate of 12 per cent. The Imperial Company, the applicants in this matter, move for a special order fixing, for transfer duty purposes, the 8th of July, 1905, as the date of sale, at a price to be ascertained by valuation. It struck me during the argument that perhaps the objects of the applicants would be attained by a declaration of the day upon which the duty became payable, rather than a declaration of the day of sale, the latter being a question of fact within the knowledge of the applicants themselves, whereas the former might be a subject of controversy. It seemed not unreasonable that under the circumstances of this case, although the contract was entered into upon a certain day, seeing that it could not be carried into effect until the Government grant was obtained, there might be some provision of law postponing the due date of the transfer duty. But it would seem that similar questions had been anticipated by the Legislature, and it was enacted in sections 6 and 7 of the Act that where in a contract of sale it is stipulated that possession shall not be given or that the sale shall not take effect until some future day, or where the sale is conditional, the date at which the contract is entered into, and not such future date or the day when the condition is fulfilled, shall be the date from which the space or term of six months shall be reckoned. There was a peculiar provision contained in section 9 of Act 8 of 1861, where it was enacted that when a condition contained in a contract of sale was a suspending condition, the six months were to be reckoned from the date upon which the condition happened, but that Act has been repealed, and the provision referred to was not taken over in the later Act. It is clear, under all the circumstances, that for the purpose of calculating transfer duty, it was the intention of the Legislature that regard should be had to the date of the day of sale, and no other date. However, the intention of the applicants in this case is of a different nature. It is argued that under section 2 of Act 5 of 1884 transfer duty is payable only upon the purchase price of freehold property and property held from Government upon quitrent, and the leasehold tenure, and in this case at the date of sale that was not the character of the land in question, which could not answer that description until the grant was made by Government on July 8, 1905. It was contended that

only upon July 8 could the previous sale of certain rights in the property have matured into a sale of freehold property. It will appear quite clear from the phraseology of the documents referred to above that the parties did not intend merely to assign certain rights they possessed, but to sell and purchase land with the express purpose that the freehold title should be transferred. At the time the Imperial Company bought the land the sellers were in occupation of the property, and in full enjoyment of all the beneficial rights of ownership. The Imperial Company, upon purchasing the land, did not purchase only such rights, but the right to obtain title to freehold property from the sellers at the appointed time. The Imperial Company bought property of the character described in section 2 of the Act, which the sellers were not then in a position to transfer, but which they expected to be in a position to transfer at the expiration of a fixed period. The contract of sale was not made on July 8, and it is consequently not in the power of the Court to fix that day as the date of sale for transfer duty purposes. With reference to the valuation of the property, it can only be said that the Act contains all the necessary machinery for arriving at the required value. The application will, therefore, be refused, with costs. A preliminary objection was raised to the Court entertaining the application, and it is quite clear that in ordinary course the applicant should have proceeded in accordance with the provisions of the Act, and only appealed to the Court if they felt themselves aggrieved by the action of the Civil Commissioner. But in this case it seemed so clear that the issue between the parties was one which would inevitably come before the Court, that I felt it expedient to deal with the matter at once. In the ordinary course, the view expressed by the Assistant Registrar of Deeds would undoubtedly be correct. The application is refused, with costs.

[Applicants' Attorneys: Van Zyl and Buissinné.]

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

INDWE MUNICIPALITY V. { 1906.  
INDWE RAILWAY AND { Apr. 18th.  
OTHERS. { „ 25th.

Municipality—Owner's rate—Act 45 of 1882—Perpetual quit-rent lease — *Emphyteusis* — Registration.

*The defendant Company in 1896 sold the leases of certain erven forming part of a farm belonging to it for the purpose of founding a township, the conditions of the sale being that the persons offering the highest rental should become lessees in perpetuity with the right of redeeming the rent by payment of 20 years' rent in advance, with the right of assigning the lease and with the right of registering the lease in the Deeds Office, whilst the Company reserved the right to cancel any lease should the lessee fail to pay rent for two consecutive years. In 1898 a municipality was established for the township under Act 45 of 1882, and the lessees were always, without any objection on their part, assessed in the plaintiff Council's books as the owners liable to the owners' or landlords' rent, no tenants' rent being ever imposed.*

*Held, that the defendant Company was not liable to the payment of owners' rate on the erven of which they had thus sold the perpetual leases.*

This was an action brought by the Municipality of Indwe against the Indwe Railway, Collieries, and Land Company, Limited, to recover a sum of £421 14s. 11d. in respect of unpaid landlord's or owner's rates.

The plaintiff's declaration was as follows:

1. The plaintiff is the Municipal Council of the municipality of Indwe, which

is constituted under the Act No. 45 of 1882.

2. The defendant is the Indwe Railway Collieries and Land Company, Limited, which is a company duly incorporated and registered in this Colony, and carries on business at Indwe aforesaid.

3. In virtue of the provisions of Act No. 45 of 1882, and more particularly section 125 of that Act, the plaintiff Council from time to time during the years 1899, 1900, 1901, 1902, 1903, 1904 and 1905 duly and lawfully assessed and levied certain landlords' or owners' rates upon rateable property situated within the municipality of Indwe in manner provided by that section, to wit:

For the year 1899 a rate of 3d. in the pound on the value

1900	2½d.
1901	3d.
1902	3d.
1903	3d.
1904	2d.
1905	2d.

4. The said rates when so duly assessed and levied became due and payable upon certain dates fixed by the Council, and it became and was the duty of all persons liable for such rates to pay the amount thereof to the Municipal Clerk or collector authorised by the Council.

5. Among the rateable property so situated are sundry erven whereof the defendant company is the owner, which erven were valued according to law for the purposes of such assessment and levy of rates as aforesaid during the aforesaid years.

6. In the account and lists hereunto annexed and marked A, B, C, D, E, F, G, H, the erven referred to are more particularly detailed, together with the rateable valuations thereof from time to time and the amounts of assessments of rates therein in the several years aforesaid, and the plaintiff craves leave to refer to the said account and lists as though here inserted.

7. At the foot of the said accounts the defendant company is indebted to the plaintiff in the sum of £421 14s. 11d. after deduction of all sums received on account of the rates assessed and levied as aforesaid.

8. All things have happened, all conditions have been performed, and all times have elapsed necessary to entitle the plaintiff to recover payment of the said sum of £421 14s. 11d. but the defendant company after lawful demand, neglects and refuses to pay the whole or any part thereof.

Wherefore the plaintiff prays for judgment for the sum of £421 14s. 11d. together with interest *a tempore morae*, that is from the several due dates of the respective rates, or for such further or other relief as this honourable Court

may seem meet, together with costs of suit.

To this declaration the defendants pleaded as follows:

1. The defendant company admits paragraphs 1 and 2, and says that the plaintiff Council was first established in or about the year 1898.

2. As to paragraphs 3 and 4, it admits that the rates set forth were assessed under the provisions of Act 45, 1882, but it denies that they were duly assessed or levied as against the defendant company.

3. As to paragraph 5, it admits that the erven were valued by the plaintiff Council for the purposes of assessment, but denies that it (the defendant company) was the owner or was liable to pay any rate in respect thereof.

4. As to paragraphs 6 and 7, it does not admit the correctness of the lists, as showing the amounts due in respect of the erven therein mentioned, and refers to such proof as plaintiff Council may adduce in respect thereof.

5. It denies paragraph 8, and save as above denies all the allegations in the declaration.

6. In or about the year 1896 the defendant company owned the land now situated within the municipal limits and sold the leases of certain erven or lots of ground surveyed by the company for the purpose of establishing the township of Indwe; the defendant company craves leave to refer to the copy of the conditions of sale hereunto annexed marked A as showing the conditions on which the said lots were sold.

7. Thereafter, in or about the year 1897, a village management board, and later on a municipality under the provisions of Act 45, 1882, were established on the said township.

8. The leases of the lots were sold as aforesaid in perpetuity, the purchasers having the option to redeem the rents at any time by paying twenty years' rent in advance, at which time they are entitled to have transfer of the lots passed to them in terms of the conditions of sale.

9. The said erven have been from time to time valued for municipal purposes since the constitution of a municipality, and the purchasers of the leases aforesaid have from time to time paid the municipal rates levied in respect of their erven: and the amount claimed in this suit is in respect of rates unpaid by the said purchasers upon their erven purchased under the aforesaid conditions of sale.

10. The defendant company contends that it is not the owner of the said erven, within the meaning of the aforesaid Act of 1882, and is not liable to pay any rates in respect of the said erven: but that the purchasers of the aforesaid leases are the persons liable for any rates which may have been duly assessed and levied, the said leases

being in effect alienations of the said erven.

11. In or about the year 1900 the defendant company agreed to allow the plaintiff Council to exercise certain rights and privileges upon the vacant and unsold ground belonging to the company and styled the commonage, the said rights and privileges being fully set forth in a certain draft deed to which defendant company craves leave to refer.

12. The plaintiff Council has taken the benefit of the rights and privileges referred to in the said deed, has established a pound, collected licenses for brickmaking and quarries, and hut tax at the native location on the defendant company's commonage, but has failed and neglected to execute the said draft deed which recognises the position of the defendant company as contended for in this plea: the moneys collected by the plaintiff Council in respect of licenses and taxes on the defendant company's ground exceeds the amount now sued for.

Wherefore the defendant company claims that the plaintiff Council's claim may be dismissed with costs.

And for a claim in reconvention the defendant company, now plaintiff in reconvention, claims:

13. It craves leave to refer to the matters set forth in the plea in reconvention.

14. The plaintiff in reconvention is entitled to claim that the Council be ordered to execute and complete the said draft deed or in the alternative, to account to the plaintiff in reconvention for all such benefits and privileges exercised by the said Council, as are set forth in the said draft deed and to pay over to the plaintiff in reconvention all sums of money received or collected by the said Council through the exercise of the aforesaid rights and privileges.

The plaintiff in reconvention claims:

(a) That the defendant in reconvention execute and complete the said draft deed.

Or in the alternative: -

(b) Account for and pay over to the plaintiff company all moneys collected or received by virtue of the exercise of any of the rights and privileges on the plaintiff company's commonage as are therein provided for.

(c) Alternative relief.

(d) Costs of suit.

#### ANNEXURE A.

Conditions of sale upon which John Linden Bradfield, in his capacity of auctioneer, will sell, for and on behalf of the Indwe Railway, Collieries and Land Company, Limited, proprietors of certain piece of land, being lot No. 17, situate in the Division of Wodehouse, field-cornetcy of Guba, by public



auktion, at Indwe, on 22nd day of April, 1896, the leases of the building stands or erven, comprising sub-divisions of certain portions of the said farm, for the purpose of forming the township of Indwe, according to the general plan framed by the surveyor, E. Gilbert Hall, Esq.

1. The term company in these conditions of sale shall mean the Indwe Railway, Collieries, and Land Company, Limited, or their lawful assigns.

2. The sale shall be held for sterling money.

3. The leases of the building stands or allotments will be sold separately, the present lot being building stand No. and the upset annual rental, £

4. The highest bidder, who shall have offered not less than the upset rental, shall be declared the lessee of the said stand in perpetuity, at the annual rental at which the property shall have been knocked down, subject to these conditions, and the right of the company to accept or refuse any bid that may be offered, and subject also to the right of the purchaser of redeeming the said annual rent as hereinafter provided.

5. The lessee shall be bound to pay one year's rent in advance, commencing from the 22nd day of April, 1896, together with £1 11s. 6d., for surveyor's diagrams, and these conditions of sale, and to sign these conditions of sale and lease on the spot immediately after the sale, and should any purchaser fail to fulfil the provisions of this clause the company shall have the right of having the lease put up again and re-sold at the risk of the defaulter, who shall submit himself to any loss the renewed sale may occasion without benefitting by any eventful profit thereon.

6. The second year's annual rent shall be payable at the office of the company, at Indwe, on the 22nd day of April, 1897, and the annual rent which shall thereafter accrue, also in advance, on the 22nd day of April in each succeeding year, for ever, unless redeemed as hereinafter provided.

7. Should the auctioneer commit any error in the sale it shall not be considered binding, but be rectified.

8. The company reserves the right to cancel any lease should the lessee fail to pay rent for two consecutive years, upon giving the lessee one month's notice of its intention so to do, such notice to be held as duly given when posted to the tenant, addressed to his then last known place of residence, and, in the event of such cancellation, the company shall not be liable for any claim of the lessee in respect of improvements, nor shall the right of the company to any other legal remedy be affected.

9. No assignment of lease will be recognised by the company unless the same shall be duly registered in the books of

the company, for which a fee of two shillings and sixpence will be charged.

10. Every lessee whose rent shall not be in arrear, and who shall not be in default in regard to any condition incumbent upon him to perform, shall possess the right of having his lease duly registered in the office of the Registrar of Deeds of this Colony, at the cost, charge, and expense of such lessee.

11. The building stand or allotment is leased as to its extent such as it lies, and the company or vendors will not benefit by any eventual surplus neither will they be answerable for any possible deficiency in the extent thereof.

12. The purchaser or lessee shall be bound to regard and obey all such lawful rules and regulations as the leaseholders by a majority of votes, may frame and promulgate from time to time, pending the erection of the township into a duly constituted municipality or village board of management, according to law, providing that such rules and regulations are not repugnant to, and do not interfere with the rights reserved by the company, and provided, also, that such rules and regulations shall have been passed at a meeting of leaseholders convened, upon the requisition of not less than 25 resident leaseholders by a justice of the peace for the district, after at least seven days' written or printed notice shall have been posted at some conspicuous place in the town.

13. Until such municipality shall take over the company's water scheme or create a water supply of their own, a water rate of ten shillings per annum shall be payable to the company by lessees or purchasers, for or in respect of each building stand, the first payment to be made on the 1st day of January, 1897.

14. The company or vendors expressly reserve the right to, and property in, all deposits of coal or other minerals in or upon the stand leased or purchased, in and upon any portion of the commonage, reserves for native locations, recreation grounds or other purposes, together with the right of mining for the same—subject, however, to the obligation of making compensation to the owners of any building or other improvements which may be damaged by such mining operations.

15. The company further expressly reserves the sole right from time to time to extend the limits of the town, and, for the purpose to survey and dispose of new stands or erven; and furthermore, to survey and dispose of such suburban allotments as they may think proper for residences, erecting brick-kilns, woolwashes, mills, and manufactories, and also to appropriate additional land for railway purposes and mining, as may from time to time be necessary, and for the purpose of creating burial grounds, squares, gardens, reservoirs, and water-courses, and gene-

rally such matters and things as may tend to the common advancement of the township and benefit of the proprietors, which newly-surveyed and disposed of stands and allotments shall be at all times subject to the same conditions as those already surveyed and marked on the general plan; and the proceeds of all such future sales shall be payable to and belong to the company.

16. The town and commonage shall be deemed to comprise portions of farms Nos. 17 and 18, Block 3, portion of the "Camp" Farm, and portion of the mining lease on "Camp" Farm, the last-mentioned property being held under a lease from Government of 99 years, from first day of June, 1886, under the provisions of Acts No. 9 of 1877 and 15 of 1883, the remainder being grants from Government to the company, and to be held under title, still to be issued, similar to those held by owners of land under Act 15 of 1887; the joint extent of the whole of the said properties measuring, according to diagram framed by the surveyor aforesaid, 2,160 morgen and 363 square roods.

17. The lessee shall have the right or option at any time of redeeming the lease rent, by payment of twenty years' rent in advance; and if he shall elect to do so, and shall also pay the transfer duty on such capitalised rent, he shall be entitled to have transfer effected into his name by the company's solicitors, on payment of the usual fees according to law, and subject to the provisions of clauses numbered from 9 to 16 inclusive of these conditions.

18. In the event of ten pounds or upwards being bid for the annual rental of any building stand, the transaction shall be regarded as a sale, and the purchase price shall be deemed to be twenty times the amount so bid, payable in manner following, at the office of the company:

(a) One-tenth of the purchase amount on the day of sale, with costs of these conditions (21s.), diagrams, transfer, and transfer duty.

(b) One-tenth three months from the day of sale.

(c) The balance four years from the day of sale, with interest thereon at the rate of five per cent. per annum, payable annually, subject, however, to the right of the purchaser of sooner paying the same; and should he elect to do so, interest shall only be claimable up to the date of payment, and no longer.

(d) On payment of the second instalment, the purchaser shall be entitled to have transfer of the property—upon payment of all expenses—passed into his name, through the company's solicitors, subject to the provisions of clauses numbered 11 to 16 both inclusive, of these conditions, upon passing a bond or kusting brief in favour of the company for the balance of the purchase money

and interest at the rate of 5 per cent. per annum, payable as aforesaid.

#### ANNEXURE B.

Memorandum of agreement made and entered into by and between the Indwe Railways and Collieries and Land Company (Limited) (hereinafter styled the company) of the one part and—(hereinafter styled the municipality) of the other part.

Whereas the limits of the said municipality are duly defined and set forth in a proclamation of the Governor No. 150 dated 7th day of May, 1898, and published in the Government Gazette of the 13th day of May, 1898.

Whereas the company is the owner of the land within such limits save and except the buildings, stands or erven sold by it on the 22nd day of April, 1896, and portion of the mining lease on camp farm such portion being sold on lease from the Government, and

Whereas for and in consideration of and for the purposes of the good government of the municipality the said company has agreed to give grant, and cede to the said municipality certain rights and privileges.

Now therefore it is hereby agreed between the parties aforesaid as follows:

(1) The said company doth hereby assign, cede and transfer to and unto the said municipality all such rights, powers, privileges (in so far as the company possesses them) as may be necessary to enable the municipality to from time to time make, alter or revoke for the purposes of the government of the municipality and the management of the affairs thereof in accordance with the laws from time to time constituting and regulating the said municipality provided however that nothing herein contained shall be considered or taken as precluding the company from at any time objecting to the making altering or revoking of any such bye law or regulation.

(2) The municipality shall have the right to grant licenses for the making of bricks and quarrying of building stone at such place or places as may be agreed to by the said company and the municipality shall receive the fees arising from such license for its own use.

(3) The company hereby consents to the municipality establishing a pound and erecting the necessary buildings thereof erecting a sheep dip or dips, building a store room for the plant, implements, and tools of the municipality, planting trees, constructing tramways, building a house for the municipal sanitary inspector or inspectors, building a camp for the municipal police, at such respective places on the commonage as the company may agree to and without payment of compensation to the company. Should the company sell (as hereinafter provided) any

piece of land on which any of the aforementioned buildings may be erected or on which any building has been erected by the municipality, or should the company require any such piece of land in accordance with the rights reserved by it in clause five hereof then the company shall pay the municipality compensation for such buildings which shall be their then value should the company and municipality fail to agree on the amount of such value it shall be arrived at by arbitration.

(4) The municipality shall have the sole control of the recreation grounds, burial grounds, and all public squares and native location at present established within the municipality, but shall not establish any other location without the consent of the company first had and obtained.

(5) Anything to the contrary above-mentioned notwithstanding.

(a) The company expressly reserves the right to and property in all deposits of coal or other minerals, in or upon land within the limits of the municipality reserves for native locations, recreation grounds or other purposes together with the right of mining for the same

(b) The company further expressly reserves the sole right from time to time to extend the limits of the town and for that purpose, to survey and dispose of new stands or erven and furthermore to survey, and dispose of such suburban allotments as they may think proper for residences, erecting brick kilns, woolwashes, mills and manufacturies, and also to appropriate additional land for railway purposes and mining as may from time to time be necessary, and for the purpose of creating burial grounds, squares, gardens, reservoirs and water courses, and generally such matters and things as may tend to the common advancement of the township and benefit of the company, which newly surveyed and disposed of stands or allotments shall be at all times subject to the same conditions as those already surveyed and marked on the general plan, and the proceeds of all such future sales shall be payable to and belong to the company.

(c) The company further reserves the right to make such roads and erect such buildings on the commonage as it may from time to time deem fit in pursuance of its operations.

Nothing in this agreement contained shall be taken to in any way diminish, interfere with or prejudice any one or more of the rights reserved by the company in this fifth clause.

(6) All the company's buildings situate within the limits of the municipality (save and except such as may be exempted by law) shall be subject to the same bye laws and regulations and liable to the same rates and taxes from time to time as all other buildings within the same limits.

(7) The said company shall not be entitled to claim any compensation or payment from the municipality for any of the rights herein given to the same.

(8) The municipality having decided not to take over the company's water scheme but to create a water supply of its own from the Indwe River for the township under a scheme already submitted to the municipality, it is agreed that as soon as such water supply is created and the municipality is in a position to regularly supply the company at its reservoir at the Green Mine with water for the period and as hereinafter set forth the said company in consideration of such supply shall pay an annual contribution of two hundred pounds sterling for a period of thirty years to the municipality, payable at the office of the Town Clerk at Indwe in two equal instalments of £100 each on the first day of January and the first day of July in each and every year, the first of such payments shall be made on the first succeeding 1st day of January or first day of July as the case may be after the date on which the municipality commences to deliver the supply of water aforesaid, and the municipality in consideration of the said annual contribution agrees and undertakes to supply the said company at the said reservoir at the Green Mine with such amount of water as may be required by the said company for its own purposes for a period of thirty years reckoned from the said date on which the municipality commences to supply, not however exceeding an amount of fifty thousand gallons per diem.

The said company shall have the right at its own cost to take water from any water furrow or pipe line of the municipality, at such place or places as the company may desire in addition to receiving it at the reservoir at the Green Mine, provided that the total amount of water supplied to or taken by the company shall not exceed the said 50,000 gallons per diem.

It is, however, specially agreed by the said company, that whilst the maximum amount of water to be supplied to it is fixed at 50,000 gallons per diem, that in the event of a scarcity of water at any time the company shall only receive a *pro rata* share of the available water, such *pro rata* share being considered as one-third of the total supply obtained by the municipality.

(9) The company agrees to grant such sites and land the property of the company as may be necessary under the aforesaid municipality scheme for the construction of a reservoir or reservoirs, and water furrow or water furrows, and the laying of a pipe line from the reservoir to the town with the free access at all times to the agents, employees and servants of the municipality, to enter upon the said site and land, for

the purpose of making such repairs and alterations to the said reservoir or reservoirs, water furrow or water furrows, and pipe line, as may be necessary, provided however that no such reservoir, water furrow or pipe line, shall be constructed or laid as to interfere with or encroach upon any lot which has already been surveyed by the company for the formation of the township, and shown on the general plan thereof. The municipality shall further in carrying out its own water scheme, provide that the route of the pipe line and furrow shall not interfere with the extension of the township upon the lines of the existing plan.

(10) Should the municipality not have made a substantial commencement of the work in connection with the said water supply by the 30th day of June, 1902, clauses eight and nine hereof shall be considered as lapsed, and of no effect.

The plaintiff made replication and pleaded in reconvention in the following terms:

1. Paragraphs 6 and 7 of the plea are admitted; the plaintiff begs to refer to the terms of the leases referred to, and says that the defendant is still owner of those erven in respect of which the rates claimed in this action are due and unpaid.

2. The erven have been from time to time valued, and certain municipal rates have been from time to time paid by the lessees, but the amount claimed in this suit has not been paid by them, and is outstanding and due from the owner, the defendant company to the municipality.

3. As to paragraphs 11 and 12, before, in and since the year 1900 the plaintiff exercised and had the benefits of the rights referred to therein, and more particularly lawfully established and managed a pound, collected licences for brick-making and quarries, and collected hut tax at the native location on the commonage, all which was done with the knowledge and consent of the defendant and none of the moneys collected were collected on its behalf but for lawful municipal purposes. The draft deed to which the defendant refers was never mutually agreed upon, though long negotiations before, in and since 1900 took place with a view to arriving at an amicable arrangement and understanding with regard to various matters of common concern to the municipality and the defendant, and the plaintiff did not fail to execute the said deed, and has never agreed, nor in law would have power to agree to the contention of the defendant now pleaded, or specifically to exempt the defendant from the payment of municipal rates lawfully due in terms of the statutes governing the municipality and payable by the defendant as owner of the said erven.

4. Save as aforesaid, and save in so far as the allegations in the declaration are admitted in the plea, the plaintiff denies all allegations of fact and conclusions of law therein contained, joins issue thereon and again prays for judgment with costs.

5. For a plea in reconvention the plaintiff (now defendant) begs to refer to the foregoing replication, denies that the defendant (now plaintiff) is entitled to demand either that the said draft deed shall be executed and completed by the plaintiff (now defendant) or that the plaintiff (now defendant) shall account for and pay over to the defendant (now plaintiff) all or any of the sums of money collected in manner set forth in paragraph 3 of the replication, and denies all the allegations and contentions of the defendant (now plaintiff) in the said claim.

Wherefore the plaintiff (now defendant) prays that the said claim may be dismissed with costs.

The rejoinder and replication in reconvention were general.

Mr. Schreiner (with him Mr. Close) for the plaintiffs. Mr. Searle, K.C. (with him Mr. Burton) for defendants.

Mr. Searle said he saw that to a great extent defendants must produce evidence on the point, but there was one point as to which plaintiffs certainly ought to make their case clear. When the evidence was gone into it would at once appear that this was a perfectly recent claim of the municipality, and that for years past the people who had been rated in the municipal books were the erf-holders, not the company at all; except where the company were rated for unsold erven which did not come into the present dispute. He thought it would be quite clear that the company never had notice of the valuations of the plaintiffs for the purpose of objection.

[De Villiers, C.J.: How is it that point is not pleaded?]

Mr. Searle: It is pleaded that we are not the owners, and I think that is sufficient. I submit that it is sufficiently pleaded when we say that, in terms of Act 45, 1882, we are not the owners.

De Villiers, C.J., suggested that the plea should be amended so as to cover the point.

Mr. Searle said that under the circumstances he would have the plea amended.

George E. Dugmore, managing director of the Indwe Company, said he remembered the sales of the erven. A plan was originally made by Mr. Hall showing about 570 erven. A sale took place in 1896 of about 270 erven, the balance being sold in 1902. The former sales took place on quit-rent leases, and the 1902 sales were made according to different conditions and transfer was given. A Village Management Board was established in October, 1896. The rate was then collected by the company on behalf of the Divisional Council, and



the company received a commission of 5 per cent. on the amount collected. In 1898 the Indwe Municipality was constituted. The erven were built upon from time to time, and the township of Indwe sprang up. No demand was made by the Municipality for rates upon the leased lands. The unsold erven were valued and rates were paid upon these by the company. The first demand by the Municipality for rates upon the leased erven was not made until December, 1904. Valuable buildings stood on a number of the erven, and in several instances the rates would considerably exceed the quit-rent. In 1899 negotiations began with regard to what was called a declaration of rights between the Municipality and the company. Subsequently a draft agreement between the parties was drawn up. A public meeting was held on the 27th July, 1900, to which the draft agreement was submitted. The water supply question was raised in the draft in addition to other questions. All the questions were settled except that of the water supply.

[De Villiers, C.J. (to Mr. Searle): Then how can you claim that plaintiffs should execute the agreement?]

Mr. Searle admitted that there was a difficulty, but he pointed out that plaintiffs had exercised privileges under other sections of the draft deed.

Witness (continuing) said that the Municipality had obtained benefits under the deed in the collection of revenues from the Commonage.

Cross-examined by Mr. Schreiner: In the 1896 conditions of sale the company undertook that all future sales of erven would be under similar conditions. In the sales of 1902, the company broke that agreement by selling under different conditions.

Mr. Schreiner (in answer to the Court) said that the Municipality's case certainly was that the Municipality never did until 1904 make any claim upon the company. What they said was that they could not make a gift away at all of that which was their duty as a Municipality to collect from all owners. They had been under the impression up to then that they were to collect rates from the lessees.

Cross-examination resumed: Witness's company had paid the Divisional Council rate he believed all through, and had collected the amount from the erf-holders. A tenant rate had never been levied in Indwe. He considered that the draft agreement was adopted at the public meeting in July, 1900, except as to the water proposals.

Mr. Schreiner: Indwe is like a child of yours?

Witness thought it was very likely that licences were issued by the Village Management Board for the making of bricks and taking of stone. In regard to the hut tax, the company considered that if they were liable as owners of the site,

they should have the benefit of any revenue. He was not sure that it really was a hut tax that the Municipality levied. From the first the Municipality had had full control of the native location. The natives paid nothing to the company for the ground they occupied. The company had no wish to take over the control of the location. Witness would be very much surprised to learn that the expenditure on the location and commonage in the years in question had greatly exceeded any revenue received by the Municipality from those sources.

Mr. Schreiner: But that is the fact.

De Villiers, C.J., pointed out that witness's opinions on these questions did not matter. The case would have to be decided upon the correspondence. It was a question of law. The correspondence would decide whether an agreement was made.

Re-examined: Since the declaration of rights had commenced the company had sent out circulars to the erf-holders as a result of which some 70 had taken transfer of the erven.

By the Court: As far as witness knew none of the erf-holders had objected to paying rates. He believed the Council had passed a resolution saying that they would not take rates from the erf-holders.

Mr. Schreiner: We sued the company in February, 1905, in the Magistrate's Court, for rates upon three erven, and got judgment.

Joseph R. Nightingale, secretary of the company, said he had drawn up the account showing items of £83 odd in no case recoverable from the company. The company had never been rated in the Municipal books for the erven, in respect of which rates were now claimed. Under the heading of "owners" the names of the erf-holders were given.

Cross-examined: The second case in the Magistrate's Court went off upon exceptions, and nothing then remained but to come to the highest Court in the Colony.

Harry Neville, formerly Mayor of Indwe (called by Mr. Schreiner), said that he had lived at Indwe since 1899. He had been secretary of the Municipality since the first of last month. Witness took a prominent part in the meeting of July, 1900. From that time he took an active part in the negotiations with the company for a water supply and other things. He had never, while he was Mayor, understood that an agreement was entered into with the company. Constant difficulties cropped up just as they were about to come to an agreement. The Municipality changed their attitude with regard to the liability of the company for these erven, on account of a Divisional Council election. It was found when they wanted to have a member for Indwe on the Divisional Council that not more than one had the qualification to sit. Many lease-holders



were men of some substance, worth about £4,000 or £5,000 in leasehold property, but they were not qualified to sit on the Divisional Council, because they were not registered owners. Witness gave figures showing that during the period in question there was a deficiency of £600 as between revenue and expenditure on the location and commonage.

Cross-examined by Mr. Searle: The erfholders were still assessed in the municipal books for these erven. At the public meeting in 1900 the different clauses in the draft agreement were treated and voted upon separately. The leaseholders were many of them in a position to pay, but they would not pay pending the decision of the Supreme Court. One of the erfholders (Mr. Sissons) tendered some little time payment of the rate for his erf. He tendered a cheque, which the Council refused, because there was some doubt as to whether it was a sufficient tender. The cheque was not refused because this question was pending.

Mr. Searle: You have been the moving spirit of the whole thing throughout?

Witness: It is good of you to say so, but I don't think it is so. In further cross-examination, witness said that he was Town Clerk, superintendent of the location, and overseer of the commonage.

Mr. Schreiner, in his argument, dwelt upon the difficult position in which the municipality had been placed by the company, valuable and important as that company was, and said he hoped there would be a clear declaration as to the position of this young municipality, which had been hampered at every turn.

Mr. Searle said his learned friend had drawn a somewhat lurid picture of this municipality that was hardly borne out by the facts. The municipality were now seeking to get rates from a company that had got no powers or privileges of ownership, as laid down in Roman-Dutch law. The municipality were, as a matter of fact, the leaseholders, and they were attempting to make the company pay the rates of the ground of which they were lessees. Counsel did not press the claim in reconvention.

Mr. Schreiner having been heard in reply,

*Cur. Adv. Vult.*

*Postea* (April 25th).

De Villiers, C.J.: This is an action to recover certain arrear municipal rates alleged to be due to the plaintiff Council by the defendant company, as the alleged owner of certain erven within the Municipality of Indwe. The defendant company, by its plea, denies that it is the owner of the erven, inasmuch as the leases of the erven had been sold by it to individual purchasers under condi-

tions of sale which, as the plea alleges, in effect transferred the ownership to such purchasers. The plea further alleges that the rates were assessed and levied as against the purchasers of the leases, who have been treated and appear as the owners in the plaintiff's books, and that the defendant company has allowed the plaintiff Council to exercise certain privileges upon land belonging to the defendant company, known as the commonage, which privileges have brought in a larger revenue for the Council than the amount now sued for. For a claim in reconvention the company claims that the Council be compelled to execute a draft deed setting forth the terms of an agreement relating to matters in dispute between the parties, or, in the alternative, to account for and pay over to the company all moneys received by the Council by virtue of the exercise of the privileges on the commonage already mentioned.

It appears that in the year 1896 the company, which was the owner of the land on which the township of Indwe now stands, sold the leases of certain erven or lots of ground for the purpose of establishing such township. Among the conditions of sale the following are the most important. The highest bidder who shall have offered not less than the upset rental shall be declared the lessee of the stand in perpetuity, at the annual rental at which the property shall have been knocked down, subject to the right of the purchaser to redeem the annual rent. The company reserves the right to cancel any lease should the lessee fail to pay rent for two consecutive years, and in the event of such cancellation the company shall not be liable for any claim of the lessee in respect of improvements. The lease may be assigned provided that such assignment be duly registered in the books of the company on payment of a fee of two shillings and sixpence. Every lessee whose rent shall not be in arrear, and who shall not be in default in regard to any condition incumbent upon him to perform, shall possess the right of having his lease duly registered in the office of the Registrar of Deeds at the expense of such lessee. The lessee shall have the right or option at any time of redeeming the rent by payment of twenty years' rent in advance, and if he shall elect to do so he shall be entitled to transfer of the property on payment of transfer duty and other expenses of transfer. In the event of ten pounds or upwards being bid for the annual rental of any building stand, the transaction shall be regarded as a sale, and the purchase price shall be deemed to be twenty times the amount so bid. In the year 1898 a Municipality was established for the township under the provisions of Act 45 of 1882. The owners' rates were assessed and levied by the plaintiff Council as

against the purchasers of the leases, who appeared and still appear as owners in the plaintiff's books. The leases of the erven, in respect of which the owners' rates are now demanded from the company, have never been registered in the Deeds Office, but the erven have continued to be in the occupation of the lessees or their assignees. The real question to be decided is whether the company is still the owners of the erven in question, so as to be liable to the payment of the owners' or landlords' rate, under the provisions of Act 45 of 1882.

I quite concur in the view, which the plaintiff's counsel has strongly urged upon the Court that by the law of this colony a lease for ten years or more requires registration in the Deeds Office in order to bind particular successors and creditors of the lessor, although, in order to be binding between the parties, such lease requires no registration. Any doubt that might exist on the point is removed by the able reasoning of Innes C.J., and Curlewis, J., in the Transvaal case of *Canavan v. New Transvaal Gold Farms* (T.S.C., for 1904, p. 136). In that case our own case of *Green v. Griffiths* (4. Jura, 350), was cited with apparent approval, but it does not appear that the subsequent case of *Hill's Executor v. Jones* (19, S.C.R., 244) was referred to. In this last case I ventured to remark that "the rule giving a real right to the lessee, as against the purchaser, does not extend to terms exceeding ten years, without notarial registration of the lease upon the title deed of the property." The leases now in question, which are leases in perpetuity, have not been so registered, and if the company were now to sell and transfer the land to persons ignorant of the perpetual leases, the cases just mentioned would have an important bearing on the respective rights of the purchasers and lessees. They have no direct bearing, however, upon the question whether the company is liable to the owners' rate levied as against the erven. The plaintiff's contention is that the lessees not being registered owners are not liable to the rate, but it does not appear that any of the lessees themselves, whose names appear in the Council's books as the rated owners ever objected. It is important to observe that the Act of 1882 does not speak of "registered owners," as would have been done if registration was intended to be the only test of ownership under the Act. In the case of *Kimberley Divisional Council v. London and S.A. Exploration Company* (2, A.C., 23), the Court of Appeal carefully guarded itself against lending any support to the view that registered owners are alone liable to the payment of Divisional Council rates. "As a general principle," it was said, "the best proof

of ownership is registration . . . , but there may be special circumstances to take the case out of the general rule." Take the case of a person who, for the full period of prescription, has been in the undisturbed occupation of land within a municipality, and has during that period raised no objection to his name appearing as the rated owner, it would be idle pedantry to say that he is not the owner liable to pay the rates. Or take the case of a person who has purchased land from a non-resident registered owner, and has paid for and occupied such land, but has neglected to secure transfer, it could not be successfully contended that he is entitled, by reason of such neglect, to be freed from the payment of the owner's rate. Or take the case of an erfowner within a municipality, who holds a perpetual quitrent lease of his erf, and has increased the value of his erf a thousand-fold by erecting thereon extensive buildings, which he has let to several tenants. In the estimation of the whole local community he would be the owner, the obvious intention of the legislature would be that he should be liable to the owners' or landlords' rate, and the tenants to the tenants' rate, and his neglect to register his perpetual quitrent lease would not prevent the Court from giving effect to the intention of the legislature. In the present case the defendant company has, by the leases in question, parted with its owners' rights in respect of the land thus leased. It is true that the company has the right to cancel any lease in case (?) two successive years' rent is unpaid, but until such cancellation actually takes place the company has no control whatever over the property, nor has it any rights in respect of the reversion. So long as the lessee pays the rent he has every right of the owner. He may assign his right, he may improve the land without giving the company any right to the improvements, and he may at any time become the registered owner of the freehold by payment of twenty years' rent in advance. In point of fact, it is admitted that valuable buildings have been erected by many of the lessees, and that owing to the improvements thus made the rates payable are in many cases far in excess of any rents payable to the company. In this connection it should be borne in mind that the Council, in levying and suing for rates, really acts on behalf and for the benefit of the whole body of municipal voters, who should not have the benefit of non-registration of the leases if the practical effect of these leases is to endow them with all the rights and privileges of owners. If plaintiff's contention is correct, the only person liable to the owner's rate is the company, which has parted with its rights in the leased lands, whilst the persons who had all the owners'

rights and are in enjoyment of municipal protection would go scot free. It is clear from the evidence that no tenant's rate has ever been levied. The lessees appear on the books as the rated owners, and as such they are entitled to appear on the voters' list. They elect the Municipal Councillors, and thus control the affairs of the municipality, including the levying of rates. The company, as the owner of unsold erven, does not deny its liability to pay owner's rates thereon. But even if it paid, in addition, the rates on all the sold erven, it can have only three votes in all under the 28th section of the Act. The result would be that in every election the votes of the company would be entirely swamped by the votes of the lessees as the nominally rated owners. The further result would be that the lessees would have the full benefit of all improvements made by them on their stands without paying any rates, even on the increased value, whilst the Municipal Council, by levying no tenant's rates at all, could throw all the expenses of the municipality on the defendant company alone. Fortunately such a state of things does not appear to me to be countenanced by the Municipal Act of 1882. The tenure upon which the stands are held by the leaseholders is to all intents and purposes the emphyteutical tenure. The company may still be the *dominus directus* of the land in the same way as the Crown is the *dominus directus* of land granted by the Governor on perpetual quitrent tenure, but the practical ownership has passed to the lessees. It has never been suggested in this colony that the Crown is liable under section 115 of Act 45 of 1882, or under Act 36 of 1891, to the payment of municipal rates in respect of land granted on perpetual quitrent. If the leases of the erven now in question had been duly registered there would, to my mind, have been no doubt as to the lessees being liable to the owners' rate under the Act of 1882, and I have already attempted to show that the neglect of the erfholders to have their leases registered should not release them from a liability which would have existed if registration had taken place. The company, which is not assessed as the owner in the municipal books, is not, in my opinion, liable to the payment of owner's rates under the Act. In this view of the case the claim in reconvention, which seemed to have been framed by the company to meet the contingency of an adverse decision on the claim in convention, falls to the ground. There is, moreover, no proof of such a final agreement between the parties as to justify the Court in giving effect to the claim in reconvention. There must be absolution from the instance on the claim in convention, as

well as on the claim in reconvention. but the plaintiff Council will pay the costs of this action, with the exception of costs incurred by reason of the claim in reconvention, which must be paid by the defendant company.

[Plaintiffs' Attorneys: Van der Byl and De Villiers; Defendants' Attorneys: Sauer and Standen.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HERRING V. HERRING. { 1906.  
Apr. 18th.

This was an action for a decree of divorce brought by Sydney Herring, of Matatiele, against his wife, on the ground of her adultery. Mr. Sutton was for the plaintiff and the defendant was in default. The matter had been previously before the Court, when it was ordered that further evidence should be taken on commission as regards the conduct of the defendant. The evidence on the first occasion was an admission by the defendant and the co-respondent, Clement Johnstone, of the adultery, and now the evidence on commission went to show that the parties were living as man and wife in Durban. At the hotel where they stayed their names were entered on the book as Mr. and Mrs. Johnstone.

Decree of divorce granted, with forfeiture of the benefits under the marriage, the defendant to pay the costs.

## GENESE V. GENESE.

Mr. Benjamin was for the applicant, and the respondent was in default. The application was for an order of restitution of conjugal rights, failing which a decree of divorce against the husband, Arthur Genese, of Simon's Town, on the ground of his malicious desertion.

Rebecca Genese said her husband was managing a tailoring business in London at the time of the marriage. Six months afterwards he became greatly addicted to drink, and in June, 1902, he left for South Africa. Witness followed him subsequently to Cape Town. The defendant had not contributed towards her passage, and had not given her anything towards her maintenance, and she was forced to take employment to support herself. The defendant deserted her, and wrote a letter, saying he would leave her free to do what she pleased, and finished up the letter with: "Good-bye, and God bless you."

The defendant was ordered to restore conjugal rights by the 1st June, or show cause by the 14th June why a decree of divorce should not be granted.

**BERRANGE V. BERRANGE.**

Mr. Russell was for the plaintiff, and the defendant was in default.

The action was for restitution of conjugal rights, failing which a decree of divorce. The defendant was at present living in Heidelberg, under the assumed name of D. F. de Villiers. In 1895 the defendant left the applicant in Phillip's Town, and since then had not returned.

The plaintiff, Geesine Katrina Berrange, stated that in November, 1885, she was living in Phillip's Town, when her husband, who was in trouble—there was a warrant out against him—left for Vryheid. The defendant asked her to go to Vryheid, but she did not go, as he would have been found out. Since that time he had not returned to her, and had contributed nothing towards her support. Since the issue of summons the defendant had written acknowledging receipt, and describing his feelings at the receipt of it. In the course of the letter he said, "This is the last nail in my coffin."

De Villiers, C.J., said there was no evidence of desertion here. The man was compelled to leave, and in his letter he expressed the wish to have his wife back.

Mr. Russell submitted the defendant should go further than merely express feelings.

De Villiers, C.J.: The plaintiff's case depended upon the establishing of the fact that the defendant had wilfully and maliciously deserted her. Under certain stress of circumstances he was obliged to leave the country with her knowledge, and she was aware of the circumstances under which he left, and when at one time, he was prepared to receive her she thought it best for his safety not to join him. For the larger portion of the twenty years he had resided in the Free State, and that raised a serious question as to his domicile. On the evidence he did not think there was sufficient proof that the defendant was domiciled in this country. With reference to the desertion the defendant, according to the correspondence, seemed shocked at the plaintiff's action. There was no proof of desertion, and the question of domicile was in doubt. The action would be dismissed.

**GENERAL MOTIONS.**

*Ex parte* DA COSTA AND *Others*. 1906. Apr. 18th.

Mr. P. S. T. Jones moved for an order for the compulsory liquidation of the South African Trade Protection Society.

Order for liquidation granted, Mr. J. B. Hobday appointed liquidator, with powers under 149th section of Act 25, of 1892.

**INSOLVENT ESTATE M. SEAGULL AND CO. V. NEW ZEALAND INSURANCE CO.**

Sir Henry Juta, K.C. (with him Mr. Struben) appeared for the defendants (the excipients), and there was no appearance for plaintiffs.

Counsel explained that this was an action to recover the amount of an insurance policy in respect of a fire which occurred on May 24, 1904. One of the conditions of the policy was that any action in respect thereof must be instituted within six months for loss, and this action was not instituted until September 4, 1905, or 16 months after the fire. Plaintiff, in replication, pleaded that an action was instituted by Pilney and Co., and abandoned, and Pilney and Co. retained the policy, with the result that they were unable to bring the action within the stipulated time. To the declaration the defendants excepted. Further, the defendants stated that the policy was ceded by Seagull and Co. to Pilney and Co., and the former had no interest in it. Plaintiffs pleaded that the cession was not valid, and to that defendants excepted.

De Villiers, C.J.: Plaintiffs' allegation that some other person had instituted an action is no answer to the plea, and the exception to the replication must be sustained with costs.

**TURPIN V. DISTRICT OF STUTTERHEIM SCHOOL BOARD.**

Sir Henry Juta, K.C., appeared for applicant, and there was no appearance for defendant.

This was an application for an order declaring the election of members of the District of Stutterheim School Board on December 5, 1905, invalid.

From the affidavits it appeared that the applicant, a farmer in the Stutterheim District, was a candidate in the election, and received 10 votes, as against 17 for Mr. Oosthuisen, who was at the bottom of the list of successful candidates. The Act provided for the election of two-thirds of the members of the Board by municipal ratepayers in the case of a municipal area, and by Divisional Council ratepayers in the case of a Divisional Council area. The question was what were Divisional Council ratepayers? The Government erroneously, counsel submitted, issued instruction to the return officers that the only persons entitled to vote were owners of property, and acting on these instructions the returning officer at this election refused to allow certain persons to vote who were not owners of property, but were lessees and occupiers, and who wished to vote for Mr. Turpin. These votes would have resulted in applicant being elected. Supporting affidavits of persons who were refused votes, and contended that Divi-



sional Council ratepayers were not merely the owners, but the persons who paid the rate and included lessees and occupiers.

Sir H. Juta, K.C., for applicant. Respondent in default.

Counsel quoted authorities in support of his contention, and referred his Lordship to the Divisional Council Act 40, of 1889. Section 243 set out that "all persons owning immovable property within any division, including any municipality within such division, shall be liable to be rated for the purposes of this Act." Section 269 read: "Every Council may in suing for the recovery of rates proceed against the owner, lessee, or occupier." Section 17 set out the persons entitled to be on the voters' roll and section 18 the persons not entitled to vote. Here the lessee or occupier wanted to vote, and the objection was that the rate had remained unpaid, but it was said that this had got nothing to do with the case, as he was not a ratepayer, and did not fall under section 18. The Court held in a former case that the lessee or occupier was liable for the rates without any previous demand. In this case all the persons who tendered their votes had actually paid their rates. It seemed very hard to see logically in the instructions that a lessee who actually paid the rates should not have a vote. Counsel submitted that the Civil Commissioner was incorrect and had taken an erroneous view of the law.

De Villiers, C.J.: The applicant is one of the candidates duly nominated for election to the School Board for the district of Stutterheim. There were six other candidates at this election. After the votes had been taken, the returning officer returned the six other candidates as duly elected. Applicant now complains that certain persons tendered votes for him at the polling booths, and their votes were refused. He alleged they were duly qualified voters, and that their votes were refused on illegal grounds. It seemed that four persons claiming to be duly qualified voters tendered their votes, but the polling officer informed them that, as they were only occupiers or lessees of certain landed property in the district, and not the owners, they were disqualified from voting. The polling officer seemed to have acted upon instructions received from some Government officer, who, for the aid of polling officers, had drawn up certain instructions, and among other things had informed the polling officers that only such ratepayers as were the owners of immovable property in the school district would be allowed to vote. His Lordship drew attention to section 10 of the Act, and, proceeding, said that in this case the district was not a municipal area, and consequently the

qualified voters were the Divisional Council ratepayers. Now, it was quite clear, from the authorities quoted, that the voters whose votes were rejected on this occasion were Divisional Council ratepayers. They were not owners of property, but occupiers and lessees under such rights as made them liable to pay the Divisional Council rate, in case the rate was not paid by the owners. Being liable to pay these rates, His Lordship was of opinion that upon the authorities cited they must be described as ratepayers. The polling officer was therefore guilty of an irregularity in excluding their votes. It appeared that the applicant received 16 votes, and if the polling officers had done their duty according to law he would have received four votes more. That would have given him 20 votes, and it seems that two other candidates declared elected immediately above him received 17 and 18 votes respectively. It followed, therefore, that the applicant would have been declared elected upon this list if the votes which had been tendered were received. It was quite clear, therefore, that these other two candidates had not been duly elected. The question, therefore, arose whether these circumstances ought to affect the election of the other candidates, whose position upon the list would not have been affected by the addition of these four votes to the applicant's votes, but it was impossible for the Court now to act, as it were, as returning officer, and include these votes, and place applicant in that position upon the list which he ought to have occupied. It seemed to his Lordship that the only course open to the Court was to declare the whole of the election invalid. The election would be declared invalid and illegal, with costs against the other six candidates.

#### *Ex parte* ESTATE OF THE LATE OWEN.

Mr. P. S. T. Jones moved to make absolute a rule calling on all persons concerned to show cause why there should not be an order for the cancellation of certain sales of land.

Dr. Greer appeared for the representatives who purchased lot "i."

Rule made absolute in all cases except sections "d," "l," and with regard to "i," the matter to stand over for further inquiries.

#### ESTATE MACKINTOSH V. DRUMMOND.

Mr. Upington appeared for the *curator bonis* in the estate of C. E. Mackintosh, and moved to make the interdict final restraining the respondent from collecting any accounts in the estate, and counsel said the respondent, who represented the Assets Realisation As-



sociation, was in court, and had no objection to the application.

The respondent stated that Mackintosh, two days before the provisional order of sequestration, when he made the assignment, had no idea he was insolvent. Mackintosh at the present moment was in durance vile, and had no idea of these proceedings. The *curator bonis*, Mr. Hennessy, was working only in the interest of Hammond and Co., and not in the interest of the creditors.

Respondent was prepared to consent to the interdict continuing until such times as a trustee be appointed, and he would ask his lordship to fix a date, and order the trustee to proceed forthwith.

De Villiers, C.J., said the matter would remain open at present, and Mr. Hennessy would collect the debts by consent, and retain them pending the decision of the question between the parties. Should any difficulty arise in the collection of the debts, the respondent to be acquainted, so that he could take steps to protect himself. The trustee to proceed forthwith with the action when elected.

*Ex parte FLUCKIGER.*

Mr. Rowson moved on behalf of the petitioner for leave to sue her husband, Jacob Fluckiger, *in forma pauperis*, and by edictal citation for a decree of divorce by reason of his malicious desertion. Counsel also applied for substituted service, as the respondent was in Switzerland.

The matter was referred to counsel for the usual certificate, a rule *nisi* to be issued and sent by registered letter as soon as the respondent's last known place of address was put in.

*Ex parte BLAKE AND SPILHAUS AND CO.*

Mr. Upington applied to make absolute a rule calling on all concerned to show cause why a certain lease should not be cancelled.

Rule made absolute.

*Ex parte HACHER.*

Mr. Lewis applied to make absolute a rule *nisi* calling on the respondent to show cause why the applicant should not sue *in forma pauperis* for judicial separation and maintenance.

Rule made absolute.

*Ex parte VERSTER.*

Mr. Payne moved for leave to sue the respondent, petitioner's wife *in forma pauperis*, to have the marriage set aside

on the ground that the respondent had given birth to a child five months after the marriage, of which he was not the father.

The matter was referred to counsel for further information as to how long the parties lived together after the birth of the child.

*Ex parte MAYERNA.*

Mr. Payne moved to make absolute a rule *nisi* calling upon the Registrar of Deeds to pass transfer of certain property.

Rule made absolute.

*Ex parte COWIE.*

Mr. Sutton moved for an order authorising the Registrar to amend a certain bond by inserting the petitioner's full name.

Order as prayed.

*Ex parte HUMAN.*

Mr. Roux moved for an order confirming the sale of certain property in the Division of Wodehouse certain minors were interested in the estate. The Master's report was favourable.

Order on terms of the Master's report.

*Ex parte MAEDES.*

Mr. Benjamin moved for the appointment of a *curator ad litem* for the purpose of assisting certain minors in the subdivision of certain property in the district of Colesberg.

Application granted, Mr. F. G. Wills, of Colesberg, appointed as *curator ad litem*.

*Ex parte HOME.*

Mr. W. P. Buchanan moved for leave to sue the respondent by edictal citation for restitution of conjugal rights by reason of the malicious desertion of the respondent.

Application granted, the return day fixed for June 14. One publication ordered in the "Cape Times," "Star," Johannesburg, and the "Gazette."

*Ex parte KLEYNHAUS.*

Mr. Van Zyl moved for leave to the petitioner to pass transfer of certain property in the division of Wodehouse.

Rule *nisi* granted, calling upon two of the heirs or their representatives to show cause why the sale should not go through for the sum of £1,400, return day, June 1.

*Ex parte ELOFF.*

Mr. Payne moved for an order authorising the Registrar of Deeds to pass transfer of certain property. The Master's report was favourable.

Order granted.

*Ex parte DE KOCK.*

Mr. P. S. T. Jones applied for an order requesting the Courts in Rhodesia to recognise his appointment as sole trustee in the insolvent estate of Charles Riley, who had property in the country. The application explained counsel was to make Mr. De Kock's position clear.

The order was granted.

*SKIBBE V. KOLBE.*

Mr. Roux applied for an order authorising the amendment of a certain deed of transfer passed on February 15, 1905, in favour of applicant.

The respondent was ordered to deliver up the transfer to the sheriff for amendment, sale, and execution, surveyors' costs, and costs of application to be paid out of proceeds.

*Ex parte WYBURG.*

Mr. Gutsche applied for the appointment of a new trustee to pass transfer of certain property.

Granted, Mr. G. W. Steytler being appointed trustee for the purposes of the trust.

*Ex parte McDONALD.*

Mr. Van Zyl appeared for the applicant. The application was for leave to sell certain property. The Master's report was favourable.

An order was granted in terms of the Master's report.

*Ex parte MORUM BROS.*

Mr. Sutton applied for an order confirming sale of property in Maclear district in an insolvent estate for £1,150.

Application granted.

*Ex parte MARAIS.*

Dr. Rainsford applied for an order extending the return day of a citation in an action against one Adamstein, whose whereabouts they were unable to ascertain, and who was said to be in Europe.

The return day was extended to June 1. personal service to be effected, or,

in default, by publication in the "Government Gazette" and the "Cape Times."

*In re THE CAPE CANNING CO. (IN LIQUIDATION).*

Mr. Van der Byl moved for the confirmation of the final report of official liquidators.

Report confirmed, and creditors' claims ordered to be proved by 31st July.

*Ex parte COETZEE.*

Mr. P. S. T. Jones moved for an order authorising the applicant to sell a share in a certain farm.

Order granted.

*Ex parte HUTTON AND ANOTHER.*

Mr. Sutton moved for leave to raise a loan on a life policy.

Leave granted, upon Mrs. Hutton giving an undertaking to the trustee that she will pay the amount out of certain property in the Transvaal, in case her husband fails to do so.

*SUMMERFIELD V. SUMMERFIELD.*

Mr. J. E. K. de Villiers moved, on notice of motion, on behalf of the defendant (the wife), for an order on the plaintiff to pay £50 to the defendant for maintenance, to defend an action brought by the husband for restitution of conjugal rights, and to proceed with a counter-claim for divorce.

Order granted.

*Ex parte THE INSOLVENT ESTATE OF CANE.*

Mr. Swift moved for the appointment of a provisional trustee to carry on the business in the estate of George Cane, of East London.

Application granted, Mr. W. F. S. Booty, of East London, being appointed provisional trustee.

# SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

## PROVISIONAL ROLL.

ESTATE KERB V. GOLOM- { 1906.  
BICK. { Apr. 19th.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.  
Order granted.

VAN DER SPUY V. HEEGER.

Mr. Payne moved for provisional sentence on a mortgage bond for £1,800, with interest; counsel also applied for the property specially hypothecated to be declared executable, and for rents due to be paid to High Sheriff.  
Order granted.

ASPELING V. FALALL.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,400, with interest, and £9 18s. 6d. premiums of insurance; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

MARAIS V. NOWAK.

Agent—Conduct of parties - Provisional sentence.

*M. applied for provisional sentence against N. for certain sums of interest due on a mortgage bond. N. asserted that he had paid the money to one H., M.'s duly constituted agent. M. repudiated the agency. It was, however, proved that up to Feb. 1st., 1906, H. was in the constant habit of collecting interest for M. On that date M. notified N. that in future his son G. M. would manage his business, and that all payments were to be made to G. M. at H.'s office.*

*Held, that as M. had allowed H. to hold himself out as his agent, provisional sentence must be refused.*

This was an application for provisional sentence on a mortgage bond for £1,800,

with interest, and on an undertaking subsequently entered into to pay 7 per cent. interest; the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

The defendant's affidavit stated that he obtained the loan in 1901. He had paid the interest to Barry Heatlie Heatlie, agent of the plaintiff, and had likewise paid the insurance premiums due in respect of the property mortgaged. In July, 1904, he received notice from Heatlie, on behalf of the plaintiff, that the interest would be raised from 6 to 7 per cent, and a memorandum was attached to the said notice for his signature. On the 30th January, 1906, he paid interest amounting to £63, which had accrued on the 31st December, 1905, to the said Heatlie, as agent of the plaintiff, and received a receipt (annexed) from a clerk in the employ of the said Heatlie. He had called at Heatlie's office after receiving notice in 1904, and asked how he was to pay the interest. He was told that he must pay it at Heatlie's office. On the 2nd February last he received a letter from the plaintiff, stating that his son, George Marais, would conduct his business in Cape Town from that date, and that until further notification, all payments must be made to him at Heatlie's office, 92, Adderley-street. Deponent verily believed that the said Heatlie had abused his trust, that plaintiff had withdrawn the authority given to the said Heatlie to act on his own behalf. The answering affidavit of the plaintiff said that Barry Heatlie Heatlie had no authority from him to collect interest, and was expressly forbidden by him to do so. Heatlie was authorised to collect his (plaintiff's) rent, on which Heatlie was paid a commission, and, as a broker, he applied for and obtained from deponent many loans on behalf of his clients. Heatlie had kept his (plaintiff's) books. In the middle of 1904 he became aware that, notwithstanding his instructions to the contrary, Heatlie had been collecting interest from certain mortgagors, and he thereupon gave Heatlie emphatic directions that each mortgagor was to be informed that interest was in future to be paid to his credit in the Standard Bank. A formal undertaking was thereupon prepared and printed, including a promise to pay interest at a slightly increased rate, and the said document was, he understood, sent to his mortgagors. It now appeared that the said Heatlie did not properly observe his instructions, and several of his mortgagors, he believed, were not required to sign the said document, and Heatlie continued to collect the interest. The total amount so received by Heatlie was very large. In certain instances, where no notice was sent to mortgagors, and they had paid interest to Heatlie, he had decided to

put up with the loss, but, in the instances where, notwithstanding the express directions to pay to him (deponent) at the bank, mortgagors had chosen to pay to Heatlie, he regarded such interest as still owing to him. For many reasons, he had arranged with his son, George Marais, to go to Cape Town and start business, and he, naturally, intended that he should look after his (plaintiff's) affairs; hence the letter which he sent out at the beginning of February. He had not regarded the said Heatlie as his general representative, and, therefore, the construction placed by the defendant upon the said note was quite erroneous.

Sir H. Juta (for defendant) submitted that this was a matter in which the plaintiff should go into the principal case. There were several questions to be decided on which it was of the utmost importance that the Court should have evidence. It was incredible that Mr. Marais did not know between 1904 and 1906 that Heatlie was collecting interest. It was clear this was not an isolated case, but that it was a test case. There was a number of other people in the same position. There was a good number of mortgagors who had been paying interest to Heatlie under the impression that he was the agent of Mr. Marais to receive interest. Heatlie was no longer in Cape Town, and it was alleged that he had taken this money. It was easy, therefore, for plaintiff to say that there was no agency. The bank slips had never been sent to Heatlie, and had never been entered in the books; hence it was impossible to believe that Mr. Marais had during all this time not been aware that Heatlie was collecting the interest. It was an important point as to how far Heatlie was held out to the public as the agent of Mr. Marais.

Mr. Upington (for plaintiff) said that the first point raised was to show how far Heatlie was held out as plaintiff's agent to collect interest. Now, clear and distinct notification was sent to the debtor in what way payment was to be made. That was accepted and agreed to by the debtor in the most positive and clear terms. If a debtor chose to adopt some other method of paying the interest, had he any right to complain, in view of what had happened? There was no proof at any time of agency on the part of Heatlie. As to the question of the bank slips, the interest for 1904-1905 was paid into the bank. It was the conduct of Nowak that had rendered the fraud possible to be committed.

Maasdorp, J.: The question the Court has to inquire into in this case, but not absolutely decide, is whether Heatlie acted as the duly appointed agent of the plaintiff, and the Court has to inquire

into that question merely to ascertain whether, upon the documents now before it, the probability of success, if the principal case is gone into would lie with the plaintiff or defendant. It seems that the bond was executed in 1901, and it is admitted that interest was paid up to July, 1905. It appears that that interest was paid from time to time, not to Mr. Marais, but to Heatlie. Now, there is nothing in the bond constituting Heatlie the agent for Marais to receive the money. Therefore the question of relationship merely depends upon the conduct of the parties. Up to 1904 constant payments were made of interest, which was always received up to that date by Heatlie and accounted for by him to Marais. An important document is put in of the 15th July, 1904, and in that there appears to be an express undertaking that the money should be paid into the Standard Bank by the defendant, and that he should send the deposit receipts to B. H. Heatlie, of Cape Town. That must, therefore, be taken to be an agreement, which was in future to be in force between the parties, but it is quite within the power of the parties to waive that condition, and the question is whether that condition was waived. It is merely a printed form, and, to my mind, it does not prove that such a state of affairs had occurred that Mr. Marais insisted that a change should be made, but it is simply a matter in the ordinary course of business which should have arisen without any change having taken place. This printed form was signed by defendant, in which he promised to pay the money into the Standard Bank. The money was not paid into the Standard Bank, but was paid to Heatlie; but, under ordinary circumstances, one would anticipate that Marais would inquire whether his interest had been paid, and if he had made inquiries he would have ascertained whether the deposit receipts had been duly forwarded to Mr. Heatlie. However, the money was paid to Mr. Heatlie, and a doubt now rests to some extent upon that part of the case whether Mr. Marais was aware that the moneys were received, and whether he allowed the defendant to believe that it was paid properly to his agent. I think the strength of the plaintiff's case, as based upon that document, is removed when we refer to the document of the 1st February, 1906. The plaintiff sent a letter to the defendant, in which he says: "I beg to advise you that my son, George Marais, will conduct my business in Cape Town as from to-day's date. Until further notification, all payments must be made to him at Mr. Heatlie's office." What payments does this refer to? Upon the information as given in this case, it refers to the payments of interest. We have, there-

fore, this position taken up, that, notwithstanding the direction to pay into the Standard Bank, he is here instructed to pay this interest to Marais's son at Heatlie's office. I come to the conclusion that there seems to be strong evidence that Mr. Heatlie acted as agent for Mr. Marais, and was allowed by Mr. Marais to hold himself out to the public as his agent, and that consequently he would be bound. I say there is a strong probability of that; the probability is in favour of the defendant that that is the case. Consequently provisional sentence will be refused, with costs, and the parties can go into the principal case.

[Plaintiff's Attorneys: Syfret, Godlonton and Low. Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

### ILLIQUID ROLL.

KAISER V. BELMONT. { 1906.  
Apr. 19th.

Mr. Sutton moved for judgment under rule 329d for £375 rent due and costs. Order granted.

HODGSON AND ANOTHER V. VAN GERWE.

Mr. P. S. T. Jones moved for judgment under rule 319, in default of plea for £55 6s. goods sold and delivered, with interest and costs. Order granted.

TIERPIN V. SCHOOL BOARD OF STUTTERHEIM DISTRICT.

Mr. Howel Jones mentioned the matter of Turpin v. School Board of Stutterheim District, in which an order was granted yesterday by His Lordship declaring the recent election invalid and illegal, with costs against the six successful candidates. Mr. Jones said that he had been instructed to appear for the respondent, the Civil Commissioner, to oppose. The motion was a very long way down the list, and it was taken on Wednesday, apparently out of its place, and he (counsel) had no notice of the hearing. He understood that the Registrar was not aware that the application would be opposed. He did not know whether there was any opportunity of rearranging the matter.

[Maasdorp, J.: It may be treated as a case of default where a person gives a good reason for not appearing.]

Sir H. Juta (for applicant) said they had not been aware that the Civil Commissioner was going to appear. The other six respondents against whom costs were asked did not appear, and, in spite of all inquiry, they could not find

that anybody was appearing for the respondents.

Mr. Jones said that it was not on the question of costs that he wished to appear. This was an important matter. The Government wished the whole matter to be argued as to whether the School Board authorities were right in the construction put on the Divisional Councils Act, and whether they were right in refusing the lessees or occupiers referred to by applicant, permission to vote. If his lordship did not see his way to allow the matter to be re-argued, the Civil Commissioner would, no doubt, have an opportunity of appealing to a full Bench.

[Maasdorp, J.: That would be the better course. Can you appeal when you are in default?]

Mr. Jones: Well, are we really in default? We had notice given to us, and we intended to appear. Strictly speaking there was no default.

[Maasdorp, J.: I do not think the case ought to go by default in this way when there was an intention to appear.]

Sir H. Juta (in answer to the Court) said he thought the matter was now open to appeal. He should not raise any point as to default.

The matter then dropped, it being understood that the case would be carried to appeal before a full Bench.

### Ex parte HOFFMAN.

Extradition—Act 22 of 1882.

*H. had been arrested in Cape Town on a warrant issued in the O.R.C. and detained in prison, in order that he might be sent back.*

*Held, that he could not be extradited until a Magistrate had enquired into his case.*

Dr. Greer said that he wished to mention a matter of extreme urgency. It was an application on behalf of a man arrested this morning on a warrant issued in the Orange River Colony, who was to be removed by the 11.45 a.m. train (it was now 11.28). He was petitioning the Court to restrain such removal, on the ground that the provisions of Act 22, 1882, had not been complied with. Applicant's legal adviser had been refused permission to see him, and consequently he had been unable to sign the petition or to swear an affidavit. He (counsel) had now to move for an order restraining the removal of petitioner and authorising his attorney to interview him. The present application was brought on the petition of his legal adviser. Counsel read affidavits by Attorney Friedlander and a clerk in the



employ of Friedlander and Du Toit stating that petitioner was detained at Wale-street Police Station under an escort from the O.R.C. and that application to the sergeant in charge and to the inspector at Wale-street for permission to interview the applicant had been refused. Accused was to be removed by this evening's train to Bloemfontein.

[Maasdorp, J.: What is the charge?]

Dr. Greer: Applicant is charged with fraud, in a sum of £4 10s. 6d.

How can there be a removal until the Magistrate has decided the matter? —That is exactly the ground of the petition. We say he must first be brought before a Magistrate, and charged.

[Maasdorp, J.: Nothing of that kind has been done yet?]

No.

Maasdorp, J., said that an order would be granted requiring the officer in charge of the Wale-street Police Station, or other person in charge of the applicant, to detain him until a further order of court, applicant to proceed forthwith with his application, and notice to be given to the Attorney-General. Leave would be granted to applicant's attorney to interview him.

#### REHABILITATIONS.

( 1906.  
( Apr. 19th.

Mr. P. S. T. Jones applied for the release from insolvency of Alfred Russell, and for re-investment with his estate.

Granted.

Dr. Rainsford applied for the discharge from insolvency of Mr. Blair Philip, trading as W. B. Philip and Co.

Granted.

#### ADMISSION.

Mr. Burton mentioned the matter of the admission of Peter Edward de Wet as a conveyancer, which was granted on Tuesday, but the applicant was not in court, through circumstances over which he had no control, to take the oath.

The applicant now appeared, and the oath was administered.

#### GENERAL MOTIONS.

VAN ROOYEN V. COLONIAL ( 1906.  
GOVERNMENT. ( Apr. 19th.

Service of summons Bad service  
—Provisional sentence set  
aside.

This was an application on notice of motion to have a provisional sentence

set aside, with costs, on the grounds that the summons was bad, and that the applicant had no notice of the proceedings. The Government obtained provisional sentence against the applicant for £330 on a mortgage bond, and the property was declared executable. The only intimation he had of the judgment was what he read in the "Weekly Cape Times." The applicant was willing to pay the interest in arrear, which he now tendered.

Mr. Jones read an affidavit, which set out that a telegram was sent by the Deputy Sheriff of Fraserburg, and it was assumed, as no notice was given of the non-delivery of the message, that it was delivered.

Mr. Burton was for the applicant, and Mr. Howel Jones appeared for the Government.

Mr. Burton said that a judgment was usually granted upon proof of service of summons. Here there was no proof, and that invalidated the whole of the proceedings. Upon the fact where the summons was stuck up, the applicant had not resided since 1891.

Maasdorp, J., said that the plaintiff in the case obtained provisional sentence against the defendant upon the default of the defendant to oppose the action. The defendant now sought to set aside the judgment upon the ground that the summons was never duly served. Although there was no express rule upon the question, it was within the power of the Court to set aside a judgment upon good cause being shown. His Lordship, after reviewing the documentary evidence, said he did not think the sheriff had observed the spirit of the rules in making the return. Under the circumstances he thought the service was insufficient, and judgment would be set aside, with costs.

#### *Es parte* REYNOLDS.

This was an application to have a rule nisi made absolute, officially liquidating the company, and calling on all concerned to show cause why Messrs. Syfret, A. J. Chiappini, and J. P. Muirhead should not be appointed official liquidators. Counsel now applied for the appointment of Messrs. Syfret and Chiappini as official liquidators. The opposition to a third liquidator was on account of the poor state of affairs of the company.

Mr. Schreiner, K.C. (with him Mr. Burton) was for the applicants, and Mr. Close was for the respondent, the Reynolds Vehicle and Harness Factory, Limited.

Mr. Close appeared on the question of the appointment of the liquidators. There was no objection to the appointment of Messrs. Syfret and Chiappini,

but the respondent urged that Mr. Muirhead should join them. His learned friend was showing cause against the original rule, which included Mr. Muirhead. There was no objection, in his learned friend's affidavits, in regard to Mr. Muirhead, and counsel then read affidavits in support of the inclusion of Mr. Muirhead.

Maasdorp, J., said the questions between the parties was one respecting the appointment of liquidators. It appeared that all parties represented here were satisfied that Messrs. Syfret and Chiappini should be appointed liquidators, but some of them who were represented by Mr. Close suggested that Mr. Muirhead should be added to this number. The appointment of the official liquidators was in the discretion of the Court. There was no objection to Messrs. Syfret and Chiappini, but it was contended that there was a probability that certain interests would remain unrepresented in this case if the third liquidator was not appointed, and it was suggested that such interests might perhaps be safeguarded by the appointment of Mr. Muirhead. These were merely suggestions that there were conflicting interests upon which Messrs. Syfret and Chiappini would take a partial view, which ought to be corrected upon the appointment of some impartial gentleman. It was argued that Mr. Syfret had already made up his mind upon certain points implicating directors in an irregularity, and consequently some persons who had an open mind on the matter should be appointed. Three of the directors themselves were satisfied that no objection in that respect could be raised to Messrs. Syfret and Chiappini. There being no objection to these gentlemen, the only question was, should a third gentleman be appointed? No facts had been advanced to show that the business of this company was of such importance that two gentlemen could not manage it. Upon that ground also, the Court should hold that the appointment of two liquidators would be sufficient. The rule would be made absolute, and Messrs. Syfret and Chiappini appointed as liquidators, with powers under sections 149 and 151 of the Act.

#### MAY V. GOLDSTEIN.

Mr. Close (for applicant) said that this was an application to have respondent restrained from taking out a certain writ in execution of a judgment given by the Court on Tuesday.

Mr. Benjamin (for respondent) said that he was prepared to consent to the writ of execution not being taken out until the application could be heard.

Order in terms of consent, application to be proceeded with forthwith, question of costs to stand over.

#### *Ex parte* SALIE AND ANOTHER.

Mr. Rowson moved, as a matter of urgency, on the petition of Salie and another, for a rule calling upon the officer administering the Immigration Act to show cause why he should not be restrained from deporting applicants. The Colonial Secretary's Department, he understood, purposed to deport the applicants; hence the urgency of the application.

[Maasdorp, J.: Why didn't you give notice to the Government?]

Mr. Rowson: I believe notice has been given to the Colonial Secretary's Department, but these people might be spirited away. Counsel read an affidavit by the first petitioner, who gave his address as Longmarket-street, Cape Town, in which he said that he was born in India, and was domiciled in the Transvaal until February last. He came to this colony in February, and the authorities allowed him to remain here for two months to visit his friends. This leave expired on Sunday last. He had obtained employment from a certain general dealer at Simon's Town for two years, and had asked the authorities to be permitted to remain in this colony, where he wished to be domiciled henceforth among his relatives. The officer administering the Act had refused to allow him to remain in the Colony on the ground that he was not domiciled here, and that he had entered the Colony in contravention of the Immigration Act of 1902. He was ignorant of his rights when he gave an undertaking to leave the Colony at the end of two months.

Maasdorp, J., said that the matter had better stand for another week, and notice could be given to the Crown in the meantime. He also pointed out that the affidavits had not been stamped and informed counsel that the matter might be mentioned later in the afternoon, when the affidavits had been put into order.

At a later stage, a rule nisi was granted, calling upon the officer in charge of the Immigration Department to show cause why he should not be restrained from deporting the applicants, rule to be returnable on 26th inst.

#### *Ex parte* THE KRAAIFONTEIN HOTEL COMPANY, LTD. (IN LIQUIDATION).

Mr. Van der Byl applied for an extension of the return day until the last day of term, and for an order as to substituted service. Counsel read a list of contributories upon whom service had been effected, and of those upon whom no service had been effected for various reasons. He asked that, so far as the latter were concerned, an order as to publication should be given.

Mr. Burton said that he appeared on behalf of J. W. van Reenen, C. O. Bowman, J. Berman, and V. A. van der Byl, to oppose the application to include them in the list of contributories. He consented to a postponement, but submitted that the liquidators should pay the costs of to-day.

Maasdorp, J., said that the question of costs of to-day should stand over.

Cornelis Johannes Muller applied for his name to be struck off the provisional list of contributories. He said that he had paid in full any claim that the liquidators had against him.

Mr. Van der Byl raised no objection on behalf of the liquidators.

Mr. Muller's name was, therefore, struck off the provisional list of contributories.

As to the question of extending the return day and substituted service, this matter was ordered to stand over pending further information.

#### *Ex parte* STRADLING.

Mr. Douglas Buchanan moved for a certain rule *nisi* to be made absolute authorising petitioner to deal with the annual income arising from certain trust funds in the estate of the late J. G. and M. V. Gruber. Counsel added that the widow, who was in Brussels, had now consented.

Order granted in terms of consent.

#### *Ex parte* THE ESTATE OF THE LATE VAN ZYL.

Mr. J. E. R. de Villiers moved for a rule *nisi* to be made absolute authorising the Registrar of Deeds at Vryburg to pass transfer of certain property.

Rule made absolute.

#### *Ex parte* LOUBSER.

Mr. Sutton moved for a certain rule *nisi* to be made final calling upon the executors in the estate of the late Antonie Botha to show cause why she should not be allowed to sue *in forma pauperis* for £500 and transfer of certain property at Worcester. From the petition it appeared that petitioner, who lives at Darling, had been in the employ of deceased as housekeeper, and she claimed that she had been promised the money and property in return for her services in looking after the deceased.

The affidavit of one of the executors denied that applicant was entitled to anything from the estate Botha, and urged that applicant was not entitled to sue, and put the estate to unnecessary expense. There had been no registration of the alleged donation. The affidavit of Daniel Bland, of Wor-

cester, and of a midwife at Riversdale were also read. The cottage had, it appeared, already been transferred at the time of the alleged promise.

Answering affidavits in support of the alleged promise given by deceased to donate to applicant £500 and a cottage occupied by Mr. Uys at his death were read. Applicant said that she was 20 years of age, and was a dressmaker. She had advertised in the "Cape Times" for a situation. Subsequently she replied to an advertisement that she saw in the "Cape Times," and was waited upon in Cape Town by Mr. Botha and a Mr. Lindenberg. They told her that the advertisement had elicited 72 applications. They engaged witness's services, and Mr. Botha promised the donation claimed. She alone nursed Mr. Botha through his illness up to the time of his death.

Sir H. Juta (for respondents) submitted that the applicant's story was such an utterly improbable one that it could not be believed. The petitioner did not show any consideration for this alleged promise. Counsel submitted that Miss Loubser went to live with Mr. Botha as his mistress, and not as his housekeeper.

Mr. Sutton submitted that the petition disclosed a *prima facie* cause of action, and cited the case of *Sanders v. Cape Town Electric Tramway Company* (15 C.T.R., 1010) in support of his contention.

Maasdorp, J., said the question for the Court was whether aid should be granted to the applicant to sue *in forma pauperis*. The applicant claimed she was entitled to receive from the estate of the late Mr. Botha transfer of an erf, and the payment of the sum of £500, which was alleged was due to her through an agreement entered into by Mr. Botha before his death. The arrangement on the affidavits of the applicant and Mrs. Benson appeared to His Lordship to be a peculiar one, and it would require very strong evidence to support it. The arrangement was that this lady was to become the companion of Mr. Botha until his death, when she would be entitled to the erf as part consideration. Now, it appeared he did not possess the erf in question before the arrangement was made. That seemed to throw great doubt upon her allegations that he was prepared to give transfer of an erf which he did not possess. His Lordship had no doubt that Mr. Botha was prepared to make some arrangement for her, but it was to be by will after his death, and having failed to make a will that promise did not become operative. Under all the circumstances the applicant was not entitled to the assistance of the Court to sue *in forma pauperis*; but it was still given to her to establish her case in any other way she may please. The application would be refused.

*Ex parte* ACHBERG.

Mr. Alexander moved to make absolute a rule nisi to sue *in forma pauperis*.

Mr. Howel Jones, on behalf of the Government, appeared to consent.

Rule made absolute, Mr. Alexander to act as counsel, and Mr. J. Buirski as attorney.

*Ex parte* HARTMAN.

Dr. Greer, for the applicant, applied for his release from civil imprisonment on the ground that the judgment was given against him while he was out of the Colony. He was not in possession of any means at present. Notice had been served on the attorneys on the other side, and they were not opposing.

Order of discharge granted.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

STEVENS V. STEVENS. { 1906.  
Apr. 20th.

Dr. Greer was for the plaintiff; and Mr. J. E. R. de Villiers was for the defendant. The action was brought by Susan Stevens against her husband, George Stevens, for restitution of conjugal rights, failing which a decree of divorce. The marriage took place in January, 1905, and in May, the defendant deserted the plaintiff, and left her. In June, 1905, the plaintiff instituted an action for restitution of conjugal rights, and it was withdrawn on the defendant undertaking to receive the plaintiff, but he had failed to do so. Plaintiff claimed a decree of restitution of conjugal rights, failing which a decree of divorce, custody of the minor child, maintenance, and a division of the joint estate.

Decree of restitution of conjugal rights granted, the defendant to return or receive the plaintiff on or before May 1, failing which to show cause by

the 15th May why a decree of divorce should not be granted, the plaintiff declared to have the custody of the child, and, further, an order on the defendant to show cause why the sum of £50, one-half of the joint estate, shall not be paid to the plaintiff, and why the defendant shall not be ordered to pay the plaintiff £2 per month until the child attains the age of sixteen, and why the defendant should not pay costs.

### WEST V. WEST.

Mr. Van Zyl was for the plaintiff, and the defendant was in default. The action was brought by Marea Elizabeth Gertrude West, of Woodstock, against her husband, Wm. B. West, also of Woodstock, for a decree of restitution of conjugal rights, failing which a decree of divorce. The parties were married at Salt River in 1901, and there were two children of the marriage. Last year the defendant maliciously deserted the plaintiff. The plaintiff, in the course of her evidence, stated that her married life was an unhappy one. They could never agree.

[De Villiers, C.J.: Why did he leave you?]

Plaintiff: We could never agree.

[De Villiers, C.J.: On any point?]

Plaintiff: We could never agree on any point.

Decree of restitution of conjugal rights granted, the defendant ordered to return or receive the plaintiff on or before April 30, failing which to show cause by the 14th May, why a decree of divorce should not be granted, the plaintiff declared entitled to the custody of the children, the defendant further to show cause why he should not be ordered to pay £3 per month for the maintenance of the children until both attain the age of sixteen, the defendant to pay costs.

### ESTATE GREYLING V. VAN DER WALT.

Mr. J. E. R. de Villiers was for the plaintiff, and there was no appearance for the defendant. Counsel for plaintiff asked for judgment in terms of a consent paper against the defendant in his individual capacity, with costs. The defendant was sued both in his individual capacity and in his capacity as executor, but the action was not withdrawn against the estate.

Judgment granted in terms of the consent paper; in terms of prayers "a" and "b," with the exception of the latter part beginning with the words "failing which," the defendant to pay costs and render a true and fair account within fourteen days.

NESER V. DELPORT. } 1906.  
Apr. 20th.

**Cancellation of sale—Purchase and sale—Ejectment.**

*The plaintiff sold certain farms to the defendant and one R. under a deed of sale, which fixed the price and the terms of payment and provided that occupation should at once be given to the purchasers. Part of the price was paid by the defendant and R., but R. became insolvent, and his trustee abandoned the purchase. Now defendant brought an action against the present plaintiff, to compel transfer of one half of the farms on payment of half the price, but an exception to the declaration was allowed by the Court (14 C.T.R., 861). The defendant remained in possession of the farm, and the plaintiff brought the present action to eject him.*

*Held, that as the plaintiff did not claim the cancellation of the sale, he could not eject the defendant.*

This was an argument on exceptions. The plaintiff's declaration claimed that the defendant was in unlawful possession of a farm in the district of Colesburg, having failed to carry out the terms of the deed, and he prayed for an order of ejectment and £100 damages. In April, 1903, the plaintiff sold to the defendant and one Le Roux for £11,500 certain landed property. After £3,200 had been paid on account, the estate of Le Roux was surrendered, and the trustee abandoned the purchase. Possession of the property was given prior to the insolvency. The defendant was still in possession of the farm. The plaintiff claimed that by reason of the abandonment the defendant was not entitled to remain in possession of the landed property. The plaintiff was ready and willing to give transfer to the defendant on payment of the balance of instalments due, and passing a first mortgage bond for the balance, which the defendant refused to do. The defendant excepted on the ground that the declaration disclosed no cause of action, inasmuch as, by the terms of the deed of sale, it was provided that possession of the property should be at once given to the purchaser. The plaintiff in his declaration did not claim a cancellation of the sale.

Mr. Burton was for the defendant (the excipient), and Mr. Schreiner, K.C. (with him Mr. Close), was for the plaintiff.

Counsel having been heard in argument,

De Villiers, C.J.: The deed of sale was executed on April 7, 1903, between the plaintiff on the one side and the defendant and one Le Roux on the other. The purchase price and terms of payment were fixed, and the third clause provided that possession of the property should be at once given to the purchasers. The purchasers were treated as one, but, in point of fact, one of the purchasers became insolvent, and the trustee abandoned the purchase. There remains therefore only the present defendant as the remaining purchaser. He is in possession of the property under the deed of sale. It may well be that the plaintiff is entitled to have the sale cancelled as against the defendant and to obtain damages from him, but if the sale is cancelled the part of the price already paid would have to be returned. But the plaintiff, while not claiming a cancellation of the sale, cannot claim the right to eject the defendant and at the same time to retain the money paid to him. The exception will be allowed and leave given to the plaintiff to amend the declaration. Costs to be costs in the cause.

[Attorneys for excipient: Fairbridge, Arderne and Lawton. Attorneys for respondent: Van der Byl and De Villiers.]

**INHAMBANE OIL AND MINERAL DEVELOPMENT SYNDICATE, LTD. V. MEARS AND FORD.**

Mr. Schreiner, K.C., moved to have this case set down for trial on May 9, and for the appointment of a commission to examine E. C. Winley and Gordon William le Sueur, as necessary witnesses.

Application granted, Mr. Advocate Van der Byl being appointed commissioner.

**SECOND DIVISION.**

[Before the Hon. Mr. Justice MAASDORP.]

**GENERAL MOTIONS.**

WHITE, RYAN AND CO. V. } 1906.  
FLORIDA. } Apr. 20th.

**Practice—Return day.**

*It is not necessary, save in provisional cases, that action*



*should be taken on the return day.*

Mr. Lewis moved for leave to set down a case for judgment by default against Jennie Florida, married in America to Charles Florida. Petitioners said that respondent was indebted to them in the sum of £50 5s. 11d., balance of account from November, 1904, to February, 1905, for goods sold and delivered. Some time ago they obtained leave to sue respondent by edictal citation, and to attach certain lots of ground on the Frogmore Estate, at Retreat, *ad fundam in jurisdictionem*. After considerable trouble service was effected on respondent at Manila by the agent of Customs, Philippine Islands. Mrs. Florida did not enter appearance. Petitioners, however, decided at that time not to take any further steps, believing that the assets attached were insufficient to cover the costs of proceedings, but they had now become aware that the assets were of much greater value than at first they had been led to believe, and they, therefore, prayed for leave to set down the case for judgment by default.

[Maasdorp, J.: Why didn't you proceed by the ordinary process? If she did not appear on the return day she is now in default.]

Mr. Lewis: No action was taken on the return day, and the original summons has lapsed.

[Maasdorp, J.: There is no necessity, except in provisional cases, that action should be taken on the return day. The case may be set down in the ordinary way for an order of the Court. There will be no order on the present application.]

*Ex parte* MAREE.

Mr. Douglas Buchanan moved for the appointment of a *curator ad litem* to the minors Nortje, in connection with the subdivision of property in the division of Oudtshoorn.

Order granted appointing Mr. James Alexander Foster, of Oudtshoorn, *curator ad litem*, as prayed.

*Ex parte* EXECUTORS, ESTATE SCHOE-MAN.

Mr. Douglas Buchanan moved for the appointment of petitioners as *curators ad litem* to the minors Schoeman in connection with the subdivision of certain property in the division of Oudtshoorn.

Order granted as prayed.

*Ex parte* MALCOMESS AND CO.

Mr. Roux moved for an amendment of registration of trade mark of certain

plough called the "blue bird plough," manufactured by the Moline Plow Company, of Illinois, U.S.A., so as to have the trade mark registered in the name of the manufacturers instead of petitioners.

Order granted authorising amendment of registration as prayed.

WILSON V. DAVIS.

Mr. Sutton moved for a rule nisi to be made absolute calling upon respondent to show cause why he should not be restrained from removing certain movables from 146, Victoria-road, Woodstock, pending result of an action to be instituted by petitioner for rent.

Respondent appeared and said that he owed applicant £65 for rent. He had given notice to applicant that it was his intention to remove his goods to a building four doors away. He had promised to pay Wilson £30 this month in respect of the arrear rent and the balance next month. He had had no notice of the interdict until it was served upon him. He was prepared to give guarantees of his *bona fides*.

[Maasdorp, J.: The goods must remain there until you have taken steps to satisfy applicant's claim. There need be no action at all if you can come to terms with him. The Court must grant this order. Rule absolute with costs.]

*Ex parte* DE JAGER.

Articled clerk—Service.

*The Court condoned a breach of service during 20 months on account of applicant's illness.*

Mr. MacGregor moved for leave to include a certain period during which petitioner was articled to Attorney Hofmeyr, of Cradock, in his articles of clerkship. Petitioner formerly served with Mr. Hofmeyr from the 24th April, 1903, to 24th December, 1904, when he discontinued further service on medical advice owing to a breakdown in health. He now proposed to resume his articles.

Order granted authorising the period in question to be counted in articles of clerkship.

*Ex parte* THE KRAAIFONTEIN HOTEL CO. (IN LIQUIDATION).

Mr. Van der Byl presented the second report of the liquidators for confirmation. The liquidators reported that they had provisionally agreed to sell the hotel, grounds, fittings, etc., of the Kraaifontein Hotel for £2,800, the purchaser being Mr. L. Sacks. They were

of opinion that it was in the interests of the creditors that the sale should be confirmed

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE BARNARD.

Mr. J. E. R. de Villiers moved on behalf of the sole trustee in the insolvent estate of J. P. Barnard, of Carnarvon, for an extension of time, within which to file the liquidation and distribution account for a further period of nine months. It was expected by petitioner that after the recent rains there might be a good opportunity of selling the farm to advantage. The Master raised no objection.

Order granted authorising extension as prayed, no order as to costs.

*Ex parte* TRIMMS.

Mr. J. E. R. de Villiers moved on behalf of petitioner, as executor testamentary in certain estate, for leave to mortgage certain properties.

Order granted as prayed.

*Ex parte* PRINCE.

Mr. J. E. R. de Villiers applied for an extension of the return day of rule nisi until the 1st day of August term.

Return day extended accordingly.

GREENBLO V. MAVIEZKAS.

This was an application to make absolute a rule nisi restraining respondent from parting with possession of a certain wagon.

From the affidavits it appeared that applicant's allegation was that he bought a wagon from respondent, who was a blacksmith and wagonmaker in Canterbury-street, Cape Town, and paid the purchase price (£25), by cheque. The wagon was delivered to him on Sunday evening, April 1, and on the following Tuesday he placed it in his yard in Canterbury-street. On the following morning he found that it had been removed, and subsequently the missing cart was traced to the possession of respondent.

The respondent's case was that he sold a wagon to applicant for £25, and afterwards took it back on a representation by applicant that the wagon was unsuitable. He agreed to make a fresh wagon for £30. He allowed the applicant to have the second wagon before it was completed for urgent requirements, but the wagon was to be returned in order to be completed. The applicant did not return the cart, and as a balance of £5 was owing, deponent had it removed.

Applicant, in his answering affidavit, denied having agreed to pay £30 for the second wagon, and said that he was given delivery by respondent.

Dr. Greer for applicant. Mr. Lewis for respondent.

Mr. Lewis submitted that the applicant's story was a most ingenious fabrication from beginning to end. Applicant, he said, was an artist in the matter of affidavits. The whole case of Greenblo was of the most improbable character, and was not entitled to credence. The probabilities were in favour of respondent's case.

Maasdorp, J.: It seems to me that the real dispute between the parties is as to whether or not the applicant owes the respondent the sum of £5. That question is not now raised for decision, but it will be an important consideration in dealing with the issue that is now before the Court. It is impossible, upon the affidavits that have been put in, to arrive at any conclusion as to the truth. There is a most direct conflict of evidence between a large number of witnesses on both sides. Upon the facts as proved, I come to the conclusion that there was a delivery of the wagon from respondent to applicant, but beyond that it is impossible to go on these affidavits. An order will be granted for restoration of this wagon by the respondent, but I shall not now decide the question of costs. The question of costs is really dependent upon the further question whether £5 is due by applicant to respondent. Respondent will be ordered to deliver up the wagon to applicant, question of costs reserved pending an action to be brought forthwith in the Magistrate's Court by respondent, if so advised, to recover the balance claimed, either party to have leave to move for costs, applicant to be restrained from parting with the wagon pending decision of the matter.

*Ex parte* HOFFMAN.

Mr. Greer mentioned this matter, which came before his lordship on Thursday on a petition to restrain the police from removing applicant in custody to the Orange River Colony on a charge of fraud.

Mr. Nightingale (for the Crown) now appeared, and explained that affidavits had been sworn, from which it seemed that a mistake had been made by the Orange River Colony police officials, who thought they were acting under the Prisoners' Removal Act, while, as a matter of fact, they were acting under the Fugitive Offenders' Act. It was clear, therefore, that the prisoner should have been brought before the Magistrate before he was removed. The prisoner's detention had now been le-

gaised, and he would be brought before a Magistrate in terms of the Fugitive Offenders' Act.

Dr. Greer said that, under the circumstances, no further order was sought by applicant.

His Lordship said that the rule granted yesterday would, by consent, be discharged.

*Ex parte LOTRIET.*

Mr. Rowson moved for leave to divide certain property in the division of Britstown, in which minors are interested, and to appoint petitioner as guardian of the minors. The Master's report was to the effect that there appeared to be no necessity for the subdivision, nor for the application. Counsel read a further affidavit by applicant, who said that she was anxious to see all the transfers carried through, and that she was prepared to pay all the expenses and fees which might be incurred.

Maasdorp, J., said that the further affidavit should be placed before the Master. The application would be referred back to the Master.

*Postea* (April 26th).

The Master having reported favourably the Court granted an order in terms of the report.

*Ex parte VAN RENEN.*

Mr. Van der Byl moved for leave to raise a loan of £5,000 on first mortgage on a farm at Constantia Vale, in the estate of the late Isabella Hester Ann van Renen, mother of petitioner. Petitioner proposed to reoccupy the farm and to pay off the existing mortgage. The Master's report was favourable.

Order granted as prayed.

TODD V. GIRDWOOD.

This was an application to have certain trial cause in which the applicant is the defendant removed to the ensuing Circuit Court to be held at Butterworth on May 2.

The affidavit of the applicant (William Todd) stated that he was being sued in the Honourable the Supreme Court to answer respondent in an action for £1,000 damages, which respondent alleged that he had sustained by reason of a letter written by applicant, and published in the "Transkeian Gazette." Deponent denied that the statements were false, malicious, or defamatory, or that respondent had sustained any damages in consequence thereof. It would be necessary for deponent to call about half a dozen witnesses, all of

whom resided at or near Kentani, and to the best of his knowledge and belief the majority of plaintiff's witnesses also resided in the Transkei. Deponent was a poor man, and unable to meet the expense of conveying his witnesses to Cape Town. He was an assistant in a trading station at Kentani, and only earned £4 a month and board. He therefore prayed for the removal of the trial to the ensuing Circuit Court.

The answering affidavit of the respondent (William Girdwood), stated that it was necessary and desirable that he should obtain the highest and most impartial medical testimony, and the witnesses he should call were resident in Cape Town. Such testimony was not available in Butterworth. His private and professional reputation was at stake, and he required the best and most experienced counsel. Such counsel would not go on circuit.

Mr. W. Porter Buchanan was for applicant; Mr. Upington was for respondent (Dr. Girdwood).

Mr. Upington said that the defamation complained of was contained in a letter written to the editor of the "Transkeian Gazette," and the letter, if it were false in its statement of facts, was a very serious libel on plaintiff in his profession. In this letter defendant opened by saying that he would call attention to an accident which had caused indignation in Kentani. Then he described an accident to a young man who was tilting at the ring, and he accused Dr. Girdwood of having neglected this young man, owing to his (plaintiff's) being engaged for a music party. "Surely," the letter went on, "such conduct on the part of a doctor is unprecedented—to leave a man lying unconscious without examining him to ascertain the extent of his injury. If the man had died—as it was he had a narrow escape—would it not have been a case for a judge and jury? I question whether a poor, heathen Kafir would treat his dog as our district surgeon (meaning plaintiff) treated this case."

Mr. Upington said that the case was one of great importance to plaintiff, and that an adverse verdict would mean that he might have to go out of his profession.

Mr. Buchanan contended that there were sufficient medical men in East London, Port Elizabeth, Queen's Town, Graham's Town, and elsewhere who were capable of giving evidence without bringing this case to Cape Town.

Maasdorp, J.: It is quite clear that this case cannot now be conveniently heard at the Circuit Court at Butterworth. The Court sits there, I understand, on the second day of next month, and it appears that the plaintiff has witnesses living in Cape Town. Now, that is sufficient to show that it would be impossible to have the case ready for

the next Circuit Court. It is also very inconvenient, and not in the interests of justice, to have a case at the last moment removed to a Circuit Court, when in all probability the full time of the Circuit Court will be occupied, and when the case so removed may be left in an unfinished condition. The only application now is for removal to the Circuit Court at Butterworth, and that must be refused. Whether the parties may not find some court more conveniently situated, and recourse to which would incur less expense than coming to this Court, is quite another question, but there is no such application before the Court at present. Application refused, with costs.

*Ex parte* CLARKE AND CO.

Mr. Schreiner, K.C. (with him Mr. Burton) moved for the rule provisionally placing the company in liquidation to be made final, and for the appointment of Mr. E. R. Syfret and Mr. Richard Starling (formerly managing director of the company) as official liquidators. Counsel also applied, on the petition of Mr. Starling, for an order authorising the payment of certain arrears of salary and advances of remuneration.

Rule made absolute, Messrs. Syfret and Starling to be official liquidators, with the usual powers, and ordered that the arrears of salary be paid to Mr. Starling, and that £50 per month be allowed to Mr. Starling as advances in respect of remuneration.

ENSLIN V. WEITSZ.

This was an application to make absolute a rule nisi restraining the executors in estate Weitz from distributing an inheritance of £300 falling due to the respondent (Cornelius Stephanus Weitz), pending an action to be brought by applicant, an attorney, practising at Aberdeen, and to have the said inheritance declared executable to a judgment of this Court. Mr. Gutsche was for applicant; Mr. Burton was for respondent.

After hearing the affidavits and counsel in argument,

Maasdorp J.: In this case it does not appear that there is anything as yet available in the hands of the executors for payment to the respondent, and consequently there is nothing executable. There is no application to have the right to the property declared executable, so that it is merely a question whether there is any money that can be declared executable. There is at present no information before the Court that there is such cash available, but it does appear that at any time such payment may become available, and unless the applicant in this case be protected in some way the respondent may deal with this pro-

perty. In fact, it seems to be his intention to do so, i.e., he intended to pay certain creditors according to certain arrangements with them. There is no reason why applicant should be prejudiced by any agreement that respondent may have with other creditors. If this is the only money out of which the creditors are likely to be paid, they may have to take some other steps to have a legal distribution made amongst them. However, that is for them to consider. The Court will grant an order restraining the executors from paying out his inheritance to respondent, pending further order of Court, which any of the parties may move for, respondent to pay costs.

*Ex parte* POTE AND OTHERS.

Mr. Inghbold moved for the appointment of a trustee under a certain ante-nuptial contract, petitioners praying that Mr. Gus. Trollip should be appointed.

Ordered that Mr. Trollip be appointed trustee, but no order on prayer (2), that petitioner be granted power to appoint another trustee, should it become necessary.

*In re* THE GRAND JUNCTION RAILWAYS (IN LIQUIDATION).

Mr. Schreiner, K.C., presented the second report of the liquidators, and applied for directions as to the report lying for inspection and for publication.

Ordered that the report lie for inspection for two months, and same order as to publication as in the case of the first report.

OLIVIER AND OTHERS V. ALLY.

Dr. Greer moved for the appointment of Mr. W. J. McLeod as provisional trustee in the insolvent estate of Kariem Ally.

Order granted appointing Mr. McLeod provisional trustee.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

*Ex parte* THE ESTATE OF 1906.  
THE LATE VISSER. (Apr. 21st.)

This was an application for an order confirming the testamentary disposition

of a certain farm. The petitioners were Andries Gerhardus Visser and Solomon Jacobus Jacobs, in the capacity as executors testamentary of the estate of the late Floris Albertus Visser, and of Andreas Gerhardus Visser and Philipus Johannes Gerhardus Jacobs, in their capacity as executors testamentary of the late Susanna Johanna Visser, widow of the late Floris Albertus Visser, of the division of Carnarvon. Mr. Van Zyl appeared for Jacob Casper Kruger.

The petition was in the following terms:

(1) That the late Floris Albertus Visser and Susanna Johanna Visser (born Du Toit), who were married in community of property, by their joint will and testament, dated the 16th June, 1866, and codicil thereto, dated 10th October, 1888, bequeathed to their children certain farms or landed property subject to certain conditions. To one of these children, viz., Francina Jacoba Visser, married in community of property to Jacob Casper Kruger, they bequeathed that portion of Blaauwkrantz known as Bulandsfontein, in extent 7,390 morgen and 396 square roods, at a valuation of £700, subject to the following conditions: (a) “The survivor of us retains the right to the full and undisturbed possession, use, and usufruct of said properties during his or her natural life, with the right to live and reside where he or she may choose; (b) should the survivor at any time not make use of his or her said right in and to one or more of said properties, but allow the legatee so to do, then and in that case such legatee of such property or properties shall pay to such survivor a sum of money equivalent to 4 per cent. interest on the aforesaid sums mentioned in connection with each bequest for the period during which he or she shall not use the ground, and during which the legatee shall use it. (c) In case one or more of our legatees should happen to die before the testators, then and in that case their lawful descendants by representation shall succeed in their place. (d) Transfers of the said property shall first be effected after the death of the survivor of both of us to those then entitled thereto, according to the above-named conditions, stipulations, and terms. (e) In case one or more (lit., one or other) of our said legatees shall not comply with the above-named conditions, stipulations, and terms, then and in that case, his or her share shall devolve upon the survivor of both of us as his or her undisturbed and lawful property.”

2. The said Floris Albertus Visser died on 11th June, 1890.

3. After the death of Floris Albertus Visser, his surviving spouse, Susanna Johanna Visser (now deceased) permitted all the legatees under the will to occupy the properties bequeathed to them and have the full use thereof, sub-

ject to the payment of a fixed annual sum on life interest to the survivor, which payment in the case of Francina her death, her husband (Jacob Casper Kruger) amounted to £28 per annum.

4. The said Francina Jacobus Kruger predeceased her mother, Susanna J. Visser, leaving issue.

5. The aforesaid payment of £28 per annum was regularly made during the lifetime of the said Francina J. Kruger to the said Susanna J. Visser, but, after the death, her husband (Jacob Casper Kruger), who was also the executor of her estate, failed to pay the life interest or any portion thereof to the said Susanna J. Visser.

6. That the said Jacob C. Kruger became intemperate and misspent and wasted the estate of himself and his predeceased spouse, and the remaining assets of the said estate were sold by execution creditors, leaving the children unprovided for.

7. Thereafter, to wit on the 20th July, 1904, the said Susanna J. Visser executed a will. In this will the testatrix, after reciting that she had, in terms of condition No. 5, whereunder Oulandsfontein is bequeathed to the late Francisca J. Visser in the will made by her and her predeceased spouse Floris A. Visser, dated the 16th June, 1888, cancelled that bequest and had taken back the said farm Oulandsfontein three months after her death, and the proceeds thereof be distributed among the children of the late Francina Jacoba Visser in equal terms.

8. In terms of the said will of Susanna J. Visser, dated July 20, 1904, aforesaid, your petitioners, who are her executors, caused the farm Oulandsfontein to be sold by public auction, and the same was sold on June 10, 1905, for £1,700 to Daniel Petrus Visser and Frans Daniel Visser, to whom your petitioners, as executors, now propose to effect transfer; but before this can be done it is necessary that transfer should be effected by your two first-named petitioners as executors of the late Floris A. Visser in favour of your two last-named petitioners as executors of the said Susanna J. Visser, of the said farm Oulandsfontein.

9. Your two first-named petitioners as executors of the said Floris A. Visser have tendered such transfer as mentioned paragraph 8 hereof to the Registrar of Deeds, who has, however, rejected the deed, maintaining that the late Susanna J. Visser had, under the circumstances above set forth, no right to dispose by her will of the farm Oulandsfontein in the manner she has done.

10. In consequence of the refusal of the Registrar of Deeds to register the said transfer, your two last-named petitioners, who are executors of the late Susanna J. Visser, are unable to effect transfer of the said farm to the purchasers aforesaid.



Wherefore, petitioners pray that your Lordship may be pleased to grant an order confirming the disposition of the farm Oulandsfontein made by the said late Susanna J. Visser in her separate will dated the 20th July, 1904, and directing the Registrar of Deeds to register the aforesaid transfer, or that your Lordships may be pleased to grant such further or other relief in the premises as to your Lordships may seem meet.

Mr. McGregor having addressed the Court in support of the petition,

Mr. Van Zyl said that he appeared for Kruger, who did not oppose the position taken up by the petitioners, but who said that he must get value for his life interest in the meantime. In his affidavit he denied in paragraph 4 the allegation made in paragraph 5 of the petition, viz., that after his wife's death he failed to pay the life interest or any portion thereof to Susanna Johanna Visser. He took up the attitude that he would have lost that life interest if he had failed to pay, but he denied on affidavit that he had failed to pay.

[De Villiers, C.J.: He simply denies the statement that he had not paid, but he does not even add that he had paid?]

Mr. Van Zyl said he must admit that the affidavit had not been carefully drawn, but still it amounted to a denial of the specific allegation that he had not paid after the death of his wife.

De Villiers, C.J., suggested, as a basis of settlement that the respondent should agree to accept £120 as the value of his life interest, subject to the deduction of arrears, should such found to be owing on further inquiry.

This suggestion was acquiesced in both sides.

De Villiers, C.J.: The Court will grant an order as prayed, on condition that out of the purchase-price of the aforesaid farm, Oulandsfontein, there be paid to the respondent the sum of £120, less any arrears of the annual payments of £28 payable for life interest to the surviving testatrix, Mrs. Susanna Visser, under the mutual will of herself and her husband, costs of this application to come out of the proceeds of the sale.

Mr. McGregor said he took it that the executors could not claim from Kruger any payment of arrears after the death of the survivor. He should like an expression from the Court as to the period to which the arrears would be payable.

[De Villiers, C.J.: I suppose they would have to be paid up to the death of the testatrix?]

Mr. Van Zyl asked his lordship whether the costs of respondent were included.

[De Villiers, C.J.: The costs of this application will include his costs.]

#### *Ex parte* HOFFMAN.

Dr. Greer moved as a matter of urgency, for the admission to bail of petitioner, who has been extradited to Bloemfontein, Orange River Colony, on a charge of theft of £4 10s., by means of fraud. The case had previously been before the Court, on an application by Hoffman for an order restraining the police from removing him in custody to Bloemfontein without first bringing him before a magistrate. It appeared that petitioner had since been brought before Mr. Broers, A.R.M., of Cape Town, and his extradition had been granted under the Fugitive Offenders' Act. An application was at the time made on behalf of petitioner for bail, but this was refused by the Magistrate. Petitioner said that on the 19th inst. he was released from the Convict Station, after serving a term of twelve months, with hard labour, and that he was re-arrested inside the station on the present charge. He submitted that the offence with which he was charged was a bailable offence, and that Mr. Broers was not entitled to refuse bail. Petitioner was prepared to provide substantial bail. He was in a serious state of health, having undergone two operations while in the hospital.

[De Villiers, C.J.: Has notice been given of this application to the Attorney-General?]

Dr. Greer: I am instructed that notice has not been given. Counsel went on to urge that there was no question as to the offence charged against accused being a bailable offence, and said that he was prepared to give such bail as would ensure his appearance at Bloemfontein at the trial. He understood that the petitioner was about to be conveyed to Bloemfontein this evening; hence the urgency of the application and the impossibility of giving notice to the Attorney-General.

De Villiers, C.J.: The Court has not sufficient evidence before it to deal with this case. No notice has been given to the Attorney-General, and no notice has been given to the Magistrate. The Court is wholly without information as to the reasons of the Magistrate for withholding bail. Then, it is said that the man is ill, but there was ample time to have got a certificate to that effect. We have only his bare statement to that effect. I am quite satisfied that, if the man is removed to-night, it will be on a doctor's certificate to the effect that he is fit to be removed. We must trust to the humanity of the authorities to see that the man is not removed if he is not in a fit state of health. At all events, there is not sufficient before the Court to justify it now in making the order asked for.

Dr. Greer: Would your lordship allow the application to be made on

Monday, and in the meantime restrain the authorities from removing the petitioner?

[De Villiers, C.J.: I cannot do that; I have given my reasons for refusing.]

*Ex parte* THE INSOLVENT ESTATE  
HOFFMAN.

Mr. W. Porter Buchanan moved, on the petition of Gysbert Willem Kotze, of Malmesbury, as sole trustee in this estate, for an order authorising the Deeds Registry Surveyor to accept certain sub-divisional diagrams with the roads shown thereon deleted. Insolvent was of Hooikraal, district of Malmesbury. In October, 1902, prior to insolvency, he had caused a large number of lots known collectively as the township of Hooikraal, to be sold by auction. After insolvent's surrender, petitioner, acting as trustee, sold to C. Starke and Co., Limited, certain land, which insolvent had in November, 1902, sold to several purchasers, and which said last-named sales (except certain six erven since re-transferred) had been abandoned previous to the sale to Starke and Co. The sub-divisional diagrams of the ground sold by petitioner to Starke and Co. were duly submitted to the Deeds Registry Surveyor for deduction, but were rejected by that office on the ground that the roads, as shown on the general plan, filed in his office, were not marked on the said diagrams; subsequently the roads so shown on the general plan were laid down on the said diagrams, which were then re-submitted to the Registry Surveyor, and by him duly passed. No other sales of the ground sub-divided subsequent to the first sale in October, 1902, had taken place. The purchasers at the sale in October, 1902, would be in no way prejudiced by the present application.

Counsel informed his lordship that a similar application came before the Court on the 3rd November, 1904, *In re Courtenay* (14 C.T.R., 893, 1011), when a rule was granted calling upon all persons interested to show cause why an order should not be granted as prayed. one publication in the "Cape Times" and the "South African News," rule to be affixed to a public place in the locality referred to. That rule was subsequently made final.

De Villiers, C.J., said that a rule would be granted in the same terms as in the case of *Courtenay*, to be published in the same manner as then ordered, rule to be returnable on the 3rd May.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. KOENIGSFEST. { 1906.  
Apr. 23rd.

This was an appeal from a decision of the A.R.M. of Cape Town, convicting the appellant of contravening section 2, sub-section A, of Act 10 of 1895—the Second-Hand Dealers' Act—and fining him in £10, or 30 days' imprisonment. The charge was that the accused, a second-hand dealer, purchased a certain number of stolen sacks, and failed to enter in the book a true and correct description of the articles. The reasons for the appeal were that the conviction was not supported by the evidence before the Court, and that it was contrary to law. The Magistrate, in his reasons, stated that the two boys, who were undergoing a sentence for the theft of the sacks, gave their evidence fairly, and they were corroborated by an independent witness, who saw them enter the shop. The statement of the accused in the box was at variance with that which he made to the detective. The evidence for the Crown he held to be conclusive, and as there were two previous convictions he ordered the accused to pay a fine of £10, or thirty days' imprisonment.

Dr. Greer was for the appellant, and Mr. Howel Jones appeared for the Crown.

Counsel for the appellant submitted, on the evidence as advanced in support of the charge, that the Magistrate ought not to have found the accused guilty. On the evidence for the Crown there was such a contradiction between the various witnesses that it must be taken as untrustworthy. The boys might have thought that their evidence, which tended to convict the accused, would mitigate their sentences.

De Villiers, C.J., said he saw no reason for disturbing the decision of the Magistrate in a matter like this, involving the credibility of evidence. The appeal was dismissed.

## REX V. BUSHULA.

Perjury—Statement material to the issue—Native penal code.

This was an appeal from the Resident Magistrate at Elliot in a case in which the appellant was convicted of perjury by falsely swearing that a certain pro-

missory note for £27 on which he was sued by John William Corderoy, a farmer, of Matatiele, was not read over and explained to him before he signed. Sentence of four months' imprisonment was passed.

The appeal was on the ground that this statement was not material to the issue, and that the evidence was not sufficient to prove the charge of perjury.

Mr. Roux was for the appellant, and Mr. Howel Jones was for the Crown.

Mr. Jones pointed out that the materiality of the statement was not required by the Penal Code, and submitted that the evidence was quite clear.

De Villiers, C.J., said that in the circumstances he considered the Magistrate would have been justified in accepting as a valid defence that the accused did not know at the time he signed that he was to be the person primarily liable, but accused swore positively that the note was not explained to him, and a host of witnesses was called to prove that this was false, and the Magistrate came to the conclusion that it was wilfully false. In his lordship's opinion, the allegation was sufficiently material to the issue, and the appeal must be dismissed.

#### REX V. HARRIS

##### Theft — Magistrate's inference from facts overruled.

This was an appeal from the decision of the Resident Magistrate of Swellendam convicting the appellant of the theft of a twelve inch square belonging to a joiner. Appellant was fined 8s. 6d., with the option of seven days' imprisonment.

Mr. J. E. P. de Villiers was for the appellant, and Mr. Howel Jones for the Crown. The latter said he was instructed not to support the conviction.

Counsel for the appellant said that the Magistrate's finding was against the weight of the evidence, which was very brief and scrappy.

De Villiers, C.J.: It does appear that there was a mistake on the part of this man, who took away one square and left another in its place. He admits that the one he took was the more valuable, but he says it was all done in a hurry. If he had intended to steal the square he would not, I think, have left another in its place, because that square could at once be identified as belonging to him. That is a circumstance which ought to have been borne in mind by the Magistrate in considering the case. It would be very hard if the man for a mistake of this kind was branded as a thief. The appeal will be allowed and the conviction quashed.

#### REX V. MAPUCENI.

##### Magistrate's finding on credibility of witnesses overruled—Presumption of innocence.

This was an appeal from a decision of the R.M. of Mount Ayliff. The accused was charged with the crime of theft under section 198 of the Native Territories Penal Code, in that in November, 1905, he stole a goat. The accused was found guilty and sentenced to nine months' imprisonment with hard labour. The grounds of the appeal were that the conviction was contrary to the weight of evidence, and generally that the conviction was contrary to law.

The Magistrate, in his reasons for judgment, held that the conviction was supported by the evidence for the prosecution. The accused did not say anything to the owner of the alleged exchange. The manner in which the witnesses for the defence gave their evidence was far from satisfactory.

Mr. Upington was for the appellant and Mr. Nightingale appeared for the Crown.

De Villiers, C.J.: The Magistrate did not seem to have attached sufficient importance to the evidence as to the exchange, but he simply said that he disbelieved the evidence for the defence. It seemed utterly incredible that the accused would have taken over the goat unless he was entitled to dispose of it. His lordship was of opinion it was a case in which, notwithstanding the question of credibility, the Court should have given the accused the benefit of the doubt. The appeal would be allowed and the conviction quashed.

#### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BLACK V. BLACK AND ( 1906.  
BLACK. ( Apr. 23rd.

This was an application to make absolute a certain rule *nisi* restraining respondents or any other persons from removing any household furniture belonging to applicant from his house, 31, Albert-road, Woodstock.

It appeared that applicant and respondents, and a third son named David, had carried on business in partnership, and that disagreements had arisen between them. The first proposal was that the business should be wound up, and that a receiver should be appointed, but it was ultimately agreed that respondents should take over the business, subject to certain payments. The respondents had lodged with their parents at a house in Albert-

road, Woodstock, of which applicant was the proprietor. The disagreements in business had extended to the household. Applicant said that, owing to repeated quarrels and disagreements with his sons, he had had to leave the premises. Respondents had undertaken to leave the premises on or about the 15th inst. On going to the house, he found that respondents were intending to remove his furniture. Respondents said that there had been repeated quarrels in consequence of applicant's ill-treatment and neglect of his wife (mother of respondents). They added that they owned the greater and more valuable part of the furniture, and that they had no intention of removing any furniture belonging to applicant. They admitted that they had agreed to vacate the premises, but said that that agreement had subsequently been cancelled.

Mr. Douglas Buchanan was for applicant, James Roger Black; Mr. Benjamin was for respondents, James Black and Alexander Black.

Maasdorp, J.: When an application for an interdict is made, the burden is thrown upon the applicant to make out a clear case of right. Now it would appear upon the affidavits, in the first place, that he claimed all the furniture in the house, and it would then appear that there was no dispute as to the property being in him. In paragraph 4 of his petition, he says that the house of furniture had been acquired by him at his own expense, and petitioner has repeatedly warned respondents not to remove any of the said furniture. It is quite clear that he claimed all the furniture, and upon that the Court granted this rule. Now it appears clear that there is a good deal of furniture in the house that does not belong to the applicant, but to the respondents. Under the circumstances, there is no clear evidence before the Court as to what portion of the furniture belongs to the applicant in this matter. It is said that what is claimed by the respondents as their property is also claimed by the applicant. Therefore, there is a question of ownership in dispute; on the one hand, we have the statement of the applicant alone, and on the other hand there are affidavits by his wife and his two sons, who say that the greater part of the furniture in that house does not belong to the applicant. The question arises whether there is clear proof that the applicant intended at any time to remove the furniture from the house. It seems that there was an agreement by which they were bound to leave the place, but there is no clear proof that they intended to remove any of the furniture of the applicant. It appears clear that, by a subsequent arrangement, the first was cancelled, and there is no provision in the second

agreement that the respondent should leave the premises. They contend that, by that agreement, they are entitled to remain in possession, and they intend to remain in possession. That agreement was made on the 10th, and then on the 11th the applicant moves for the interdict. I now come to the conclusion that it has not been proved by the applicant that there is any intention to remove that furniture, and if he intends to retain that furniture, he must bring clear proof to the Court as to what his property is. The order will be discharged, with costs.

CAPE TOWN TOWN COUNCIL ( 1906.  
V. PINN. ( Apr. 23rd.

Lease—Arbitration—Concealment  
of material fact—Rule of  
Court—Stay of execution.

*The applicants had expropriated certain property, in which was a shop, of which the respondent was the lessee, under a lease still current. The respondent's claim to compensation for disturbance was submitted to an arbitrator, whose award had, by consent, been made a Rule of Court. The applicant's now asked for a stay of execution of the Rule, on the ground that the respondent had not informed the arbitrator that he had been promised the tenancy of a shop in the immediate vicinity of that which he had to quit; and that such fact was material to the arbitration proceedings.*

*Held, that the fact was not material, and the application must, therefore, be refused.*

This was an application, upon notice to Lazarus Pinn, carrying on business in Cape Town as L. Pinn and Co., to show cause why the issue or execution of a warrant by respondent against applicants should not be stayed, pending an action to be instituted by applicants against respondent to amend an award of arbitrator of the 16th March, 1906, and an order of Court granted thereon on the 24th March, or otherwise, for an order referring the matter back to the arbitrator to take further evidence, and make such other or further award as may to him seem necessary, and why costs should not be costs in the cause.

From the affidavits produced, it appeared that the application arose out of certain arbitration proceed-

ings heard before Mr. Harry Gibson, as arbitrator, in connection with the expropriation of the property of the Dutch Reformed Church in Adderley-street. One of the tenants of that property was the respondent, a jeweller. When he received notice to quit from the Council there were still two months to run of his lease, and he had also the option of renewal for a further term of two years. At the Arbitration Court Pinn presented a claim for £6,000, made up as follows: Loss of profit for 26 months, £2,600; loss of fittings, less amount written off original cost in respect of expired portion of tenancy, £400; loss on stock, £3,000. The hearing occupied five days, and in due course the arbitrator made his award, finding that the claimant was entitled to £1,011. The award was taken up by claimant's attorneys, and, as some question arose in regard to taxation of costs, they moved in the Supreme Court for the award to be made a rule of Court, the Council's attorneys consenting. The ground of the present application, which was based principally on an affidavit by Mr. Lawton (Messrs. Fairbridge, Arderne, and Lawton), was that Pinn had wilfully concealed at the arbitration proceedings certain material facts, i.e., that he had been promised a lease of the new premises to be erected by the consistory of the D.R. Church on the surplus land remaining after the street improvement had been carried out.

Mr. Schreiner, K.C. (with him Mr. Close), was for applicants; Mr. M. Bisset was for respondent.

Mr. Schreiner said that if it had not been that before these facts were discovered a rule of Court had been made upon the award, then the 14th sub-section of section 3, Act 16, 1882, would have founded an application to have the matter referred back to the arbitrator then and there. The position in this case was peculiar, because in all good faith a consent was given by the applicant's attorneys to have the award made a rule of Court. The real point, and the only point, in that application was that there should be taxation of the costs by the taxing officer of the Court. He would suggest to his learned friend that he should consider whether he should have the expense and delay of an action by consenting to a reference back to the arbitrator. The applicants made the averment—and it was an averment of which they were prepared to give proof that there had been a wilful concealment of the most material fact. Counsel referred to Voet (4—1—25).

Mr. Bisset said that, as to his learned friend's suggestion that he should waive his rights so far as the judgment was concerned, if the Court were against him on the law and facts, then he thought it would be much better that the matter should be referred back to the arbitrator rather than that there

should be an action. Anyone who was at all acquainted with the arbitration proceedings in this matter would see that it was almost ludicrous to find the Town Council taking up a position that was utterly inconsistent with the attitude they took up at the arbitration. At the arbitration they urged that it was a mercy to Pinn that the Council turned him out of Adderley-street, and that they had thus saved him from being faced by starvation. He denied, firstly, that there had been any concealment, wilful or otherwise, and, secondly, that the fact that they had been alleged to have concealed was material. Pinn was cross-examined by his learned friend, but never once was he asked whether he had taken another shop in Adderley-street. The reason was perfectly obvious—it was inconsistent with the applicant's case at the arbitration. Even assuming that Pinn did get back within twelve months of the twenty six, how was it going to make any substantial difference in the award of the arbitrators.

Mr. Schreiner submitted that it was absurd for anybody to consider that it was not material in connection to the arbitration to know that Pinn was going back to Adderley-street in twelve months. Pinn had not spoken "the truth, the whole truth, and nothing but the truth" in the evidence he gave before the Arbitration Court. That counsel did not put the question to him in cross-examination which would have brought out this important fact might be a *culpa* on his part, but it did not save the claimant from the responsibility of concealing a most material and important fact.

Maasdorp, J.: In this case the applicants ask for an order of Court to stay issue of execution of a writ by respondent against applicants, and, pending result of an action to be instituted forthwith by applicants against respondent to amend an award of arbitrator, dated 16th March, 1906, and an order of Court granted thereon, dated 24th March, 1906, or otherwise for an order referring the matter back to the arbitrator to take further evidence, and to make such other and further award as may to him seem necessary. It seems that the ground upon which this application is made is stated in the twenty-sixth paragraph of the applicant's petition, in which it is said that the respondent obtained an award for a greater amount than he was entitled to by reason of his wilfully concealing certain material facts that should have been given to the arbitrator, or, by misrepresentation, or misstatement of facts, I shall only go into the facts of this case, in so far as it is necessary to support my reasons for my finding. If it were necessary to go into the matter for the purpose of absolutely deciding whether such a fraud



had been perpetrated that applicants in this case might upon the authorities cited bring an action before the Court to have the judgment set aside, then it might be necessary to go more fully into the facts. It seems that certain property belonging to the Dutch Reformed Church had been expropriated. The respondent in this case became entitled to compensation in respect of prospective losses in business through his having to remove from the premises then occupied by him to any other premises he might obtain. It seems that the lease under which he held the premises in question would not lapse for another period of twenty-six months, and the question therefore arose as to what compensation he should be entitled to obtain in respect of the loss of the premises. The matter went to arbitration, and the question the arbitrator had to decide was upon the evidence of the losses the respondent incurred through his having to go into such premises as he was likely to obtain during the 26 months, when he might have made a large profit on the premises previously occupied by him. It appeared that it was said that he was making a profit at the rate of £100 per month at the Dutch Reformed Church premises, and that there would be certain losses if he had to go to other premises. It is now contended that in bringing that issue before the Court the respondent was guilty of making certain misrepresentations. What he actually said is set forth in the sixth paragraph of the petition, where it appears that the respondent stated that "on receiving notice to quit from the Council, he endeavoured to obtain a suitable shop in Adderley-street; the only shop that he could obtain in Adderley-street was one in Jutta's Buildings at a rental of £120 per month; that the premises did not suit him, that they were too deep and the frontage was too narrow for his business, and for this reason, as well as on account of the high rental required, he decided not to take this shop; that he was ultimately compelled to take a smaller shop in Longmarket-street." The applicants say that in saying this, and not saying more, the respondent fraudulently concealed a certain material fact, which was to the effect that he was actually entitled at that time, under an agreement, to a lease of the premises that were then being erected by the D.R. Church in approximately the same locality in which this shop had formerly stood. Now, the question arises whether there was any fraudulent concealment in this of any material fact, and whether, if there were, it is a question which can now be reopened in the manner asked for by the applicants. No direct authority has been given in which the Court has acted in the manner now

asked for by the applicants. The authorities referred to have all reference to the question whether an award, before it is made a rule of Court, should not, under certain circumstances, be referred back to the arbitrator, and it has been held that an award so made should be referred back to the arbitrator for certain reasons, amongst others, if the arbitrator had been guilty of an irregularity, or where there had been a mistake of fact, or there had been concealment of facts. Now, it seems to me that if this award had not actually been made a rule of Court, and the facts which are now brought to the notice of the Court had come to the notice of the Court at an earlier stage, it is not improbable that the Court might have referred the matter back to the arbitrators to ascertain whether the matters then brought to their notice were really material, and would have affected the issue; but this case stands in quite a different position now. Now, we have got to deal with an actual judgment of the Court, given upon an award of arbitrators, and the question now arises upon what grounds will the Court set aside such a judgment? Upon the authorities cited, it would appear that by a certain mode of procedure it would be in the power of the defendant to have a judgment of the Court set aside which had been obtained by fraud. Now, the question is whether there is sufficient now before the Court to induce it to interfere at such a stage, because it would always be open to the applicants, whatever the Court may do now, to take an action for restitution for fraud if such fraud can be established. It is alleged that material facts were concealed from the arbitrator. Now, it is quite possible that material facts may not be brought to the notice of an arbitrator, and that, in itself, would not constitute a fraud, and the mere fact that certain matters of some importance might have been known to a party which he had not brought to the notice of the Court does not establish the fact that there is any wilful concealment, because, in the first place, it has to be decided what facts are material, and it is quite possible that a party to a suit may have the opinion that certain matter is not material, and consequently need not be brought to the notice of the arbitrator. There is no evidence that there is an absolutely false statement made by the respondent in this case. The only case made against him is that he omitted, wilfully and fraudulently, to state certain facts of which he had knowledge. Now, it does appear from his own statement that for some time past he had been negotiating with the Consistory of the Dutch Reformed Church for a shop in their new buildings, and that they had agreed to let to him two shops on

completion of the said building. "It is still uncertain that deponent will be able to obtain such occupation." Therefore, it is clear that there was some arrangement that when certain buildings were completed, the defendant would obtain a lease of a portion of them for his business, but it does not appear that there is any likelihood of these buildings being completed.

Mr. Schreiner (interposing): Within 12 months, it is stated; he will be only 12 months out of occupation.

Mr. Bisset: I don't know where that is stated.

Mr. Schreiner: In the letters attached.

Maasdorp, J. (continuing): It is said that there is a statement made by the applicant in this case that in 12 months he would be in occupation. There is no proof at all in this case that in 12 months he will be in occupation; there is no positive proof at all that in 12 months the buildings will be in such a state that he will be in occupation. It is still an open question whether within 26 months the defendant may fail to obtain premises situated in Adderley-street in which he can carry on his business, and, besides that, it was quite open to the respondent in this case to be under the belief that, even if he did get back to Adderley-street, he would not immediately recover the same large business as he had before, and, consequently, it is not a necessary and material statement to say that he would go back to Adderley-street, and would obtain rooms upon these premises. Under these circumstances, I do not think the Court ought now to interfere, and it is quite clear that, even if the Court does not now interfere, and if execution is taken out, it will still be open to the applicants to take any action they may think fit. If they are able to establish a case of fraud, and to bring it within the rule of Voet, that in case of fraud restitution will be granted after a judgment has been given, then it is still open to them to take such proceedings, but there is no such information now before the Court as to satisfy the Court that a fraud has been committed by reason of which the Court should now interfere by stay of execution. The application will be refused, with costs.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton. Respondents' Attorneys: Tredgold, McIntyre and Bisset.]

#### GINSBURG V. ESTATE ZOER.

This was an application brought by Hyman Ginsberg to have a certain order of Court interdicting applicant from collecting the rents of certain property set aside.

It appeared that in August last provisional sentence was granted against

Ginsberg by the Court, on the application of estate H. J. Zoer, upon a certain mortgage bond for £2,650, with interest due, less £24 paid on account, and the property specially mortgaged was declared executable. After judgment had been obtained, plaintiff stayed execution, his explanation being that that was done on condition that defendant (Ginsberg) should authorise the Board of Executors in Cape Town to collect the rents of the property mortgaged. The rents had been collected by the Board of Executors, but defendant in breach of this agreement had subsequently given notice to the tenants withdrawing the authority given to the Board of Executors, and directing the tenants to pay the rents to himself. Upon an affidavit by plaintiff's attorney, the Court granted an order interdicting defendant from collecting the rents, and authorising the applicant estate to collect the rents pending attachment of the property, steps to be promptly taken to satisfy the judgment, leave being reserved to respondent to move the Court on the 17th April, if so advised, to have the said order set aside or modified. This respondent now sought to do.

The affidavit of the respondent (now applicant) denied that he had committed any breach of agreement by withdrawing from the secretary of the Board of Executors authority to collect the rents. He said he had not agreed with his bondholders that the Board of Executors should collect the rent. It was a perfectly voluntary arrangement that he made, for his own convenience, as he was at the time carrying on business at Piquetberg. He said that respondent admitted having taken judgment against him by a "legal oversight."

Certain answering affidavits stated that the applicant agreed to allow the Board of Executors to collect the rents of the property, and apply the proceeds to reduction of the indebtedness of applicant to respondent for interest on a bond. The whole question of the relationships of the parties was gone into at great length in the affidavits.

The replying affidavit of the applicant stated that he had been disgusted with the manner in which his agent (Mr. A. E. Buyskes) had been collecting his rents, and he had handed over the work to the Board of Executors. He declared that he had always paid the interest on the due date, but since he had handed over the collection of rents to agents the proceeds were nearly all swallowed up in expenses, and he had fallen in arrear with the payments of interest.

Mr. Alexander was for applicant: Mr. McGregor was for the respondent estate.

Mr. Alexander contended that the respondent should be ordered to go into the principal case,

Maasdorp, J.: It seems to me that the applicant in this case has quite mistaken his rights. He says that a judgment has been taken out against him, and he now moves to have that judgment set aside, but as matters now stand that judgment stands good, and the Court must take it that there is a judgment in favour of the respondent, and against the applicant in this matter. It would seem that the plaintiff in the former action was entitled to judgment; but, by some understanding, judgment was to be postponed, but it was within the legal right of plaintiff to have taken out judgment at any time. Through an inadvertence the understanding that the parties had arrived at seems to have been lost sight of, and judgment was taken, and upon all the grounds it was a legal judgment. There does not seem to have been any legal agreement between the parties which would have prevented the plaintiff from taking judgment. Applicant remonstrated with respondent's attorneys, and the latter expressed their regret, but there was no question that the judgment should be withdrawn. As that judgment stands the plaintiffs are entitled to execution. They are entitled to attach property mortgaged under the bond, and to obtain all the benefits of anything that that property might produce. It appears that applicant is entitled to certain rents of the property. I think, under the circumstances, if execution is now taken out upon the property, which has been declared executable, the plaintiffs would be entitled to the sale of that property, and to any rents which it may produce in the meanwhile. Counsel for the applicant has said that certain rents had been obtained which would satisfy the interest on the bond, but the capital sum remains, and he is entitled to have the rents collected in satisfaction of the capital if necessary. The application will, therefore, be refused, with costs, and the original order will stand.

RABINOWITZ V. MARGOLIN.

This was an application to make absolute a rule nisi, restraining respondent from disposing of certain stock and fixtures, pending the result of an action to be instituted by applicant. Mr. Inchbold was for applicant; Dr. Greer was for respondent.

This matter arose out of a partnership business which the parties had carried on as cafe proprietors in Caledon-street, Cape Town. Applicant alleged, in his petition, that respondent had clandestinely removed the stock and fixtures from the Cafe in Caledon-street. Respondent said that applicant had already removed most of the stock and fixtures and had only left a small portion

on the premises which deponent took in security for his claim. Respondent further said that he had been the victim of a malicious prosecution by applicant for theft, of which charge he (respondent) was acquitted. He had given notice to his partner that he would hold the goods pending an action. He proposed to institute an action to recover the amount of £13, which he had contributed to the capital of the business, and also for damages for malicious prosecution. Applicant filed replying affidavits, repeating his allegations.

Dr. Greer having been heard in argument.

Maasdorp, J.: Respondent in this case admits there was a partnership entered into between applicant and himself, and that certain goods were upon the premises, where they had been placed by the partnership, and he admits that he removed the goods from the place where they had been deposited by the partnership, for the purpose of obtaining security in an action which he intended to bring against the applicant. The respondent had no right to interfere with the goods of the partnership, and by helping himself to the property obtained security in an irregular manner. It would have been within the right of the applicant to ask that the Court should order the goods to be restored to the place from which they had been taken, but, instead of doing that, the applicant merely asks that the respondent should now be interdicted from disposing of these goods until the question in dispute between the parties has been settled by an action. The rule will be made absolute, but the question of costs must be allowed to stand over pending an action which the applicant intends to institute. I would suggest, considering the small amount in dispute that the parties should consider whether it is worth while bringing an action. I do not know the amount in dispute, but if it is within the jurisdiction of the Magistrate, the parties must consider whether it is not proper for them to bring any action they may be advised to bring in the Magistrate's Court.

GERHARD AND HAY V. FLAUM.

Dr. Greer moved on behalf of defendants in the action for the appointment of a commission to take certain evidence in Hamburg, Germany, and Libau, Russia.

Order granted, the British Consuls in Hamburg and Libau respectively to be commissioners.

Ex parte ESTATE MACINTOSH.

Mr. Upington moved for the appointment of Mr. A. T. Hennessy as provision-

al trustee in this estate. The matter, counsel stated, had previously been before the Court, when an objection was raised by Mr. Home Drummond that only one creditor supported the application. Counsel now presented affidavits by other creditors. Mr. Hennessy was at present *curator bonis* of the estate.

Mr. A. T. Hennessy was appointed provisional trustee, with power to collect outstanding debts.

#### BENNETT V. ALLAN AND SHAW, LTD.

This was an application for reduction of instalments payable on a decree of civil imprisonment, operation of which had been suspended. Bennett said that he wished the instalments payable under the order to be reduced from £5 to £2 per month.

There was no opposition.

The order was amended by the insertion of £2 instead of £5, £2 to be paid as due on the 15th inst.

#### *Ex parte* LE ROES.

Dr. Greer moved for an order authorising the amendment of petitioner's name from "Roex" to "Roes" in certain transfer deeds and mortgage bond in Debt Registry.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

EAST LONDON MUNICIPALITY ( 1906.  
V. LUMSDEN AND OTHERS. { Apr. 24th.

Municipality—Street—Sanitation.

This was an action brought by the East London Municipality against a number of property-owners for a declaration of rights in respect of a strip of land in the vicinity of Oxford-street, which the plaintiffs desire to sell by public auction.

The action was brought by the Mayor, Councillors, and townsmen of East London, against John Lumsden, Arthur John Fuller, David McMillan, Harry

M. Stone, Henrietta E. Becker, Angus W. Newman, J. C. Waberski, Franz Waberski, and James McJannett, for (1) a declaration that plaintiffs are entitled to sell a certain strip of land in vicinity of Albany-street and Stephenson-street without any conditions attached, proceeds of such sale to be applied to certain public improvements; and (2) an interdict obtained on the petition of Lumsden on 28th February, 1904, restraining plaintiffs from so disposing of the land to be discharged. Defendants were sued as owners of immovable property in block, J. Ward, No. 3, Stone, and Becker, in their capacity of executors of estate Henry E. Becker. All the defendants, except the Hon. Mr. Fuller, had entered appearance. The estate Becker and McJannett submitted to judgment, but the other defendants had filed a plea and claim in reconvention.

Plaintiffs, in their declaration, said that the land was municipal pasture land, and that they had been granted title by the Governor on condition that they sold the land and applied the proceeds to public improvements. Defendants' plea was to the effect that the strip in question connected two public streets in East London; that the land had been left vacant as a street or roadway between two blocks of property; that the drainage and sanitary removal of adjacent buildings was by means of this strip; and that, if taken away, it would be a serious detriment to defendants, whose building plans had been passed by the municipality on the strength of this being a road or thoroughfare, and that it would involve them in considerable expense. In reconvention defendants claimed damages as follows by reason of being deprived of the use of the land: Lumsden, £3,500; Waberski, £1,500; McMillan, £1,500; Newman, £500.

Plaintiffs, in their replication, denied that the strip had been dedicated as a public thoroughfare, or that they had granted a servitude over it to defendants.

Mr. Searle, K.C. (with him Mr. Benjamin), was for plaintiffs; defendants did not appear.

Mr. Searle said that the question of making the interdict perpetual against the Council was left over, with a view to the parties arriving at a compromise. The real question in the case now was whether the land was a public street or roadway, or whether defendants had any right of way or other right over it.

Counsel (in answer to the Court) said that all the defendants had frontages to Oxford-street, so that they could get an exit from their premises without going on to this land.

[De Villiers, C.J.: What can the municipality do with a piece of land like this? Who would buy such land?]



Mr. Searle: Oh, they say it is most valuable. They say it may reach up to £3,000 for stores. They seem confident that they will realise a large amount by it; in fact, defendants have offered to pay a considerable sum for it. It is only a question of how much they should pay.

De Villiers, C.J.: Of course, it is to their interest to buy it; but, independently of the adjoining owners, who would buy that land?]

They say people would buy it for stores, and that it is such an important part of the town that they would have no difficulty in selling it.

[De Villiers, C.J.: What would be the entrance to it?]

It has got a street at each end—Albany-street and Stephenson-street.

De Villiers, C.J., said that when the matter was last before the Court, one question was, why was this strip of land left vacant if it were not intended to be a road?

Mr. Searle: I think that can be clearly shown; we have got the transfers of all the surrounding lots, and in every case it is regarded as vacant land. Counsel added that the land was called municipal pasture land.

[De Villiers, C.J.: Pasture land!]

Mr. Searle hastened to explain that he did not think there was much pasturing going on there now.

Evidence was called by the plaintiffs.

Wilhelm Medefindt, Deputy-Mayor of East London, said that he was Mayor of East London when this dispute arose, and the matter was placed before the Government. He had lived in the neighbourhood of the property, and was well acquainted with it. There had never, to his knowledge, been any public street on the strip of ground in question. The strip had been a nuisance to the town, and had been used by Kafirs. He considered that the ground in dispute would sell for about £2,500; it was suitable for stores. Pieces of ground in worse localities had lately made very high prices. He thought that other provision could be made for the sanitation of the adjoining properties. He did not see that there would be any difficulty as to sanitation of defendants' properties if the land were sold, because the properties could have their sanitation in Oxford-street. He did not think there would be much expense upon the adjoining owners by reason of taking over the land. The Council had tried their best to make a compromise with defendants, but had been unable to come to a settlement. Some of the defendants offered to pay interest on £1,000, but they could not agree among themselves. The Council had a drainage scheme in contemplation, and he did not anticipate that under their draining scheme there would be any difficulty in draining defendants' property. Defen-

dants did not make much use of the ground until the dispute arose.

Robert Edward Dowding, Town Clerk of East London, said that the discussions with the Government in regard to this matter had extended over two years. As far as witness knew, the land in question had never been dealt with by the Municipality as a street. He thought arrangements could be made for the sanitation and drainage of the different lots adjoining.

Walter P. Murray, Deeds Registry Surveyor, Cape Town, said that in all the sub-division diagrams of adjoining blocks, the strip was described as vacant land, with two exceptions, where the land was described as a street. Witness would not pass the diagrams without inquiry to-day; he might have done so in 1897.

[De Villiers, C.J.: Why wouldn't you to-day?]

Witness: I can only say I was younger then. In further evidence, witness said they were not as careful formerly as they were now.

Walter Bond, Town Engineer, East London, said that, as far as he was aware the land had never been considered by the Council to be a street or a lane. He thought the drainage and sanitation from houses in block "J" could easily be turned into Oxford-street. The cost of altering the sanitary system would be about £50 or £60 for the whole of the properties.

Thomas Beetham, Sanitary Inspector, East London, said the strip in question was practically a cul de sac. The removals from the houses could be carried into Oxford-street. The drainage could easily be turned into Oxford-street.

This was all the evidence.

Mr. Searle, having been heard in argument on the facts,

De Villiers, C.J.: The land which the plaintiff Council wish to sell was granted by the Crown to the plaintiff Council on the 13th February, 1903, and the condition of the grant was that "the land hereby granted shall be sold by public auction, and the proceeds of the sale shall be given to the construction of roads." It appears that defendants owned certain lots of ground, which, on the one side, bordered on Oxford-street, and the back premises bordered on the land now in question. It appears further that all the sanitary arrangements of these owners have been made with a view to the removal by way of this vacant land, which was at the back of the premises. I am unable to agree with the view urged upon the Court by counsel for plaintiffs that, merely because there was a grant to the Town Council and a condition that the Town Council should sell, the Town Council would be bound to sell, even if, thereby, the legal rights of the defendants were prejudiced. The plea is that they would be prejudiced, and the de-



fence comes to this, practically, that this so-called vacant land is really a street, that the defendants' premises were built upon the faith of this vacant land, being a street, and that there would be an infringement of the rights of the defendants if this land which they took to be a street should now be sold to others. But it lay upon defendants to prove that it is a street. They have not appeared to support their plea that it is a street, and all the evidence before the Court is to the effect that it never was a street, that it was a piece of vacant land, and that it was never held out by the plaintiff Council to the defendants as being a street. It is to be regretted that defendants have not appeared to put before the Court their evidence. At present I can only be guided by the evidence given on behalf of the plaintiffs, and, upon that evidence, there is only one course open to the Court, that is to make the declaration as prayed. The Court will, therefore, declare that the plaintiff Council are entitled to sell the said land by public auction, without any condition attached thereto, proceeds to be applied to the public improvement sanctioned as aforesaid. I would add to that, further, that the sale is not to take place within three months of this date. The Court will further order that the interim interdict obtained on February 28, 1904, be discharged, and that the defendants pay the plaintiffs' costs. Then, as to the claim in reconvention, which contains a prayer for damages, there is no evidence whatever as to such damages, and therefore there must be absolution from the instance upon that claim.

Mr. Searle said that there were certain of the defendants against whom the Council did not ask costs, viz., Estate Becker and McJannett, who had simply submitted to the judgment of Court. He did not ask for costs against the Hon. Mr. Fuller, whose interest was purely nominal.

De Villiers, C.J., said that the mere fact that certain of the defendants did not plead made no difference, because the Council had to prove their case just the same.

Mr. Searle said that, as to costs of interdict, the prime mover in that matter was Lumsden, against whom he had to ask for costs of these proceedings.

De Villiers, C.J., said that the Court would make an order in terms of the declaration, but direct that the sale of the land shall not take place within three months of this date, and there would be absolution from the instance on the claim in reconvention, defendants to pay costs of the action, and defendant Lumsden to pay costs incurred in connection with application for interdict.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendants in default.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### GENERAL MOTIONS.

*Ex parte* STEPHAN BROS. { 1906.  
AND THE BANK OF AFRICA { Apr. 24th.  
LTD.

Mr. Molteno moved as a matter of urgency for an order provisionally winding up the Croydon Brick Co. The company (counsel said) was unable to pay its debts, and it was in the interests of all concerned that it should be wound up. There was an affidavit by the manager that the company was unable to keep the fires alive, and if they were allowed to go out, irreparable loss would accrue.

A rule *nisi* was granted, calling upon all concerned to show cause why the company should not be wound up, returnable on Thursday week. One publication in the "Gazette," "Cape Times," and "Ons Land."

*Ex parte* ESTATE LATE PRINCE.

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* calling upon all concerned to show cause why a certain transfer deed should not be amended, and restraining Attorney T. P. Peters from parting with the deed, pending the result of the application. The deed referred to a piece of land at Claremont, and an amendment was applied for, so as to vest the title in the trustees of the Claremont Station of the A.M.E. Church, against whom costs were asked.

Rule made absolute, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DONNELLY V. DONNELLY. { 1906.  
Apr. 25th.

This was an action brought by Mrs. Donnelly against her husband, James Donnelly, described as a sanitary engi-

near, for restitution of conjugal rights, failing which a decree of divorce, with custody of the child of the marriage and maintenance. Plaintiff appeared in person; defendant was in default, and had been duly barred from pleading.

Plaintiff (in answer to the Court) said that she was not able to employ counsel to conduct her case. Attorney Sydney had been acting for her, but on Monday he asked her for £10, and she was unable to pay it. Witness was a minor at the time of marriage, and she was married in community of property in 1900 by a judge's order. They only lived together for five months. When she was married, defendant was a soldier at the front, and he was away for a period of seven months. When he came back, they lived together at her mother's. Then defendant was sent away to Port Elizabeth, and on his return, after a few months' absence, they lived together at Observatory-road for a time, during which her husband beat her. He was formerly in the employ of the Harbour Board as a plumber. It was now about three years since he deserted her; she believed that he had gone to Australia. He was aware that she was going to get a divorce, and had told her that he would pay the expenses. The only property that they had was a number of silver prizes that her husband had won, and which he had told her were worth £50.

Order of restitution granted, defendant to return to or receive the plaintiff on or before 30th June, failing which, to show cause on 12th July why a divorce should not be granted, with custody to plaintiff of the child of the marriage, defendant to contribute £3 a month towards maintenance, until such child shall reach the age of 16 years, and to pay costs of suit, personal service to be effected, failing which, one publication in a Cape Town newspaper, and one publication in the "Melbourne Argus."

#### MATTHEWS V. OOSTHUIZEN AND ANOTHER.

This was an action brought by Caroline Matthews, formerly wife of Pieter Marincowitz Oosthuizen (now deceased), of the Oudtshoorn district, against Frederick Simon Oosthuizen and the Estate Oosthuizen, for a declaration of rights in respect of a certain ante-nuptial contract.

From the pleadings it appeared that the plaintiff was one Caroline Matthews, who was also executrix dative in the estate of her late husband Pieter Marincowitz Oosthuizen, and the first-named defendant was the executor dative in the same estate. On the 15th March, 1902, the plaintiff married the late Pieter Oosthuizen, and an ante-nuptial con-

tract was executed at the time, and it was upon the ante-nuptial contract that she was now suing. The ante-nuptial contract declared that plaintiff's husband bequeathed or gave to her the sum of £2,000, upon the condition that the trustee, viz., Frederick S. Oosthuizen, as executor dative of the estate, should be obliged to invest the same at interest on good and approved security, and that during the lifetime of the husband he should be entitled to the interest on the £2,000, and at his death the plaintiff should be entitled to the interest on the £2,000 for her life. Should any differences arise between them during marriage, and a separation take place, then the gift must be void. Then, upon the death of the plaintiff, the sum of £2,000 should become the property of any children of the marriage, and should there be no children of the marriage, it should be given to the brothers and sisters of the husband.

Sir H. Juta, K.C. (with him Mr. Pyemont), was for plaintiff; Mr. Joubert was for the first defendant; in his capacity of executor dative of P. M. Oosthuizen; Mr. Benjamin appeared as *curator ad litem* of the minor.

[De Villiers, C.J.: Is the same point raised now as was raised in the previous case? See 15, C.T.R., 46.]

Sir H. Juta: In the previous case there was no dispute about the ante-nuptial contract, but what Mrs. Matthews wished to claim in that action was that she was, under the will of her husband, entitled absolutely to this £2,000. As a matter of fact, the claim in the first action was withdrawn, and no judgment was delivered upon it.

[De Villiers, C.J.: Why was it withdrawn?]

Sir H. Juta: Because it became apparent, in the conduct of the case, that the contention was one that could not very well be supported. She claimed that she was entitled absolutely to the £2,000, quite apart from the ante-nuptial contract, as if the will had annulled the ante-nuptial contract. Counsel went on to say that the defendants now submitted to judgment, but they seemed to maintain that the estate of Pieter Marincowitz Oosthuizen should not pay the costs, because there seemed to be some sort of idea that this ought to have been claimed in the first action, and they drew attention to the fact that there was this original claim in the first action. Counsel read the pleas of the defendants from which it appeared that the first defendant submitted to the judgment of the Court, but prayed that, if any order be made upon the declaration, some person other than himself be appointed trustee under the ante-nuptial contract, and also that the estate of the late P. M. Oosthuizen be not ordered to pay costs. The plea of the *curator ad litem* was in similar terms, except

that the prayer was simply that the estate should not be ordered to pay costs.

[De Villiers, C.J.: Is the claim now the same as in the previous action?]

Sir H. Juta: Absolutely different; we have nothing now to do with the will, and we do not claim that we are entitled to this money absolutely.

[De Villiers, C.J.: But does not the question of election come in?]

Sir H. Juta said that there was no question of election on this claim. Counsel added that what £2,000 the late Pieter Oosthuizen was dealing with it was impossible to say. Pieter said it was on Zwartskraal, but they had not been able to find a property of that name. One of the allegations against the late Pieter was that he was of very intemperate habits. His lordship would see in the first part of the will a clause that was almost incomprehensible. Counsel submitted that, upon the pleadings and upon the original record, there was no reason why the plaintiff should not be entitled to the interest on the sum of £2,000 in terms of the ante-nuptial contract. It now appeared that the executor, Mr. Oosthuizen, said that he had never accepted the trust, and that was now admitted, and the matter of appointing a fresh trustee must form the subject of an application to the Court. The plaintiff would suggest that Mr. G. W. Steytler, of the Colonial Orphan Chamber, should be appointed trustee.

Mr. Joubert submitted that the plaintiff should have seen that the result of the compromise arrived at in the first action formed part of the order, and that this matter of the interest should have been included. If that had not been done, then the plaintiff should have come to court by motion. He submitted that unnecessary expense had been incurred by the present proceedings.

[De Villiers, C.J.: In any event, some expense would have had to be incurred.]

Mr. Joubert submitted that the whole matter might have been settled on motion with one counsel, instead of, as they had that day, four counsel.

[De Villiers, C.J.: I have seen one counsel appear in a trial, and three in a petition.]

Mr. Benjamin submitted that the very question now before the Court might have been raised on the first action, and that the costs of the present proceedings should not, therefore, come out of the estate. It seemed to him that the only way in which the will should be read was as a confirmation of the ante-nuptial contract.

[De Villiers, C.J.: To whom does the £2,000 go after the plaintiff's death?]

Mr. Benjamin: To the minor. Three-quarters of the estate go to the minor and also this sum of £2,000.

[De Villiers, C.J.: Who paid the costs of the previous action?]

Mr. Benjamin: Three-quarters were

paid by the estate, and one-quarter by P. M. Oosthuizen's father.

Sir H. Juta said that he did not see what the defendants had come into court for, unless it were intended to throw some doubt on the ante-nuptial contract. Why did not defendants admit the plaintiff's claim at the time she made it?

[De Villiers, C.J.: In strictness the costs would have to come out of the £2,000. Has the estate any funds?]

Sir H. Juta: Oh, yes; it is a wealthy estate now. The action was successful, and the surviving child is very well off.

Mr. Benjamin: Mrs. Matthews gets one-fourth and interest on the £2,000 and £100 a year for life.

De Villiers, C.J., suggested that the question of trusteeship should be settled at once to save further expense.

Counsel acquiesced in the proposed appointment of Mr. G. W. Steytler.

De Villiers, C.J., It is quite clear that the plaintiff is entitled to judgment in terms of the prayer of the declaration. There seems to have been some misunderstanding at the recent trial as to what the effect of the withdrawal of prayer (a) really was, but I think it was made clear by Sir Henry Juta at the time that there was a withdrawal only of the claim so far as it was a claim under the will, and that there was no intention to withdraw any claim which the plaintiff might have under the ante-nuptial contract. It appears to me, therefore, that the defendants would have been quite justified in consenting to the order without any further proceedings, simply consenting to the order, subject to the approval of the Court. That would certainly have saved expense. But I do not blame the defendants for defending the action, but if they did defend it I think it is only fair that the estate of Pieter Marinowitz should pay costs. The original action was brought on behalf of those interested in that estate, and it is really only a continuation of that action. The Court will, therefore, order, in terms of the prayer of the declaration, costs of all parties to be paid out of the estate of Pieter Marinowitz Oosthuizen. Then the Court will relieve Frederick Simon Oosthuizen from his trust as trustee under the ante-nuptial contract of Pieter Marinowitz Oosthuizen and plaintiff, and appoint Mr. G. W. Steytler as trustee in his place.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset. Defendant's Attorneys: Herold and Gie.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ARMSTRONG V. FEITELBERG { 1906.  
AND SONS. { Apr. 25th.  
" 30th.

This was an action for the return of the purchase price of a certain oil engine sold by the defendants, brokers and contractors, of Cape Town, to the plaintiff, an engineer, of Robertson. The plaintiff said that the engine was not up to the condition warranted. The plaintiff tendered to give back the engine and claimed £50 damages, with costs.

The plea alleged that the engine was in good order and condition, and that if it failed to work properly such failure was due to its having been unskillfully handled by the plaintiff or his servants.

Mr. W. P. Buchanan was for the plaintiff, and Mr. Alexander was for the defendants.

Peter Armstrong, an engineer and copersmith, of Robertson, said that he was well versed in the construction of oil engines. Some time ago he bought a Cornwall, and entered into an arrangement with a Mr. Heyneman for the working of it. He also hired a room in connection with the working of the mill, paying £1 a month for it. In August last he saw in a newspaper an advertisement that set forth that Feitelberg and Sons, of Lelie-street, Cape Town, had certain second-hand oil engines for sale. He entered into negotiations with Feitelberg and Sons, and eventually the firm wrote to him saying that they had a 4-h.p. Tangye converted oil engine that was remarkably simple to use; in fact, a child could work it. It was in splendid order and condition, would run at high or low speeds, and if purchased at the price of £55 it would be started and viewed by a competent engineer before it left the premises of the firm. Further letters followed, and Armstrong said that he was not sanguine about the usefulness of converted oil engines. Consequently all he would offer was £40. This the defendants said they could not consider, but, being anxious to do business, they would let the engine go for £50 down. Telegrams passed, and the engine was bought, the defendants saying that they would like to draw on plaintiff on sight, as the engineer's certificate would be sufficient guarantee that the engine was in good order. The certificate, dated August 15, stated that the Tangye converted oil engine No. 3,001 was in good order and condition, and next day the contract was concluded. Snapshots of the engine were sent to the plaintiff. After some delay in obtaining a tank for the engine,

plaintiff, about August 25, started the engine, and found that it would hardly go by itself, much less take a load. A letter was sent to the defendants embodying the defects of the engine. In the presence of Mr. Stewart witness found out that the engine would only go itself; as soon as the band was put on it stopped. The engine was not damaged in transit; it was very carefully looked after.

Cross-examined by Mr. Alexander: He could not expect to get a new engine at the price, although he thought that some of the internal parts should have been new. Piston rings were very brittle, but Mr. Stewart had never cautioned him against the manner in which he withdrew the piston from the cylinder. Stewart was not present when the piston was withdrawn, but a Mr. Cortes had taken the rings out. Mr. Cortes had never pointed out to him that owing to the manner in which the engine had been erected too much oil exploded at one time, with the result that soldering ensued. He wanted an engine to exert 4-horse power, and he had had an engine that had worked his mill. That engine, however, had been a steam one, and steam engines, he thought, exerted far more power than nominally indicated. A steam engine could be worked to double its capacity as indicated. He had no accounts of money disbursed in connection with the engine, but he had incurred loss of money in failing to carry out a pipe laying contract some distance from Robertson, owing to the defects of the engine. He estimated that he lost £10 profit, besides a number of days' work, which he valued at £1 to £1 5s. per diem. One portion of his works had been wrecked by a hurricane about that time, but that had not caused him to lose work. The defendants were the only cause of him losing work. About £6 to £7 of his claim for damages was incurred in obtaining legal advice, £4 4s. of which had been paid to Mr. Stewart. He could not produce receipts from oil-merchants, and had not brought his books to court. The second erection took place long after the issue of the summons, and the cost could not be included in the claim for damages in that summons. He used no oil in the erection of the second engine.

Re-examined: If he had done the work that he did on the engine for an outsider he would have charged £25 to £30. He had met Mr. Cortes in every way, and Cortes had had to confess that he could not make the engine work.

An engineer named Stewart said that the engine was defective. Cortes had made the engine work, but very irregularly. Witness did not see Armstrong handle the engine improperly.

Gert Petrus Nel, attorney for the plaintiff at Robertson, said that at the request of the defendants he had wired to Cape Town and ascertained costs



which, with local ones, amounted to about £15. Feitelberg, without prejudice, admitted that the engine was no good, and that he and Armstrong had arrived at a compromise. Feitelberg also said that the £15 would not kill him, and that he would send Armstrong another engine better than the one in question, and that Armstrong would have to meet him in the matter of damages, which would remain open until the other engine had arrived.

This concluded the evidence for the plaintiff.

Carl Voight stated he had some experience of mills, and in his opinion the one in question could not be driven by a 4-horse power oil engine.

Cross-examined by Mr. Buchanan: It would require a 6-horse power oil engine to run the mill.

Edward Thomas Brun, in the employ of the Goods Department of the C.G.R., gave evidence as to the delivery of the goods in a good condition.

Edward Feitelberg, in the course of his evidence, said that he was surprised when he heard complaints about the engine. He believed that the plaintiff did not understand the engine.

*Postea* (April 30th).

Thomas Ferguson, engineer, stated he saw the engine at the defendant's place before it was despatched to Robertson. It was a gas engine converted into an oil engine. He saw the engine work; there were no piston rings broken. The engine was fit for any ordinary work.

Cross-examined by Mr. Buchanan: He would not say it was in splendid working order; it was in good working order. The engine was not tried with a load.

Francis Leon Cortes, mechanical engineer, stated he had been in the trade about twenty years. Witness converted the engine for the defendant, and gave a certificate to the effect that it was in very good working order and condition. It was impossible to drive the mill with a 4-h.p. engine; it required a 6-h.p. engine.

This concluded the evidence.

Counsel having been heard in argument,

Maasdorp, J.: It appears that the plaintiff, who lives at Robertson, ascertained about the beginning of August last that the defendant, who carries on business in Cape Town, had an oil engine of 4-h.p. for sale. After some correspondence between the parties, an agreement of sale was entered into of this engine by the defendant to the plaintiff, upon the express condition that the engine should be in good order and condition. The real issue between the parties in this case now is whether the engine was in good order and condition. It was forwarded to Robertson, and was erected by the plaintiff about the 25th August,

and after the erection had been completed the plaintiff requested a Mr. Stewart, who lives at Robertson, and who is a locomotive superintendent of the New Cape Central Railways, to inspect the engine at the plaintiff's shop. Mr. Stewart is entirely a disinterested witness in this case, and from the way in which he has given his evidence, I say he is quite capable to express an opinion on the state of this engine. He discovered, on examination, that two of the piston rings were broken, and he said, upon his ascertaining that there was something wrong with the engine, that he suggested to the plaintiff that the piston rod should be extracted, and then he discovered that these rings were broken. He said some pieces were entirely gone, and he therefore comes to the conclusion that the rings must have been in a broken condition when they were put into the cylinder, and that the breakage could not have been caused by the extraction of the piston by the plaintiff. He also ascertained that the cylinder was suffering from the effects of wear and tear, and that the machine was not in a state to work. If Mr. Stewart is correct in the view he then took, it is quite clear that the engine was not in good order and condition, and I may say it will appear afterwards that the faults he detected were such as Mr. Cortes admitted did exist when he made the examination. Afterwards, upon discovering the condition of the engine, plaintiff communicated with the defendant, who despatched his engineer, Cortes, to make an investigation. After examining the engine, Mr. Cortes said, in the presence of Mr. Stewart and Mr. Nel that the engine was of no use in the condition it then was. He also said the cylinder would have to be bored out. Thereupon, Mr. Cortes leaves Robertson, and returned to Cape Town, and all the information the defendant received as to the condition of the engine he received from Mr. Cortes, because it was not communicated to him by letter by the plaintiff or his attorney, and we find that the information must have been necessarily that the cylinder required re-boring and a new piston adjusted, because, upon the information, the defendant telegraphed to the plaintiff, "Send piston pin and cylinder push." These were to be forwarded to Cape Town, upon the advice of Mr. Cortes, to be rectified before the engine could be fit for use. It was quite clear that Mr. Cortes was of opinion that at that time the engine could not do its work, that certain repairs were wanted. If this is so, the engine was not in good order and condition, and after further consideration the plaintiff might have repudiated the sale. Upon the offer by the defendant to do the necessary repairs, he was told by the plaintiff he might do it at his own risk. Thereafter, the defendant went to Rob-



ertson, together with his engineer, and it appeared they then had a cylinder, which was repaired, and a new piston rod. The plaintiff was not obliged to take what would practically be a new engine at that time, but he was prepared to take it if it was found that the machine would work. After great efforts on the part of the defendant and his engineer, they failed to make the engine work, and Mr. Nel says that the defendant said to him that he could not get the engine to work properly, and he arranged a compromise with the plaintiff. Here we have an admission not only on the part of the defendant's engineer, but the defendant himself, that the engine could not be got to work, and the conclusion therefore is that it was not in good order and condition. It is not necessary for the Court to ascertain whether the engine in good order and condition would have developed 4-horse power, because they never arrived at the stage at which it could be properly tested. The Court therefore comes to the conclusion that the express condition of the contract that the engine was to be in good order and condition was not fulfilled by the defendant, and that the plaintiff is entitled to damages. The plaintiff claims £50 damages, but it seems to me that a large portion of it consists of a good deal of time that he says was wasted in waiting for the arrival of the new machine, and repeated attempts made by him to make the first engine work. It was in the power of the plaintiff from the very first to have repudiated the contract when he found that the engine was not up to the warranty, and the plaintiff is not entitled to lie by and accumulate his damages for a long period until the arrival of the new engine. He was willing to do so for his own benefit and advantage, and the Court cannot allow all the loss and personal labour which he suffered in the meanwhile. It appears quite clear that he went to some expense in erecting the engine, in removing it from the station to his shop, in employing labour, and certain material was consumed in attempts to get the engine to work. On the whole, I think it brings up the legitimate damages to about the sum of £30, and judgment will therefore be entered for the plaintiff for £30 with costs, and the Court will declare the plaintiff to be a necessary and material witness.

[Plaintiff's Attorneys: Herold and Gie. Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

## SUPREME COURT

[ Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1906.  
Apr. 26th.

Mr. W. Porter Buchanan moved for the admission of John Pritchard as an attorney and notary.

Application granted and oaths administered.

Mr. J. E. R. de Villiers moved for the admission of Philippus Albertus Marais as an attorney and notary.

Application granted and oaths administered.

Mr. Bailey moved for the admission of Charl David Burger as an attorney and for leave to take the oath before the R.M. of Bethulie, O.R.C.

Maasdorp, J.: The rule is that applicants for admission residing in a foreign country must appear before the Court or give very good reasons.

Mr. Bailey said that he would ask, then, that the applicant might take the oaths before the R.M. of Burghersdorp.

Maasdorp, J., said he could not consent to that proposal.

Mr. Bailey (in answer to the Court) said that the applicant had served his articles in this colony, partly in Cape Town and partly at Queen's Town and Sterkstroom. He was now living in the Orange River Colony.

Maasdorp, J., said that that put a different aspect on the matter. The application would be granted, with leave to take the oaths as prayed.

Mr. Molteno moved for the admission of Hendrik van der Graaff le Roux as an attorney and notary.

Application granted and oaths administered.

### HARRIS V. EXECUTORS, ESTATE OF THE LATE HARRIS.

Mr. Searle, K.C. (for plaintiff) asked for the indulgence of the Court in order to make a statement in regard to this case. He said that a settlement had been effected. An action was brought by Mrs. Harris, widow of the late Mr. John Harris, of Cape Town, against the executors testamentary in the estate for a declaration of her rights under the will of Mr. Harris, and, after the pleadings had been closed and certain evidence taken, the parties had come to a settlement.

Sir H. Juta, K.C. (for the executors) said that he consented, subject to the Court's approval. The late Mr. Harris carried on business in this colony, and then went to England and got married. Mr. Harris returned to this colony and carried on business here with Mr. Cleghorn under the style of Cleghorn and

Harris. Eventually he made a will in England. He subsequently died. According to that will he stated that he had a domicile in the Cape, and he wished his will to be construed according to Cape law, but he made no reference to the fact that he had been married to his wife without any settlement, and Mrs. Harris, therefore, brought an action to have it declared that she was entitled to half of the estate, having been married in community of property, and she also claimed certain legacies which had been bequeathed to her by her husband under his will. The pleadings were filed, and the parties wished to come to a compromise, and the approval of the Court was required because there were certain minors interested. The matter had been referred to the Master, who was of opinion that it would be in the interests of the minors that this compromise should be effected. The compromise was in effect this: Mrs. Harris was to give up her right to the half of the estate, and she should have an income from the estate. He (counsel) would submit that, altogether, this was really a good settlement.

Mr. Searle read the consent entered into between the parties, which was as follows: "We, the attorneys respectively for the plaintiff and defendants, do hereby agree to judgment being entered in the following terms: (a) Plaintiff shall withdraw her claim to one-half of the whole estate, left at the death of the late John Harris; (b) the defendants shall transfer the residence of the deceased, known as Beech Hurst, and its grounds, situate in the Gardens, Cape Town, to the plaintiff free from any cost or expense; (c) the plaintiff shall receive during her lifetime from the estate of the late John Harris an annuity equal to one-half of the net income of the said estate, provided that the income to be paid her shall never be less than £2,500, nor more than £3,500 per annum; (d) she shall be entitled to the special bequest of movables plate, linen, and other requisites mentioned in the will of the said John Harris, and to the legacy of £1,000; (e) this consent shall be subject to the approval of the Hon. the Supreme Court, in so far as the interests of the minor heirs may be thereby affected and subject to the written approval of the major heirs; (f) the costs of the action shall be paid by the defendants."

Mr. Searle added that the major heirs had consented. It seemed to be in the interests of all parties that this arrangement should be come to.

Maasdorp, J., made an order in terms of consent paper.

## PROVISIONAL ROLL.

LENNIKS V. CORONEL. { 1906.  
Apr. 26th

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £60, less £9 3s. paid on account; bond due by reason of the non-payment of instalments of capital. Counsel also applied for the property hypothecated to be declared executable.

Order granted as prayed.

## ESTATE TURNBULL V. COWLEY.

Mr. Lewis applied for this matter to be postponed till next Thursday.

Defendant's husband appeared, and asked that the case should be heard now. He said that he had to dispute the amount and to complain of short service of summons.

Maasdorp, J., said that full time had been allowed by the rules of Court as regarded service.

Mr. Cowley said that all the amounts were quite wrong.

[Maasdorp, J.: These allegations must be on affidavit. We can't take a mere statement.]

Ordered to stand over till Thursday next, to enable defendant to file an affidavit.

## OLIVIER V. ESTATE JACOBS.

OLIVIER V. RACHEL, LAKAY, DAMON  
AND JOSEPH JACOBS.

Mr. Howes moved, in the first case, for provisional sentence on four mortgage bonds for £25, £30, £58, and £68 respectively, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Mr. Howes also moved in the second case for provisional sentence for interest on a notarial bond for £125, the arrear interest claimed being £14 8s. 4d. Counsel said that the original claim was for provisional sentence on a bond by reason of the non-payment of interest, but it now appeared that there was no provision to this effect in the bond.

Mr. Alexander submitted that the plaintiff had come to the Court with quite a new case, and that he should be ordered to pay costs of the day. Counsel proceeded to read an affidavit by Rachel Jacobs (the executrix in her husband's estate) and the children, who said that it was intended to take steps as soon as possible to discharge the indebtedness. The deponents also asked for an account as to the payments made.

Mr. Howes said that his client had already handed over a statement of

account to the other side. Counsel read an affidavit by Mr. T. Smith, of Oudtshoorn district, in whose favour the bonds were originally granted. Mr. Howes added that the defendants had not tendered interest, the interest was due, and he submitted that plaintiff was entitled to interest.

Mr. Alexander, in reference to the first case, read an affidavit by Rachel Jacobs, and said that tender was made before issue of summons by their attorney of the capital amount of the bonds with interest, but plaintiff's attorney demanded costs, and to this proposal defendants would not consent.

Mr. Howes read an answering affidavit by Mr. Gert C. Olivier, who said that the tender was informal and invalid, and that he had been at all times willing to withdraw the case on payment of the amount due and costs.

Mr. Alexander said that it was only an after-thought on the part of plaintiff's attorney that the defendants' tender was invalid and insufficient.

Maasdorp, J.: In the case of Olivier v. Estate Jacobs, plaintiff claims the capital amount of four bonds, together with interest. It appears that on the 29th March, 1906, the defendant's attorney wrote a letter stating that he tendered the amount on behalf of his client. It does not appear that there was any actual tender made in the ordinary form, in which tenders are regarded as effectual, but on the 30th, plaintiff's attorney replied stating that he declines to accept the defendant's tender, unless costs of summons to date are tendered in addition to capital and interest. It appears clear from that that the tender was regarded as insufficient as to the amount. The claim was made that the tender should be increased by adding the costs of summons, and if that were tendered then the tender would be regarded as sufficient. It appears, however, that the costs of summons had not been incurred on that date, and, consequently, the plaintiff was not entitled to such costs. The plaintiff now says that that claim must have been made through inadvertence, because his attorney must have been under the impression that the summons had already been issued, but, as a matter of fact, it had not been issued, and the defendant was not liable for these costs. I take it that, as between the parties, the tender in all other respects was, therefore, sufficient, and the Court will now hold that it was entirely sufficient, because nothing more was due. Judgment will now be entered on the four bonds with interest, plaintiff to pay the defendant's costs. In the case of Olivier v. Rachel Jacobs and three others, a claim was made for the capital amount of a bond, together with interest. That claim was opposed by the defendant on the ground that the capital amount was not due. The ground on which it had been stated

that the capital had become due was that the interest had not been paid. It now appears that there was no provision in the bond that upon the interest not being paid the bond should become payable. Consequently, the capital amount of that bond was not yet payable. The interest, however, was payable. The defendant, however, only comes into Court on the ground that the principal was not due. Judgment will be given for the interest, plaintiff to pay costs.

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ESTERHUYSEN V. KRIGE.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

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HARGREAVES AND ANOTHER V. SAPAMLA AND OTHERS.

Mr. Swift moved for provisional sentence on a mortgage bond for £160, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

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SPIILHAUS AND CO. V. KRUMMOCK BROS

Mr. Swift moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

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NORTHERN ASSOCIATION COMPANY V. GOTTSCHALK.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £400, with interest, less £31 8s. 9d., paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for the rents, which may become payable, to be attached.

Order granted.

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MOWBRAY MUNICIPALITY V. WHITE.

Mr. Watermeyer applied for the discharge of a provisional order of sequestration.

Provisional order discharged.

**DU PLESSIS V. FAURE AND WIGGIT.**

Dr. Greer was for the plaintiff, and Mr. Searle, K.C., appeared for the first defendant. Counsel for the plaintiff moved for provisional sentence on a promissory note for £1,294, and Mr. Searle opposed on behalf of Faure, whose affidavit set out that if he did sign a promissory note in favour of the first defendant, it was done under misapprehension and misrepresentation.

Provisional sentence granted against Wiggit, with costs.

Provisional sentence refused against Faure, with costs, with leave to go into the principal case.

**ILLIQUID ROLL.**

WILSON V. DAVIES. } 1906.  
Apr. 26th.

Mr. Sutton moved for judgment under rule 329d for £65 10s., less £15 paid on account, for rent, with interest *a tempore morae*, and costs of suit.

Order granted.

**GUTHRIE AND THERON V. SWALES.**

Mr. Watermeyer moved for judgment under rule 329d for £61 18s., balance of account for services rendered and moneys disbursed.

Order granted.

**WHITE, RYAN AND CO. V. FLORIDA.**

Mr. Lewis moved for judgment under rule 319 for £50 5s. 11d., balance of account for goods sold and delivered.

Order granted.

**TRUSTEE. INSOLVENT ESTATE RAUBENHEIMER V. RAUBENHEIMER AND ANOTHER.**

Mr. Searle, K.C., moved for judgment under rule 319, in default of defendant's appearance, for an order in terms of the declaration for an ejectment against the first defendant upon payment to the second defendant of the sum mentioned in the will. Counsel said that the matter arose out of the construction of a will. The action had been brought by the trustee in the insolvent estate of the first defendant, one of the sons of the testators. The will provided that the first defendant should occupy a portion of the farm Klein Doorn River, subject to payment of a certain rental to the second defendant, who was the mother of the first defendant. The trustee offered to pay the rental to the mother as provided in the will, thus taking the place of the son. Counsel

added that an order was only asked as to one half of the farm.

Maasdorp, J.: I think, under all the circumstances, the parties not appearing, judgment will be given in terms of the prayer of the declaration.

Judgment entered accordingly.

**ZEEDEBERG AND DUNCAN V. SCHACH.**

Mr. Douglas Buchanan moved for judgment under rule 319 in terms of declaration for £60, with interest, *a tempore morae*, and costs of suit.

Order granted.

**MOSTERT AND SON V. BERMAN.**

Mr. Roux moved for judgment under rule 319 for £10 18s. 5d. and for certain property to continue under attachment.

Order granted as prayed.

**JONAS V. ISAACS AND OTHERS.**

Mr. P. S. T. Jones moved for judgment in terms of consent against defendants individually and in the various capacities in which they were sued.

Judgment in terms of consent.

REHABILITATIONS. } 1906.  
Apr. 26th.

Mr. P. S. T. Jones applied on behalf of Charles William Leach for his discharge from insolvency.

There was an affidavit of full and fair surrender. The applicant had been in partnership with one Rowson, who had since been rehabilitated.

Application granted.

Mr. Bailey applied on behalf of Hendrik Albertus Smit, jun., for his discharge from insolvency. There was nothing unfavourable in the trustee's report.

Application granted.

**SALIE AND MOHAMED V. COLONIAL GOVERNMENT.****Immigrants—Domicile.**

Mr. Rowson was for the applicants and Mr. Howel Jones was for the Government. Counsel for respondent pointed out that there had not been proper notice, but he was prepared to go on. The application was for an order restraining respondent from deporting applicants. Mr. Jones put in affidavits by the principal immigration officer, Mr. Cousins, which set out that the applicants were unable to comply with the requirements of section 2 A of the

Immigration Act 47 of 1902; in that they were unable to make their application in a European language. Neither had vested interests in the country, and both had signed an undertaking to leave the country in two months.

Mr. Rowson: Two questions arise in this case—(1) were the applicants domiciled in the Transvaal; (2) does domicile in the Transvaal count as domicile in South Africa for the purposes of Act 47 of 1902?

That the applicants were domiciled in the Transvaal is evident. A domicile is a place where a man voluntarily fixes his abode and constitutes as the centre of his business operations. It is said that these men carried on the business of fruit hawkers. Very well, that is an honest occupation. It is not pretended that they carried on this business outside the Transvaal, where they had been resident, one for 5 years and the other for 7. Then as to residence: a residence does not necessarily mean a mansion, or any place comprised within four walls. A residence may be a tent, a wagon or a common lodging house. A man may remove from one lodging house to another, just as a millionaire may change his residence from Berkley-square to Park-lane, but he does not thereby forfeit his domicile. My point is that these men had "the centre of their business operations" in the Transvaal, that they resided there, and that therefore they were domiciled there.

As to my second point, that has already been decided in *ex parte Laloo* (15, C.T.R., 992). There it was held that domicile in Natal is domicile in South Africa. Well, in the present case we have only to read "Transvaal" for "Natal" and we have the very same case.

Mr. Jones was not called upon.

Maasdorp, J.: The officer in charge of the Immigration Department alleges that the applicants, as prohibited immigrants, were not entitled to remain in the country, not having entered it under such conditions as are sanctioned by Act 47 of 1902. It appears that they are not able to comply with the requirements of the Act, and the absence of such compliance makes them prohibited immigrants, unless they can satisfy the officer that they are persons domiciled in South Africa, in which case the disqualification in the provisions of the Act would not apply to them. Upon the officer discovering that these two persons had entered the country, he found they could not comply with the requirements of the Act. He ascertained from their conversation that they had no permanent residence anywhere. He therefore came to the conclusion that as they were unable to comply with the conditions of the Act, and were not domiciled in South Africa,

that they were prohibited immigrants. The question arises, was the immigration officer right upon the facts. The only allegation the Court has now is the bare statement by the applicants, who appear to have their home in India, that the one has been domiciled in the Transvaal for five years, and the other for seven years. They seemed to have carried on the business of small shopkeepers or hawkers in different places in the country. There was nothing in their affidavits to satisfy the Court that they had their domicile in South Africa. It was necessary for them to put certain circumstances before the Court by which the Court could arrive at a conclusion as to the intention of those people. They seemed to have satisfied the officer they had no permanent residence in South Africa. He informed them they could not stay; thereupon they undertook to leave the country within two months. Upon the information the officer had before him he was right in deciding that the applicants in this case were prohibited immigrants. There was no satisfactory proof that they came under the exception of subsection F of section 3 of the Act, and the application would be refused.

## GENERAL MOTIONS.

FICK V. JANSEN AND OTHERS. { 1906.  
{ Apr. 26th.

Mr. Roux was for applicant, and Mr. Benjamin was for the respondent.

Mr. Roux moved to make absolute a rule calling on the respondents to show cause why they should not be ordered to give up possession of a plot of ground in the division of Piquetberg, of which the petitioner was the registered holder.

Maasdorp, J., said it was impossible for the Court to dispose of the rights of the respondents in this manner. The ordinary process for obtaining possession of land would be by form of action. It appeared Mr. Fick sold certain land to a Mr. Tanner, who sold portion of the land to the respondents. The respondents entered into possession, and they alleged they had made certain improvements, for which they ought to have compensation. The application would be refused, leaving it to the applicant to take any other steps he thought fit; but it might be advisable for him to consider if the respondents were not taking up a fair position. The application would be refused, with costs, and His Lordship added that he was not deciding anything in favour of the respondents upon the claim afterwards to be decided.



**KHAN V. INSOLVENT ESTATE SHAM-SUDIN.**

Mr. P. S. T. Jones, for the applicant, said he understood there was no opposition. Counsel applied to have a rule made absolute restraining the respondent from parting with the proceeds of a certain sale.

Rule made absolute, the question of costs to stand over.

*Ex parte* **THE INSOLVENT ESTATE HERMAN.**

Mr. Inchbold moved as a matter of urgency, on the petition of Messrs. Liberman and Buirski, large creditors in the estate of Herman, for the appointment of provisional trustees in the estate, the assets of which consisted for the most part of forage and other perishables. The estate was provisionally sequestered on April 24.

Maasdorp, J., said the Master would appoint a curator when the estate was only provisionally sequestered. The application would be refused.

**VAN BLERK V. ESTATE AURET AND VAN BLERK.**

Mr. McGregor was for the applicant, and Mr. Sutton was for the second respondent.

This was an application in respect of interest of a share of inheritance under the will of the late Abraham Auret, who was the father of the applicant, for an order authorising the executors in the estate of her father to pay over the interest due to the petitioner upon receiving a receipt for such payment, without the assistance of her husband. The parties were married in community of property, the husband was at present paralysed, and the parties had been separated for a period of 16 years. A further order was asked for that the husband's signature was not necessary with the payments.

Mr. Sutton pointed out that the parties were married in community of property, and the husband was entitled to the administration of this fund. If assistance had to be obtained for the husband, a *curator bonis* should have been appointed.

Maasdorp, J.: It appears that there are certain moneys in possession of the respondent executors, in which the applicant and her husband have a joint interest. She asks for leave to receive the moneys, and to grant an acquittance to the executors, which will be sufficient to relieve them of responsibility. In his condition he cannot render her any assistance. Under the circumstances, the Court will grant to her as one of the interested parties the power to receive

the interest already due. This, of course, does not dispose of the question as to the rights between the husband and the wife as to this money. That remains an open question. She shall receive it on behalf of herself, and her husband. That will leave the matter open to the husband to assert any rights he may have. The Court will not grant a general order, because this application is only on the ground she cannot avail herself of her husband's assistance. There will be a limited order that the executors are authorised to pay the interest already due to the applicant, and take her receipt as to the acquittance. There is a further reason for acceding to the application, as there had been no objections in the past. If there was any opposition it would be necessary to come to the Court with repeated applications. The applicant will be authorised to receive the money and deal with it as she thinks proper, the executors to pay the interest already due to the applicant, and to receive the acquittance. There will be no order as to costs. Respondent has not assisted the Court in the slightest degree in this matter.

*Ex parte* **KOOMIN.**

Mr. J. E. R. de Villiers moved on behalf of petitioner for leave to sue his wife by edictal citation for an order of restitution of conjugal rights, failing which, a decree of divorce. Petitioner said that he resided at Villiersdorp, that his wife refused to return to him, and that she had been travelling through Europe and America. She was last heard of in Johannesburg, where petitioner believed she was now living. The parties were married in London, England.

Leave to sue by edictal citation granted, citation to be returnable on the 14th July, personal service, failing which publication once in the "Government Gazette," "Star" (Johannesburg), and "Cape Times," with leave to serve in tendit, and notice of trial with citation.

*Ex parte* **HAMMERSCHLAG.**

Mr. Van Zyl moved for leave to sue one Pieter J. Kuhn by edictal citation, for a debt of £47 due to the late partnership of Adler and Co., of which petitioner, who resides in the Kenhardt district, had become sole partner. Petitioner believed Kuhn was travelling about the Namaqualand district under an assumed name, or that he was concealing himself.

Leave to sue by edictal citation granted, citation to be returnable on the 14th July, personal service, failing which publication once in "Gazette" and "Ons Land."

*Ex parte DAY.*

Mr. Molteno moved on behalf of petitioner, who resides at Wynberg, for leave to sue his wife, Charlotte M. Day, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Petitioner said that he was married to defendant at Wallington Church, Surrey, England. He came out to this colony in 1902. His wife had several times come out to him, and had gone back to England. She was now in England, and refused to come out here and reside with petitioner.

Leave to sue by edictal citation granted, citation to be returnable on July 2, personal service to be effected, with leave to serve intendit and notice of trial with citation.

*Ex parte CURATOR BONIS OF MEYER.*

Mr. J. E. R. de Villiers moved for leave to partition certain landed property in which Meyer had an interest under the will of his parents.

Order granted appointing applicant *curator ad litem* to represent Meyer in the partition of the landed property, costs to come out of Meyer's estate.

*Ex parte KNIGHT.*

Mr. Bailey moved for an order authorising petitioner to sell certain shares in which minor children by petitioner's first marriage are interested. The Master reported favourably.

Order granted in terms of Master's report.

*Ex parte ESTATE JOYCE*

Mr. Sutton moved on behalf of the assumed executor in this estate for an order authorising transfer of certain property at King William's Town to John Malachi Joyce. J. M. Joyce claimed that he was entitled to the land by a gift from his father. An action was pending in the E.D. Court. J. M. Joyce was prepared to take transfer of the land at the sum of £825. The Master's report was favourable. Counsel said that a question arose as to a certain interest of G. B. Christian and Co. in an inheritance of Peter Patrick Joyce.

Maasdorp, J.: There is no necessity to come to this Court to have minor's interests protected. An action is pending in the Eastern Districts Court, and this is a consent to settle that action. The matter will be referred to the Eastern Districts Court, where the action is pending.

*Ex parte NEWMAN.*

Dr. Greer moved on behalf of petitioner, who is of Cape Town, for leave to

sue his wife *in forma pauperis*. Petitioner said he wished to institute an action for divorce against his wife on the ground of her alleged adultery with one Abraham Julius, from whom he proposed to claim damages.

Subject to counsel's certificate being filed a rule *nisi* was granted, to be returnable on the 3rd May.

*Ex parte THE EQUITABLE FIRE ASSURANCE AND TRUST CO.*

Mr. Searle, K.C., moved on the petition of two directors and the secretary of the Equitable Company for an order authorising the company to resign, as co-executors in the estate of the Rev. Theo. Atkinson and wife. The business of the Equitable had been sold to the Northern Insurance Co., and the company had been wound up.

Order granted releasing the Equitable Co. from their trust as executors, no order as to appointment of other executor or executors.

KONING V. KONING.

Mr. Sutton moved on the petition of Mrs. Koning for a decree of divorce against her husband, with costs, plaintiff to have custody of the child, with payment of maintenance by defendant at the rate of £2 a month, until the said child attains its majority. Counsel put in an affidavit to the effect that respondent had failed to comply with the order of restitution granted by the Court.

Rule made absolute as prayed, first payment to be made on the 1st May under the maintenance order.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

WIGGETT V. WIGGETT. { 1906.  
Apr. 27th.

Mr. Benjamin was for the plaintiff, and there was no appearance for the defendant. The action was brought by Alfred Wiggett, of Oudtshoorn, against his wife, Emilie Rosie Wiggett, for a decree

of restitution of conjugal rights, failing which a decree of divorce by reason of her wrongful desertion. Counsel for the plaintiff said that the matter had previously been before the Court, when it was found that there was not sufficient publication in the "Gazette" of the substituted service, and the Court extended the return day, and ordered due publication to be made. The Court allowed the evidence of the plaintiff to be taken on commission. The plaintiff resided at Oudtshoorn, and was married to the defendant, who now resided at Epsom, Surrey, in Cape Town, on the 8th April, 1899. About 1900, at Hordsham, Sussex, the defendant deserted the plaintiff. The plaintiff's evidence set out that the defendant agreed to live with him if he remained in England. He bought a farm at Thames Ditton, and after returning from the market one day found that his wife had left. Since his return to South Africa the defendant had written asking for money, and he had offered to pay her expenses out to South Africa.

A decree of restitution of conjugal rights was granted, the defendant ordered to return to or receive plaintiff on or before June 30, failing which, to show cause by the 12th July why a decree of divorce should not be granted, and why the defendant should not be prepared to forfeit the benefits under the ante-nuptial contract.

#### TOORT V. DALY.

This was an action brought by Herbert Toort, of Observatory, to recover from Marion J. Daly, of Rosebank, £135, with interest, on a promissory note.

The plaintiff's declaration set out that on the 8th April, 1905, the defendant signed a promissory note in favour of the plaintiff and one Thomas Fisher for £220, which became due on June 8, 1905. The note was given for valuable consideration, viz., £150 sterling paid to the defendant by the plaintiff, and £50, which was agreed to be paid to defendant by Fisher, the balance, £20, being in respect of interest and charges. Fisher afterwards was unable to pay the £50, and made over the note to the plaintiff, who became sole holder. When the note became due, defendant owed plaintiff £165, being £150 advanced and £15, the proportionate amount of £20 interest. The amount was reduced by payments made by the defendant of £15, £5, and £10.

The defendant, in his plea, stated that the sum of £200 was actually paid by the plaintiff and Fisher to J. J. van Straaten at the defendant's request. He did not admit that Fisher was unable to advance the £50. He denied that the plaintiff became sole holder of the note before it was overdue. On the 19th April, 1905, the defendant paid to Fisher

the sum of £135 on account, and Fisher received the payment on behalf of himself and plaintiff, who declared himself as satisfied. In June, it was agreed that the defendant should feed, stable, train, and race two ponies, the property of the plaintiff, and plaintiff should pay the usual rate of £10 per month, and that plaintiff should pay certain moneys disbursed in the racing of the ponies at Klapmuts. There was due to the defendant in respect of the agreement £57 18s., which extinguished the balance due to the plaintiff under the note.

Plaintiff, in his replication, denied that Fisher had any authority to receive the money, or that defendant informed him before the due date of the note that the payment was made to Fisher. On May 17, 1905, plaintiff bought from Fisher two racing ponies, named Character and Seclusion, and asked Fisher to arrange with the defendant to continue looking after the horses on the same terms as Fisher had paid, viz., £1 a week for both ponies. Defendant was not a licensed trainer, and could not, by Rules of Racing, accept fees for training horses. Plaintiff claimed judgment for £135, less £32 8s. tendered for training and other expenses.

Mr. Roux for plaintiff; Mr. J. E. R. De Villiers for defendant.

Mr. Roux submitted that the onus was on the defendant, and Mr. J. E. R. de Villiers said he was quite willing to take the onus, and called

M. J. Daly, defendant, who stated his present occupation was speculating. Last year he had two racing ponies, and had stables at Rosebank. His nephew, Van Straaten, was racing on a large scale, and with special permission from the Jockey Club he trained horses for friends. There was no partnership between Van Straaten and himself. When he met Fisher first he explained to him that Van Straaten had a mare which could not be beaten, and he asked Fisher for the loan of £200 with which to make cash bets. Before the 8th April the plaintiff, Toort, whom he had never seen before, came to witness's house with Fisher. Fisher said he was glad to say that they could let witness have the money for two months. Van Straaten was present. While witness was writing out the note Fisher paid out to Van Straaten £200. The note was made payable two months after date on the suggestion of Fisher. He thought he had a "dead certainty," and therefore the £20 interest was immaterial. When the meeting came off the good thing materialised, but they did not win so much as was anticipated. As security witness wrote out promising two racehorses, and undertaking not to dispose of them, which Van Straaten was to sign. At Fisher's offices £135 was paid on the note on the 19th April, and he gave a receipt for the money. Witness did not actually tell Toort

about the money paid to Fisher until the due date. Both Fisher and Toort came to witness's house the night before the note became due, and both reminded him that the note had to be paid next day. Nothing was said of a balance. Next day witness and Van Straaten called, and witness asked Fisher and Toort for an extension of time for the balance. Toort, when witness handed him £15, asked him not to pay Fisher any more on the bill, as he had had enough out of it. Fisher afterwards went insolvent. Witness claimed £10 a month for the keep of the pony, and plaintiff tendered 10s. a week.

The plaintiff went out to Klapmuts and took the pony Seclusion from Van Straaten, but defendant was lax in allowing him to do so.

Cross-examined by Mr. Roux: Between the 31st August and 12th September he did not make an offer of £85 to the plaintiff. Subsequently witness made an offer of £100 to the plaintiff without prejudice. Witness was positive that £200 had been paid, although the plaintiff said that only £150 was paid. It was distinctly understood that he should pay the bill to Fisher. He did not agree to take the horses at a small fee, in order to get the chance of betting on them.

J. J. van Straaten stated that last year he pursued racing all over the country, with his headquarters at Rosebank. Witness received the £200 on the promissory note while the defendant was writing out the bill. Witness went as security. The money was required to back a “good thing” at Klapmuts, and although he could bet on account, he preferred to send cash into the ring with strangers in order to get a better price. He saw defendant repay £135 of the money to Fisher and £15 to Toort on June 8. The usual cost of keeping racing ponies was £10 per mensem. Each pony had to be exercised at a certain hour of the morning, and each pony needed a boy at £1 per week to ride it. It would be impossible to keep a racing pony for 10s. a week.

Mr. De Villiers: So what the plaintiff says about 10s. a week being the charge is wrong?

Witness: Yes; for 10s. a week the pony would have to feed, groom, and water himself.

Mr. De Villiers: And then he would be to the bad.

Cross-examined by Mr. Roux: Witness said that no entry was made on the note when the £135 was paid.

[De Villiers, C.J.: Do you keep books?—Yes; Daly does.]

Where are they?—At home.

Mr. De Villiers: I am instructed, my lord, that the only book is the betting book, which would not help us much.

[De Villiers, C.J.: But would it not

show how much was received on April 8?]

Witness: I don't know, my lord; Daly is a very careless man with his books.

Philip Sydney Hipwell, a trainer of 12 years' standing, said the usual fee for horse keep was £11 to £12 per month, and that did not include veterinary fees.

Mr. De Villiers closed his case.

Herbert Toort, the plaintiff, who is the caretaker of Rhodes's Buildings, St. George's-street, Cape Town, said that he advanced £150 and Fisher £50 to Daly, in exchange for a promissory note for £220. On June 8 defendant told him that he could not pay the money in full, and gave him a cheque for £15 in the Grand Hotel. Van Straaten was not present, and defendant said nothing about having paid £135 to Fisher. On June 3 plaintiff purchased two racing ponies from Fisher for £210 and expected that Daly would keep the ponies for the same amount as he had kept them for Fisher.

Cross-examined by Mr. De Villiers: He had lent Fisher money several times. To a certain extent he had relations with Fisher. At present he was in difficulties through lending money to people. He had no right to. At present he was under a charge of fraud, and it was stated in court that Fisher had tried to settle the matter. It was only lately that he went in for racing properly. He could not understand why the defendant made out the note for £220 when witness only paid £150, but Fisher was to pay the balance.

By His Lordship: He could not explain why an item of £7 dated the 23rd May, to make up the purchase-price of £210 to Fisher, was entered on a document dated May 17.

Thomas Fisher, carpenter, of Observatory-road, stated that he promised to try and raise the money for Daly, and he introduced the plaintiff, who paid £150 to Van Straaten. Witness did not succeed in raising the £50 which he promised. The defendant lent witness £75 in June. The defendant suggested that a receipt should be given for £125—£50 which was not received and £75 money lent, as the £50 was not taken off the plaintiff's bill. He never received the £135 as stated by the defendant. The two ponies, Character and Seclusion, were purchased by witness from Daly for £250, £75 being paid in cash and the balance in promissory notes. Witness only intended buying one pony, and he was induced to take the second through the promise of the defendant to keep the ponies at a sum not worth mentioning. Witness subsequently sold the ponies to the plaintiff for £210, the agreement being that the defendant would keep them as previously arranged upon. The document drawn up on the Klapmuts racecourse was a bogus

one, as the ponies were running in error under Van Straaten's name.

Cross-examined by Mr. De Villiers: The whole thing was done in a most friendly manner; he looked upon Daly as his best friend in Cape Town.

He did not receive the £135 on behalf of Toort; it was made up of £75 lent by the defendant and the £50, with £10 interest. The defendant owed witness money on gambling transactions. One of the ponies was still owned by Mr. Toort, and was stabled behind witness's house at Observatory.

De Villiers, C.J., referred the witness to a document which he signed purporting to have received £135 on account of the plaintiff and himself dated April 19.

[De Villiers, C.J.: According to your evidence this document is a falsehood from beginning to end?—I never received the money for Toort.

Then this is a falsehood?—I never intended it to appear as a falsehood.

Is it true?—No; I never received the money.

What made you write such a falsehood? Daly had lent me £75, for which I did not give a receipt, and with the £50 which I was supposed to have lent him and £10 interest.

It is nonsense; you know you are talking nonsense. Were you sober at the time? I was sober. I was not drunk.

Then you deliberately told a falsehood?—I was asked by Daly to put it in that way.

Then you ought to have refused. You seem to be a fine pair, you and Toort. That will do.

The defendant was recalled.

[De Villiers, C.J.: When do you say the two horses were sold to the plaintiff?—On the day of the races, for £250.

But you had already received £250, minus £60, from Fisher?—Yes.

What made you write on the 4th June that the plaintiff bought the horses for £250 from Van Straaten?—These horses belonged to Van Straaten until the £60 was paid.

Did you consider that was the truth what you wrote?—The understanding was that the monies should remain ours until they were paid for.

There was no purchase that day of the horses for £250 from Van Straaten, inasmuch as Fisher had already bought them?—That was an arrangement between Fisher and Toort.

Don't you see the whole of this thing is simply a falsehood: "I beg to offer you the sum of £250." How can he at that time make an offer to Van Straaten of £250 for a horse Van Straaten sold to Fisher. It is simply nonsense. The whole thing is false from beginning to end. Between the three of you it is difficult to know who is the worst.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The difficulty in this case is not to discover which of the different parties is deserving of credit, but rather who is less deserving of credit. The better course for the Court is to adhere as much as possible to the documents, because the oral evidence does not carry the case much further. Everyone of these parties involved have admittedly been parties to documents, which, on the face of them, were untrue. Now, first of all there is a document for £220. This document sued upon is a promissory note made by the defendant in favour of both Toort and Fisher for the sum of £220. I take it that was the amount advanced. Fisher does not now claim any share of this amount, and the question is whether Toort is to succeed in whole or part. Another document has been put in by which Fisher admits to have received on the 19th April from the defendant Daly the sum of £135, in part payment of this £220. The explanation given by Fisher as to this document is wholly unsatisfactory. I take it that that money was received, because I cannot assume a man guilty of framing that document if the money was not received. Then as to the question of authority on the part of Fisher to receive on behalf of Toort, I quite agree that this was a joint venture by which the two together agreed to make this advance. They were to receive the sum of £20 as interest for two months on the £220, which is a very high rate of interest, and it was a joint speculation on their part to find this money, and make this profit. The money was to be paid at the office of one of them, namely, at the office of Fisher, and I think there is sufficient proof of authority given to Fisher to receive the money on behalf of both. If the £135 was paid then it was a payment made to both of them. It is true that Fisher transferred his interest in this note after the due date to the plaintiff, and that might now give the plaintiff the right to sue upon the note; but it does not prevent the plaintiff from having to account for any payments made to Fisher, and, therefore, from the £220 there must be deducted £135, which is acknowledged by Fisher as being received on behalf of himself and Toort. Then there must further be deducted the sum of £30, which the plaintiff admits was paid to him in sums of £15, £10, and £5. Then there must also be deducted £6 6s., £9 1s., £5 1s., which the plaintiffs admits are expenses he is liable for in respect of fees, and the only further question is as to what the defendant might fairly be entitled to for the keep of these ponies. There is a great deal in what was said as to the benefits which the defendant himself would derive from the ponies being in his possession. It is clear from the defendant's own evidence that he was a betting man, and that he must have con-



sidered it a great advantage for the purpose of his betting, to enable him to be more successful in the betting, that he should have these horses on which to bet in his own stables, so that he would have the latest information in regard to their capacity. It was a great advantage, therefore, to him to have these ponies in his possession. I quite agree that he would not be entitled to the same charges which a trainer would be in similar circumstances not engaged in betting in the same way as the defendant was through his nephew, young Mr. Van Straaten. I am not inclined to allow more than £24, which is £12 in excess of what the plaintiff tendered. There is, therefore, a sum of £44 8s. to be deducted, which leaves a balance of £10 12s. still due to the plaintiff, and for that amount there must be judgment for the plaintiff, with costs.

[Plaintiff's Attorneys: Van der Byl and De Villiers. Defendant's Attorneys: Michau and De Villiers.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SILBERT, MAISTER AND { 1906.  
SHAGOM V. LURIE AND { Apr. 27th,  
KATZEW.

This was an action brought by Silbert, Maister and Shagom, commission agents, Cape Town, against Lurie and Katzew, of Cape Town, to recover two sums of £3 15s. 7d. and £37 8s. 3d., price of certain eggs sold and delivered and damages for alleged breach of contract.

From the pleadings, it appeared that the main issue was whether the defendants, who were jointly interested in this transaction, bought a consignment of eggs from the plaintiffs, on out-and-out terms, or conditionally upon the samples proving good and suitable. Plaintiffs, in their declaration, said that on the 21st February, 1906, they sold to defendants 86 cases of eggs, containing 30,648, at the rate of 10s. 6d. per 100, or a total sum of £160 18s., the terms being that defendants should take delivery of the eggs immediately at the plaintiffs' store. On the same date defendants removed two cases, each containing 360 eggs, but they had neglected, and still refused, to take delivery of the balance of 84 cases, and thereafter, on the 26th February, plaintiffs, after having given notice to defendants, sold the 84 cases, containing 29,928 eggs, in order to minimise the loss, the amount realised being 8s. per 100 or a total of £119 4s. 3d. Plaintiffs claimed £3 15s. 7d., price of two cases

taken by defendants, and £37 8s. 3d. damages for failure to complete contract of sale, based upon the difference between the amount realised on the balance and the rate at which defendants had agreed to purchase. Defendants, in their plea, admitted having bought the parcel in question, but said that it was a condition of the sale that they should take away two sample boxes from the consignment, and should the samples prove bad or unsuitable the sale should be cancelled, and all liability of defendants to plaintiffs should cease and determine. The eggs in the said sample cases had, on examination, proved bad and unsuitable, and the said sale was, by reason thereof, cancelled. Defendants denied that they were indebted to plaintiffs in any sum in respect of the 84 cases. They had tendered and hereby again tendered to plaintiffs the sum of £3 15s. 8d., being the price of the two sample cases, at the rate of 10s. 6d. per 100. Plaintiffs' replication was general.

Dr. Greer was for plaintiffs; Mr. Searle, K.C. (with him Mr. Lewis), was for defendants.

Dr. Greer submitted that the onus was upon defendants to open and prove their allegation that the sale was cancelled by agreement.

Mr. Searle submitted that upon the pleadings the evidence should be begun by plaintiffs.

Maasdorp, J., said that plaintiffs had better open the case.

Max Shagom (a partner in the plaintiff firm) said that on the 21st February his firm had for disposal, partly on commission and partly on their own account, several consignments of eggs from eight or nine different persons. Defendants called and negotiated with regard to the eggs. Witness asked 11s. 6d. per 100, and defendants offered 10s. 6d. They examined several cases—he should say seven or eight or nine, by taking out eggs and examining them. It was finally agreed that the price should be 10s. 6d. per 100, the consignment of 86 cases to be taken away the same afternoon. Witness's firm never sold conditionally, but always outright. No mention was made about samples being taken. On Friday, the 23rd February, defendants called at plaintiffs' office, and Katzew told witness that they had got information from Johannesburg that eggs had dropped, and that they could not take the parcel at the price. They said they would give £10 to plaintiffs if they would cancel the sale. Witness said that it was impossible for them to do so. He did not see defendants on the morning of the 22nd February; the statement made by defendants in their letter was incorrect. About the time of the transaction the market in eggs fell, both here and in Johannesburg. Witness sold the eggs remaining, partly on the

27th and partly on the 28th February. There was no doubt that the eggs were good; they had had no complaints from the person to whom the eggs had been sold. He should describe the produce as "good, saleable eggs." Defendants took and examined eggs from the two boxes in question while they were standing in plaintiffs' stores. Witness had an examination of the 84 cases made at their stores on Saturday, the 24th February.

Cross-examined: Witness believed that defendants carried on separate businesses. Eggs were generally tested by holding them to the light, sometimes by holding them in front of a candle. Nothing was said by defendants about taking away two boxes as samples. Defendants did not come and see him on the 22nd February, and say that the eggs were bad. Witness did not think it necessary to call in the defendants at the inspection on the 24th February, because he had called in two impartial people. He admitted having received a letter from defendants on the 23rd February, which he had not handed to his attorney. He had forgotten about the letter.

Aaron Silbert (another partner in the plaintiff firm) said that he was present at the transaction. Defendants agreed to take the lot at 10s. 6d. per 100, and mention was made of samples being taken.

Peter Millar, plaintiff's storeman, said that he opened about nine or ten cases of eggs at the request of the defendants on the 21st February. The consignments were Colonial eggs. Defendants took about half a dozen eggs from each case, and examined them in the light. He considered the sale to be outright. Afterwards, Mr. Katzew called, and removed two cases that he said he wanted quickly for a customer. Witness called the same evening at Katzew's store, and asked when they were going to take the remainder. Katzew said they would remove the remainder on the following morning.

Cross-examined: Witness considered the eggs to be good and useable. He should regard an egg as absolutely bad when it was black. He should not say that an egg marked with black spots was absolutely bad; such eggs were known as "spot eggs," and were bought by bakers. He should not say that if 160 of the 360 eggs bore black spots they were bad eggs.

H. Chiat, formerly of Saacks, Chiat, and Gumes, said that he was a produce merchant. He bought about 80 cases of eggs from plaintiffs on the 27th February, at 8s. per 100. The eggs were good and useable, and were subsequently sold by witness in different lots at prices varying from 10s. to 12s. 6d. per 100. He sent a quantity of the eggs to German South-west Africa for hospital purposes.

Cross-examined: Only a few eggs in the consignment were spotted. He sold some of the inferior eggs, which were broken or bad, numbering about 480, at 4s. per 100. It was not true that half of the eggs in 35 boxes were rotten.

Jan van Schoor Dreyer, Master at the Early Morning Market, said that the market in eggs dropped between the 19th and 28th, from 13s. 6d. to 11s.

George Chas. Ross, market agent, Cape Town, said that on the 24th February, at the request of plaintiffs, he examined a number of eggs taken from a large parcel, and found them to be good. They had two classes of eggs—fresh eggs, and eggs good, not fresh. In the latter class the customer must take the risk.

[Maasdorp, J.: Then eggs "good, not fresh," may include rotten eggs?]

Witness: Yes.

Mr. Searle put it to witness that if a box contained 160 eggs with black spots out of 360 he would regard that as unmarketable.

Witness: No, they are not unmarketable.

Asked when he considered an egg to be unmarketable, witness replied, "I suppose when it is rotten, black."

[Maasdorp, J.: Suppose a customer buys what you call a "good, not fresh" egg that proves to be rotten, you do not replace it?]

Witness: No.

Re-examined: Witness did not remember having found any eggs bearing black spots among those that he examined at plaintiffs' store.

Johan H. Pentz, market agent, said that he examined about ten eggs at plaintiff's store on the date in question. He regarded them as good eggs of the second class.

Mr. Searle: They were not first-class eggs?

Witness: No; they were not eggs that you could boil, except—

Mr. Searle: At your peril.

Witness (in further cross-examination) said he believed that these second-class eggs were used for baking. They were what one might call table eggs.

Max Hertzman, produce dealer, Cape Town, said that on the 21st February, Katzew told him that he had bought a parcel of eggs at 10s. 6d. per 100.

Dr. Greer closed his case.

Barnett Katzew (one of the defendants). He said that the sale was conditional on the samples proving good and suitable. Both the samples were "no good"; half of the eggs being bad. He tried to communicate with Shagom the same day, but he was unable to do so. Next morning, the 22nd February, he called at Shagom's office at the Market, and told Shagom that it was impossible for them to take the eggs. On the 23rd, witness received a letter from Shagom, saying that he must remove the eggs that day,

as they wanted room. Witness instructed his bookkeeper to send a reply. On the 21st witness told Shagom that he had had a good many complaints from Johannesburg about stale and bag eggs. He knew nothing about the story that he had gone to Shagom, and offered £10 so as to be let off the bargain.

Cross-examined: Witness only examined two or three boxes at plaintiff's store. He had had a good many transactions with Shagom previously, but he had never previously taken away two sample boxes. He had had a good many bad eggs from Shagom.

[Maasdorp, J.: What did you do with the bad ones?]

Witness: I threw them out.

Cross-examination continued: It was too dark in plaintiff's store to submit the eggs to the candle test. He expected to find a few bad eggs in a case, but when he found 160 bad ones he could not take cases of that kind. He knew there were more than two consignments, but he only took away two samples. He did not care where the eggs had come from, so long as they were Colonial. He did not ask Millar to let him have two boxes in a hurry for a customer. The market was not falling about the time of the transaction. Witness gave up the contract because the samples were so bad.

Re-examined: Witness had not, between the time he bought and the time he told Shagom he would not take the eggs, received a telegram from Johannesburg saying that the market had fallen.

By the Court: Witness took it that if the eggs in the sample-boxes were good, they would be bound to take the other boxes. He could not explain why his attorney should have written saying that if the eggs were good they would have the right to take the others.

J. Lurie (the other defendant) said that the purchase was entirely conditional on the eggs in the sample-boxes being good and suitable. Witness had a brother in Johannesburg in the same business. They were sending from £800 to £1,000 worth of eggs to Johannesburg every month, representing from 20,000 to 40,000 eggs every week. The sample-boxes obtained from plaintiffs contained a good many bad eggs. It was not true that he had offered to pay £10 if they were released from the bargain. Witness was selling a large number of eggs in Cape Town, Kimberley, and Pretoria, as well as in Johannesburg.

Cross-examined: A good number of the eggs were spotted and black.

By the Court: It was arranged that, in any case, they were bound to pay for the two sample boxes.

Maasdorp, J., pointed out that defendant's attorney said that his clients offered to pay for the two boxes of rotten eggs in order to avoid litigation.

Witness: That is not correct. We were bound to pay for the two boxes.

Abraham Hoffman, egg-dealer, Plumstead, said that he went to Katzew's to buy Colonial and imported eggs. Katzew had two boxes brought to his store. The eggs were sorted into two classes. Out of one box 200 were good, and these witness bought, while the others were set aside as bad. Witness also bought 660 imported eggs from Katzew. He was in the habit of selling eggs from door to door.

E. Koning, egg-dealer, said that he "candled" a good number of the eggs at Chiat's store, and found that a considerable number were bad. Witness told Mr. Chiat that it was impossible to send such eggs to German South-West Africa, on account of the journey. He opened one box, but he could not stand the smell.

H. Licht, egg-dealer, gave similar evidence. He said that the good eggs in the boxes that he "candled" were not many more than the bad ones.

J. B. Shacksnovis, articled clerk with defendants' attorneys, also gave evidence with regard to a certain letter which it was alleged Mr. Shagom had not disclosed, and which he had received from defendants on the 23rd February.

Counsel having been heard in argument on the facts,

Maasdorp, J.: In this case the direct evidence as to the terms of the sale is contained in the statements of the two defendants on one side and the two plaintiffs on the other, with this addition—the evidence of the plaintiffs is supported by their storeman, Millar, and by a person named Hertzman. But it would not be safe to decide the case merely by the number of witnesses. The version given by the storeman seems to be altogether quite what one would have expected of the parties—that there should be an examination on the spot, where the eggs could be examined, and that the parties should make up their minds at once after such examination, and that they should then close the bargain by accepting delivery. It appears also that the evidence of Millar is corroborated by the defendants, that there was evidently a customer waiting (Hoffman), who was to take these eggs away. It is suggested that that is merely a coincidence. However, I see no reason why I should not accept this, that Katzew knew there was a gentleman waiting at his store prepared to buy these goods. Millar's evidence bears on the face of it, the impress of truth. On the whole, I am inclined to accept the evidence of plaintiffs' witnesses as truthful, and their version of the agreement as entirely reasonable and supported by the view of the independent witnesses, who went afterwards to examine the eggs, and who were satisfied to take the

quality of the eggs in the same way as the plaintiffs say the defendants should have been satisfied, i.e., to take an occasional box here and there and be satisfied as to the quality of a part from an examination of the whole. His Lordship commented on the discrepancies between the instructions evidently given by defendants to their attorney and the evidence given by them in court to-day. Continuing, he said there was a breach of the contract of sale on the part of the defendants, and I think plaintiffs acted very properly in selling the eggs promptly. They acted more promptly than we usually find in cases of this kind. Plaintiffs were not bound to sell the eggs, and might have kept them at defendants' risk. Judgment will be given for the plaintiffs as prayed, with costs.

[Plaintiff's Attorneys: Friedlander and Du Toit. Defendant's Attorney: J. Buirski.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* BASSETT. { 1906.  
Apr. 30th.

Mr. Burton moved, as a matter of urgency, on the petition of Thomas Bassett, of the West Country Hotel, for an order restraining one Gilbert Coles from disposing of certain consignment of horses in the S.S. Norfolk, pending an action to be brought by petitioner. From the petition, it appeared that Bassett for the past twelve months had had transactions with Coles in horses. He had sent money to Coles to buy horses in Buenos Ayres, and Coles had sent the purchases here to be disposed of by petitioner. On the 5th March, 1906, he sent to Coles a sum of £250 to enable him to purchase horses to be sent to Cape Town. The S.S. Norfolk arrived in Table Bay on the 28th April, with 30 horses, and deponent on the 29th went to the Docks to see Coles and his (petitioner's) son. He had reason to complain to Coles about the condition of the animals, and to inform Coles that they were not worth the price he had paid for them,

viz., £300. Petitioner was informed by Coles that he would pay the freight of the consignment, £150. Petitioner, from this and other circumstances, was suspicious that Coles intended to sell the horses, and consequently deponent would have no security for the debts of £250 for money dispatched, £9 cash advanced, and £18 paid as passage money, due by Coles to petitioner. An affidavit was also put in by another person stating that Coles had instructed an auctioneer to sell the horses.

Rule nisi granted, calling upon respondent to show cause on Thursday next why an order should not be granted as prayed, with costs, rule to operate as an interim interdict.

REX V. COLE.

{ 1906.  
Apr. 30th.

### Scab Acts—Knowledge of owner.

*The appellant, on one of whose flock of sheep the Scab Inspector found a patch of live scab, about six inches in diameter, which, according to the inspector's evidence, would be patent to an ordinary observer, had failed to give due notice thereof to the inspector.*

*Held on appeal, that the owner could not, by closing his eyes to the existence of scab, avoid liability for not giving such notice, and that the appellant had been properly convicted.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Mount Currie, who, sitting at Kokstad, on the 5th April, had convicted the appellant (James Cole) of failing to report an outbreak of sheep scab. Mr. Upington was for appellant; Mr. Howel Jones was for the Crown.

Appellant, who is a European farmer, had been charged with contravening section 10 of Proclamation 60 of 1903, "in that, on the 19th March, 1906, at Frankland, in the said district, he did wrongfully and unlawfully neglect or fail to report an outbreak of scab amongst his sheep to the inspector of Area No. 14 (a)." He pleaded not guilty, but was found guilty, and sentenced to pay a fine of £2.

The grounds of appeal were that the conviction was against the weight of the evidence, and, generally, contrary to law.

The Magistrate, in his reasons for judgment, said that the evidence fully showed that the flock was infected, and that one ewe was very bad with the disease. The defence set up was that the



accused had no knowledge that the sheep were infected, and, consequently, that there had been no contravention of the law. Accused, in his evidence, stated that he carefully examined the sheep when they arrived on his farm, but, in cross-examination, he admitted that he merely had a look at them while in the kraal. But, even assuming that he made a cursory examination, it was difficult to see how he could have failed to detect the infected ewe, seeing that one of the patches of scab was six inches in diameter. He (the Magistrate) was satisfied that accused had knowledge of the infected sheep, either personally or through his servants. He was, therefore, guilty of a contravention of the section, which provided that the outbreak must be reported at once.

Mr. Upington said that section 10 of the Proclamation, except in a certain minor respect, was practically, in its terms, the same as section 7 of Act 28, 1886, the old Scab Act. Under that section of the Act, an appeal was decided of *Queen v. Wright* (4, C.T.R., 104), on which he (counsel) relied. He went on to submit that, in the circumstances of the present case, the fact that one ewe was infected, and apparently had been infected for a considerable time, although it might be an element in deciding whether or not defendant was aware of the existence of the scab, still was not conclusive. It appeared that a large flock of sheep were brought to the farm from some distance on a certain Saturday, and early on the Monday morning the sheep inspector turned up at the farm and went through the flock, and discovered one ewe with a patch of scab upon it. It was not alleged that in the whole flock there was more than one single ewe that showed any signs of the disease, and the Court were not told where this particular patch was, whether it was in such a position that it could easily be detected or whether it was, as a matter of fact, on some portion of the body where it might be difficult, without close examination, to discover.

Mr. Jones said that he relied on the very strong *dicta* given by His Lordship in the case of *Queen v. Wright*. In the present case, the Court might properly presume knowledge on the part of Cole. The sheep had actually been branded on the Saturday at the adjoining farm, Llewellyn, and it was difficult to conceive how, under the circumstances, the patch of scab could have escaped notice. It was not enough for defendant to say that he simply took a casual look at the sheep.

Mr. Upington having been heard in reply,

De Villiers, C.J.: In the case cited by Mr. Upington (*Regina v. Wright*), it was said that: "The means of knowledge alone is not sufficient, although, of course, the existence of such means of knowledge would go far, in the ab-

sence of clear proof to the contrary, to show that the owner knew of the infection. If it would be patent to an ordinary observer, that the sheep were infected it would be difficult to convince any court or jury that the owner or his manager in charge was ignorant of the fact." That seems a fair test. Would it be patent to a competent ordinary observer that the sheep now in question were infected with scab? If so the owner could not, by closing his eyes to the existence of scab among his sheep escape liability for not giving due notice to the inspector. It was suggested by Mr. Upington that the scab may have been upon a part of the body where it would not strike the ordinary observer, but certainly that is not the impression which one derives from the evidence. Inspector Evans had no difficulty in discovering that one of the sheep had the scab, and on examination it was found that the scab was alive there. Then if there had been a thorough examination by Cole of the sheep when they arrived, it is difficult to see how he could have failed to find the scab, but, according to his own version in cross-examination, it was a very perfunctory examination that he made. At the time the sheep were branded it seems he was not present, but certainly the person who branded the sheep ought to have discovered that the sheep had scab upon it. There is just one point urged by Mr. Upington, which certainly would have a good deal in it if the number of sheep found by the scab inspector had corresponded with the number appearing in his permit, because in that case it would have been clear that the inspector who had given the permit for the removal of the sheep had not been able to find scab in the sheep, but, unfortunately, the number differs. There were 922 sheep in this flock, whereas the inspector had given a permit only for 900 sheep, and, therefore, it seems rather likely that this sheep with the scab was one of the 22 which had not been seen by the inspector who gave the permit. Therefore, the argument derived from the fact that the inspector who had given the permit had failed to discover the scab seems to be weakened by this circumstance. If it had been clear that this sheep was one of the sheep, in respect of which another inspector had given a clean bill, I should certainly have hesitated to allow this verdict to stand; but as that point is not made clear, it seems to me that the Court has to fall back upon the evidence of Inspector Evans, whose evidence was fully accepted by the Magistrate, and according to this evidence it was a clear case of a sheep being infected with scab, which the owner ought to have known of. Under these circumstances the appeal must be dismissed.



SHASKOLSKY V. HAUPT. } 1906.  
Apr. 30th.

**False imprisonment — Malicious arrest — Malice — Want of reasonable and probable cause.**

*The appellant obtained a decree of civil imprisonment against the respondent in a Resident Magistrate's Court, of which, however, the Court on the 21st day of September granted a stay of execution until the 31st of October. The record, however, by mistake mentioned the 21st of October as the day on which the stay was granted, and by another mistake the clerk of the appellant's attorney took it that the stay was until the 30th September, and he accordingly on the 6th of October applied for a warrant of imprisonment. The Magistrate, again by mistake, signed the warrant for immediate execution, although he had ordered a stay until the 31st. The respondent was lodged in gaol for one night, but released by the Magistrate in the following morning on discovery of the mistake. The respondent having obtained judgment against the appellant for damages.*

*Held on appeal, that there had been no false imprisonment, inasmuch as the warrant was in due form and that there was not such a total absence of reasonable and probable cause as to lead to a necessary inference of malice, and the appeal was allowed accordingly.*

This was an appeal from a judgment of the R.M. of Wynberg, in an action brought by the present respondent (Pierre Francois Haupt) against appellant to recover £20 damages for illegal arrest and imprisonment.

The Magistrate had found for plaintiff for £15, with costs. The arrest took place at Observatory-road on the evening of October 6 last, and Haupt was lodged in the civil debtors' prison at Wynberg, and detained until 11 a.m. on October 7.

The Magistrate, in his reasons for judgment, said that the present defendant, Shaskolsky, obtained judgment in

his Court in an action against plaintiff on March 30, 1905, for £5 14s. 1d., with costs. The judgment was not satisfied. Subsequently a decree of civil imprisonment was granted against Haupt, to be suspended on Haupt paying £1 a month. On more than one occasion Haupt applied for a stay of execution. On the 21st September the decree was stayed until the 31st October. On the 6th October, at the instance of Shaskolsky, he granted a warrant in execution of the decree, and on the evening of the 6th October, by virtue of that warrant, Haupt was arrested and detained until about 11 a.m. next day. It was admitted by Shaskolsky's attorney (Mr. A. W. Steer) that a mistake was made. The attorney stated that he could not say how the mistake was made. There could be very little doubt that it was through a faulty record of the proceedings. There was, in his (the Magistrate's) opinion, a want of proper care and diligence in the matter on the part of plaintiff's attorney, from which malice and absence of reasonable and probable cause must be inferred. Under the circumstances he did not consider that £15 was an excessive sum to award to plaintiff for damages.

Mr. Benjamin was for appellant; Mr. Roux was for respondent.

Mr. Benjamin submitted that in an action of this kind it was essential to prove malice. All the forms of the Court had been complied with, but there appeared to have been a mistake on the part of the Magistrate's clerk.

De Villiers, C.J., pointed out that the record said "the 31st" when clearly it should have been the 31st October.

Mr. Benjamin submitted further that the writ should have been first set aside before the action was instituted by Haupt. There was no evidence whatever of malice in the present case.

[De Villiers, C.J.: Is your client liable for the malicious act of his attorney?]

Mr. Benjamin: I submit not.

[De Villiers, C.J.: Action should have been taken against the defendant's attorney?]

Mr. Benjamin submitted that that was so.

Mr. Roux quoted Pollock on Torts on the question of a principal being responsible for the torts of his agent. Everything that his agent did, counsel contended, the principal was bound to authorise. In this case the whole of the acts of the attorney were done for the benefit of Shaskolsky.

[De Villiers, C.J.: What is the evidence of malice in this case?]

Mr. Roux: There is no proof of malice, but I submit that it is not necessary to prove malice in face of the decisions of this Court. It is clear, however, that there was not reasonable and probable cause for arresting Haupt. If the attorney, through his clerk, had kept the

record properly this incident would not have arisen. Council proceeded to cite the case of *Pullinger v. Harsant* (Griqualand Reports, vol. 2, iii.). The writ, he submitted, had, *ipso facto*, been set aside by the Magistrate who granted it in the first instance. Counsel contended that the Magistrate's judgment was correct, and that the amount awarded was not excessive.

Mr. Benjamin having been heard in reply,

De Villiers, C.J.: I cannot agree with the view urged upon the Court on behalf of respondent, that in the present case there was any false imprisonment. The warrant upon which the respondent was arrested was in due form. It duly complied with the 12th section of the Act, 1856, which is as follows: "When and as often as any such Court, as aforesaid, shall make a decree of civil imprisonment against any defendant, the process for the execution of the same shall be by warrant under the hands of the R.M., which warrant shall in substance and effect be in the form in that behalf in the schedule to this Act contained." The warrant has now been produced, and it is in every respect formal. It is in the form specified in the Act, and it is duly signed by the R.M. of Wynberg, and appears to be dated 6th October, the date on which it purported to be issued. Therefore, if the defendant (the present appellant) is to be held liable at all, it must be on the ground that the arrest was malicious, and that there was a want of reasonable and probable cause. Now, it appears that the mistake arose in this manner: On the 18th September the respondent against whom the appellant had obtained a decree of civil imprisonment asked for a further stay of execution, and then execution was stayed until the 20th inst.—that is, to the 20th September. Then, on the 21st September, apparently, the matter was again mentioned, but unfortunately the record, which was entered by the Magistrate, says: "21st October, 1905: Applicant Haupt in person, applicant asks for stay of execution to 31st; stayed to 31st." The clerk to the appellant's attorney seems to have understood that the stay was until 30th September and not 31st October, and on the 6th October he applied for a warrant of imprisonment. If he had thought for a moment, he would have seen that it was a mistake, because there are only 30 days in September. But anyhow this was the mistake made. The clerk then obtained a warrant from the Magistrate's clerk, and the Magistrate's clerk then must have got the Magistrate to sign it on the 6th October, so that it was a mistake on behalf of the Magistrate, and also on the part of the clerk of the attorney. Now, it seems to me that such a mistake might very reason-

ably have been made without any malice on the part of anyone. It was a mistake; it is difficult to say who was the cause of the mistake, whether it is the Magistrate or whether it is the clerk; but it seems to be a very reasonable mistake, a mistake which might very easily have been made. Unfortunately, this man was arrested, and sent to gaol for the night. But the Court cannot forget in this connection that there was really a writ of civil imprisonment against him. He had failed to pay, there had been an execution against his goods, there had not been a sufficient return, there had been a writ against him, but that writ was stayed, and this stay of execution had not been complied with. Under ordinary circumstances, it might have been a very grievous injury to a person to be imprisoned in this manner, but it is not such a grievous injury in the case of a person, against whom there is writ at the time, of which there is a stay of execution. Unfortunately, the parties concerned did not bear in mind that the stay of execution was until the 31st October, instead of the 30th September. Meanwhile, this warrant was obtained, and the man was sent to gaol. As soon as the mistake was discovered, he was released. Now, the question is, is the appellant to be held responsible, the appellant who employed the attorney? In my opinion, there is a total absence of malice; there is not a suggestion of malice, and there is not such an utter want of reasonable and probable cause as to lead to the necessary inference of malice. For these reasons, I am of opinion that it is wholly impossible to support the judgment of the Magistrate, and the appeal must be allowed. I think, as to the costs of appeal, the appellant should have his costs of appeal, but, as to the costs in the Court below, that is another matter. There will be no order as to costs in the Court below; each party will pay his own costs in that Court.

[Appellant's Attorney: A. W. Steer.  
Respondent's Attorneys: Zietman and Bosman.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDOOP.]

REX V. VAN DER WALT. } 1906.  
Apr. 30th.

Ordinance 6 of 1843, Sec. 71—  
Act 38 of 1884, Sec. 10—  
Culpable insolvency.

*A Magistrate has no power to*



*in such use of the land may result in damage to another.*

This was an action brought by the Oranjezicht Estates, Ltd., against the Town Council of Cape Town for a declaration of rights and damages.

The plaintiff's declaration was as follows:

1. The plaintiff is a company duly registered in this Colony. The defendant is the Town Council of Cape Town.

2. The plaintiff is the registered owner of the property heretofore and still called "The Oranjezicht Estate," situated on the slopes of Table Mountain, and prior to the year 1882 belonged to the Van Breda family subject to an entail.

3. On the 8th August, 1881, a deed of submission to arbitration was executed between G. van Breda, the then owner of the said estate, and the Town Council of Cape Town, which set out that the said Van Breda should cede to the Town Council all his rights, title, and interest in the water springs, fountains and streams on the said estate, with the right to dig, bore, excavate, open up and carry out such works as might be necessary, under certain conditions, to obtain an adequate supply of water, and to lay down certain pipes, and the right to enter on the ground for the purpose of inspecting, repairing, etc., the filtering beds, pipes, streams, etc., all of which were to be subject to certain conditions to be observed by the said Town Council in regard to the said rights, and the question submitted to arbitration was the amount of compensation to be paid, and the award of the arbitrators upon such deed was duly made a rule of Court.

4. Certain of the said conditions were: "That the Town Council shall not be at liberty to enter upon or take possession for the purpose of constructing filtering beds, cisterns or catch-pits of any portion of the said estate now under cultivation, or which has at any time previous to the 1st January, 1881, been under cultivation as a garden, orchard or vineyard (except the piece of ground situated near the Platteklip-road, commonly known as Scholtz's Garden) without the consent of the said Gerrit Hendrik van Breda or his successors, for the time being, in the said estate;" and

"That in all cases where the said Town Council shall construct or lay down drainage or waterpipes across roads or cultivated lands on the said estate such pipes shall be laid at least two feet below the natural surface of the soil, and the ground at such places shall be restored by the said Town Council at their own expense to its original condition."

5. In order that the rights aforesaid acquired by the Town Council and set out in the said deed should be legalised by reason of the said entail, the Act No. 23 of 1882 enacted, after reciting that the rights so acquired and the compensation to be paid therefor should by reason of the entail be sanctioned and confirmed by legislative enactment, that the entail, so far as it affected the water springs and water sources on the said estate, was annulled, and the said springs and sources were vested in the Town Council, with the right to bore, excavate, etc., to execute filtering and other works necessary for collecting water and to lay down pipes. The rights mentioned in the said Act are the rights agreed upon and set out in the aforesaid deed of submission and none other.

6. The plaintiff company bought the said estate under and by virtue of the Act No. 10 of 1899, which annulled the entail upon the said estate and authorised the said sale, for the purpose of sub-dividing the same and selling in lots.

7. A certain number of lots have been sold under and according to plans passed and approved by the defendant Council.

8. The plaintiff company hereunto annexes a plan marked "A," which shows on the portion coloured yellow certain springs vested in the defendant Council, and in red lines the old homestead of the Van Breda family, immediately above some of these springs. The garden which always adjoined the house is immediately above other of the springs. Part of the ground coloured yellow was always occupied and cultivated by the Van Breda family prior to the sale, and thereafter by the plaintiff company, and its tenants, and other ground behind the said homestead was in like manner occupied, and included paddocks for cattle and piggeries.

9. The plaintiff company being desirous of selling other lots, submitted the said plan annexed for the approval and passing of the defendant Council, and though not legally bound so to do, tendered to the defendant Council to reserve the said portion coloured yellow, and not to sell or alienate the same, and to give the defendant Council the right to enclose the same, subject to certain conditions as to building by the defendant Council and accumulating rubbish thereon, all of which is set out in the draft deed hereunto annexed, marked "B." which was tendered to the defendant Council, and which the plaintiff company tendered to execute and to have registered as a perpetual servitude against the title deeds of the said estate, and the plaintiff company has subsequently further tendered to transfer the said area coloured yellow to the defendant Council without any payment

for the value of the ground so to be transferred, and subject only to the conditions set forth in the draft deed marked "B" as regards building and the like, and the plaintiff company has always been ready and willing to submit to the usual and proper terms and conditions as to drainage and road-making in the sub-division of the said lots.

10. Notwithstanding the aforesaid premises the defendant Council refuses to pass the said plans, and claims the right to prevent the plaintiff company, or any person that may buy from them, to build upon any of the said estate adjoining or above the said springs marked on the yellow portion for an indefinite but large extent of area around the said springs, and within such extent as the defendant Council may choose to prescribe, including all the ground and buildings in paragraph 4 set out, and as by the regulations of the said Council, within whose jurisdiction the said estate lies, no one can build except upon plans submitted to and approved of by the said Council, the latter claim the right to refuse to allow any plans for building by future purchasers from the plaintiff company of any of the said land.

11. The said refusal and claims of the said defendant Council are unlawful and wrongful, and by reason thereof the plaintiff company has been unable to sell any of the said land shown on the plan "A." and has lost good opportunities of selling the same, and the same has been lying unprofitable to the plaintiff company for a long time, and altogether the plaintiff company has by reason of the said wrongful and unlawful conduct of the defendant suffered damages to the extent of £1,000.

12. There are upon the said estate bought by the plaintiff company other springs vested in the defendant Council, not included in the said place, and the defendant Council claims to have the same rights as are claimed in respect of the land shown on plan "A" to prevent the plaintiff company or anyone purchasing from it from building upon any of the said ground within a certain area round the said springs of an indefinite extent, and such as the defendant Council may choose to prescribe.

Wherefore the plaintiff company claims:

(a) A declaration as to the rights of the defendant Council to prevent the plaintiff company or purchasers from it from building upon the said estate, known as Oranjezicht, and referred to in Act No. 10 of 1899, and more particularly as to the property described in the said plan marked "A." and as to the rights of the plaintiff company to sub-divide and sell the said portion.

(b) An order compelling the defendant Council, within such time as this

Honourable Court may appoint, to pass and approve of the said plan "A" upon the usual and proper terms and conditions as to drainage and road-making, or authorising the plaintiffs without such approval to proceed subject to such terms and conditions to sub-divide and sell the said portion of its property, and restraining the defendant Council from interfering with such sub-division and sale, the plaintiff company tendering to execute the said deed "B," and to have the same registered as a servitude against its title deeds, or to transfer the land shown coloured yellow on the plan "A" to the defendant Council, subject to the conditions as to building, and otherwise set forth in the draft deed marked "B."

(c) The sum of £1,000 as and for damages as aforesaid.

(d) Alternative relief.

(e) Costs of suit.

Defendants' plea, after making certain formal admissions, and putting plaintiffs to proof of certain allegations, went on to say:

6. It (the Council) admits that it has refused to pass the said plan, and says that its refusal is bona fide, and is lawful; and that the reason for its refusal is that it is in the interest of the inhabitants of the city, who are supplied with water from the said estate under the aforesaid award that the streams of water should not be polluted, and it says that building operations and buildings upon the land proposed by plaintiffs to be built upon are likely to cause such pollution; it denies that it has taken up or does take up the position that it may prescribe any area within which buildings may not be erected or building operations conducted, and says that its conduct has at all times been lawful and reasonable; it denies that plaintiffs have suffered any damage as alleged, and, save as above, it denies paragraphs 9, 10, and 11 thereof.

7. As to paragraph 12 thereof, it admits that there are other springs on the land which are vested in the defendant Council, and not shown on the said plan; it admits that it claims the right to prevent such building or other operations in the neighbourhood of the said springs as are calculated or likely to interfere with or pollute the public water supply; it is prepared at all times to pass and approve any subdivisional plans or building plans which will not interfere with the water of these springs.

8. It annexes hereto marked "C" a plan showing the area which it considers should not be built upon in order that there may be no reasonable probability of pollution of the said water supply, and says it is, and has been, prepared to pass and approve plans for buildings in other respects



satisfactory, outside the area marked A. B. C. D. E, upon the said plan; save as above it denies paragraph 12 thereof. Wherefore it prays that plaintiffs' claim may be dismissed, with costs.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C., and Mr. Benjamin), was for plaintiffs; Mr. Searle, K.C. (with him Mr. Close), was for defendants.

Mr. Schreiner, in opening the case, said that this was an action instituted by the Oranjezicht Estates, Ltd., against the Town Council of Cape Town for a declaration of rights and damages, and for an order as set forth in the declaration. The plaintiffs were owners of the Oranjezicht Estate, which on divers occasions had been before the Court in regard to the strict entail which was imposed and the breaking of that entail by Act of Parliament. The entail was imposed under will, and subsequently the Town Council had acquired certain rights. Material to this case, it was necessary to mention the Act of 1882. There had been a previous breaking of the entail to a certain extent. By the Act of 1882 effect was given to an award of arbitrators which was made pursuant to a deed of submission to arbitration, dated August 8, 1881. Pursuant to that deed the Town Council obtained certain rights of water, springs, fountains, and streams on the Oranjezicht Estate, in consideration of a certain payment of money. Subsequently in 1899 the entail was finally broken by the Act of Parliament No. 10 of that year, and power was given to the then owner of the estate to sell and dispose of it, and he sold and disposed of it to the Oranjezicht Estates, Ltd. What that Act did was to authorise and empower the company to become owners of the property, and they were now the registered owners of the property, subject, of course, to whatever rights the Town Council had pursuant to the award of the arbitrators and the Act of Parliament of 1882. The company had, of course, purchased the estate for the purpose of cutting it into lots and selling those lots to various persons for the extension of the town in that direction. From time to time they had submitted plans to the Town Council which showed the streets as was necessary. According to the Town Council regulations no street could be laid out without the sanction of the Town Council, so that all sub-division plans required to be laid before the Town Council for its approval in respect of such streets and ways of communication and, of course, as regarded other matters, such as drainage and sewerage. This case raised apparently a question in relation to what might be called the building lots of the company, and in relation to the rights and powers of the Town Council to refuse its approval and sanction to a certain plan, which the Estate Company had presented for the consid-

eration of the Town Council. Several plans were from time to time approved, and it would be important in the course of the case to note these facts, and to see what had been done under the same conditions in regard to other portions of the estate. In 1903 a plan, No. 5, was submitted, and the Town Council declined to give its consent to that plan as submitted, and declined to recognise the right of the company to sell its plots according to the plan. As the plan was originally submitted, the red lines which were at present on it were not shown. The Town Council objected, and returned one plan with a hatching upon it corresponding to what was shown on the plan in red, and they said that that land was not sold, but must be reserved. The company went into the Council's objection, and went so far as to say that with a view of obviating any litigation or dispute, they would block out the lots shown in yellow on the plan. They offered to execute a deed securing for all time that area from being alienated. By subsequent correspondence the company offered to transfer the area blocked out in yellow to the Town Council, with certain conditions as to erecting certain buildings, and not doing certain things that would make the neighbourhood unsightly. But the Town Council had maintained throughout the correspondence the position that it was entitled to insist that the land within the red lines should not be sold in building plots. The Council had made no proposal whatsoever to expropriate the land; it had made no offer at all of compensation; it simply took up the attitude of not being willing to give its sanction to plan No. 5 at all, unless the plaintiffs consented to allow the Council's contention that the ground within the red lines should not be sold for building purposes. That seemed to be quite an illegal position. Plaintiffs contended that it was an absolutely illegal position, and that nothing either in the deed of submission to arbitration and award thereon or in the Act of Parliament had authorised the Town Council to take up that attitude.

[De Villiers, C.J.: I see that £200 is payable by the Town Council to the Breda family. Is that now paid to the syndicate?]

No; it is specially reserved to the Bredas. This is really what one might call a case of conversion; it is not an out-and-out breaking of the entail, but it is a conversion of land to money.

[De Villiers, C.J.: Is the Council's contention that there may be pollution of water from their springs?]

They say, not that it does pollute, but that if we sell this ground then there is danger of pollution to the springs. I would say, incidentally, that it appears to me that in truth the Town Council has the onus cast upon it to show why it should in-

terfere with the rights of an owner who wants to sell his property in the way indicated on the plan.

[De Villiers, C.J.: I see that you have marked a portion of the homestead of the Bredas?]

Some is in the red portion and some is outside. Practically the whole house is within this area now. The facts show that above the red line are the old garden ground and the old kitchen. The drainage and sewage of the house has never at any time been guided away by the Town Council. I do not believe the house is now in actual occupation. Down below, in the patch that we have covered yellow, are the springs, each one of which is built in and the water from the different springs is collected in pipes and carried to a water house. Our contention is this, that in law they have no right, without expropriating our property, to a single inch of land, away from the springs themselves. They have no right whatever to say to us "We will take your land, and make it permanently useless to you, without paying you a penny of compensation," and we say that this risk of pollution, which is referred to, must be a very remote risk. Now, when we want to sell our ground to be built upon, for houses and other buildings, according to the Town Council regulations, we are told that there is a risk of pollution, and that we must not sell our ground. Giving all credit to the Town Council, for zeal and energy—it may not be zeal according to knowledge—but zeal and energy in the interests of a pure system of water, if they take upon themselves—

[De Villiers, C.J.: Very well; you had better postpone the argument until afterwards.]

Well, that is our contention. They would take our ground away from us. Not only this piece of ground, but other ground vested in the estate will become equally valueless practically.

[De Villiers, C.J.: You say there will be no risk of pollution?]

We say that there will not be any pollution that we can see will be reasonably apprehended. If the springs are lined and protected any possible risk of superficial pollution we say can easily be rectified.

Mr. Schreiner submitted that the onus was upon the defendant Council to prove its right to interfere with the land of the plaintiffs.

Mr. Searle said he could not admit that the onus was upon defendants, as they were given very wide powers by their Act.

De Villiers, C.J., said he thought it would be in the interests of all parties if the ordinary course of procedure were followed, and the plaintiffs opened the case.

Theodore de Villiers, of the firm of Marais and De Villiers, surveyors,

spoke to certain contour plans of the Oranjezicht estate, which he had prepared, and which had been submitted to the Town Council. One of the plans was returned by Mr. Cook, the Engineer, showing certain portions hatched out. Witness had seen the plan annexed to the evidence given by Mr. Rolfe on commission in England. That plan was entirely erroneous. As to the land within the red lines on plan 5, which the Town Council had marked, there were no natural limits or facts on the ground to indicate why the Council should stop at the red area, except at the left side of the plan, where there was a clay bank. Witness had not seen any ridge, such as Mr. Rolfe mentioned in his evidence, in the neighbourhood of the piggery, duck pond, and the house drainage. The natural fall from the piggery, duck pond, etc., would be to the springs. The whole of the area within the red lines was manifestly an old garden and orchard. There was a large bed of clay that was impervious to water. If the springs rose from below the clay and came up above, they could be protected by making a lining of clay or a ditch. The soil was very porous. Above the red lines there was a very heavy bank of alluvial. A great deal of water would come by percolation to the springs from the watershed above. There were formerly old slave quarters on the ground. The area which the company proposed to reserve round the springs was one and a half acres; the area included in the red line, as shown by the Town Council, was five and a half acres. Good buildings had been erected on the estate on Belvedere-avenue, near to the Molteno Reservoir. The land would have made a good realisation in 1903. The land in question was the pick of the estate, and the company had lost a good deal of money by reason of the plans being hung up. The lines marked out by the Town Council affected a large area of property beyond the limits of the five and a half acre portion.

Mr. Thomas Olive, consulting engineer, Cape Town, and formerly Town Engineer, said that there was no such ridge as Mr. Rolfe referred to in his evidence. The ground above the alluvial patch towards the mountain was very steep, and the nature of the soil was such that the water would run off rapidly in case of heavy rains. If, according to Mr. Rolfe's evidence, the alluvial patch were a great reservoir, which fed the springs, there ought to be after rain a corresponding rise in the springs, but as a matter of fact the rise did not take place until months afterwards. Witness knew the houses built in Belvedere-avenue; those houses were within 40 yards of Molteno Reservoir. If proper precautions were taken, he did not think there should be any more danger of pollution above the

main spring in the Oranjezicht estate than there was from the houses above the Molteno Reservoir. If the sewers were properly laid and properly tested in clay soil, there was no need to anticipate trouble from pollution. The sewerage arrangements of the old homestead were of the old-fashioned type. Foul water from the kitchen was brought within a few yards of the nearest spring, but whether it polluted the spring he could not say. He did not see why there should be any difficulty, with proper linings and so on, in obviating any danger of pollution of the springs on the Oranjezicht Estate.

In cross-examination, witness was asked by Mr. Searle what he would suggest to prevent the water travelling through the alluvial from being polluted, and going through into the springs?

Witness: You could meet it by a trench containing a concrete wall, backed with puddle. You would then deflect the water into the stormwater drains.

Witness (in further cross-examination) said that he entirely disagreed with what had been said as to the catchment area of the spring. It was, he maintained, impossible to define a catchment area of a spring. He did not think that the proposed street, Westminster-avenue, came within a few feet of one of the springs; he should say it would be 40 yards away. He was referring to the main spring.

Mr. Searle: Yes, but it is within 20 feet of the Vineyard spring.

Cross-examination continued: With properly modern sewers, it was very rarely indeed that one came upon leakages. He did not think there was any danger of pollution from the sewers to the vineyard spring. Sewers could be made as tight nowadays as water mains. It was not a common experience that leakages were constantly taking place from sewers; if the sewers were properly laid the danger from pollution was practically nil. It was possible to construct a sewer which would not leak, and thus there was no danger to a spring even at a distance of 20 feet from the sewer.

Mr. Searle: It may be possible, but it is not probable?

Witness: Oh dear, yes; you must use safeguards. Further cross-examined, witness said he could not imagine the loamy ground holding water for two or three months. Witness did not think that, from a sanitary point of view, there would be any greater amount of surface sewage by reason of buildings being erected, because when a place was modernised, by laying out proper streets and sewers, with paved yards and so on, it was in a better state than when mere bush.

Frank Molteno, land surveyor, having given evidence,

Edward H. Melville, surveyor, Johannesburg, said that he had been connected with the investigations for water supply on the mines in Johannesburg. He knew the Oranjezicht Estate. Witness described the geological features of the estate. All the springs in question that were now running were, he believed, deep seated; judging from the surface ground, he did not think any sub-surface springs were running at present. Witness found that when the rainfall was at its maximum, the yield from the springs was at its minimum. He did not find any signs of the water percolating across the alluvial to the springs. In reference to Mr. Rolfe's evidence, witness considered it was absolutely absurd to draw conclusions from a geographical watershed, when one was estimating the flow of springs. Any risk of pollution would be obviated by making a watertight trench.

Cross-examined: The water that came down to the spring would fall on the catchment area. The springs followed the rainfall at a period of from 3½ to 4 months. A great deal of the water must come from beyond the geographical catchment area. He did not think there would be as much danger of pollution if the ground were properly sewered, as there would be from the ground as it was at present. The woods above the spring were at present in a filthy condition.

Re-examined: Witness only suggested that a trench should be built as a precaution against any possible contamination.

Edward Ridge Syfret (chairman of the plaintiff company) said that the Town Council first took up their hostile attitude in June, 1903. Since that time the matter had been hung up. He should say that there had been a depreciation of 25 per cent. in the value of land of that kind since 1903.

[De Villiers, C.J.: There has been a very long period intervening before action was brought?]

Mr. Schreiner: A very long correspondence took place.

Witness (in further evidence) said that in the meantime other parts of the estate had been opened up, and many houses had been built. The company had been intending to sell pursuant to the plan, and witness knew of no reason, apart from the Council's objection, why they should not have proceeded to sell. There was a great delay in dealing with these matters on the part of the Town Council. There was an attempt throughout to come to some reasonable settlement, and avoid coming into Court.

[De Villiers, C.J.: What would be the value of the land that the Council wish to be reserved?]

Witness: They are reserving what is really the pick of the estate. Perhaps

counsel would tell me how many lots there are in the area in question?

Mr. Schreiner said that there were 21 lots, independently of what was offered by the company.

Witness said that the value of the lots in 1903, having regard to the prices raised for other lots, was about £400 per lot. That £400 they would have got by selling off, and auction. They would have sold the lots off by degrees. The company had lost heavy sums of money owing to the delay. He did not say that they could have sold the whole of those lots, but they could have sold a considerable portion.

Cross-examined: The company had developed other parts of the estate. He did not think there was much delay occasioned by communication with the board in London. The company's surveyors thought that another portion of the estate would be absolutely valueless to them under the arrangement proposed by the Council.

Mr. Searle: There was a portion that the Town Council proposed should be given as a recreation ground?

Witness: It was very good of the Town Council to propose to make a recreation ground at our expense.

[De Villiers, C.J.: It might increase the value of the other land.]

Witness: I do not think it would; it might to a certain extent, but it would be very costly to us.

Mr. Searle: The Town Council take up the position that you are doing this at their expense.

Mr. Schreiner closed his case.

Robert Owen Wynne Roberts, City Water Engineer, said it was originally on his recommendation that the Town Council objected to this area being built upon. Notification of the Council's objection was given to the company immediately. Witness objected to the plaintiff's plan owing to the danger of pollution to three springs—two called the Vineyard and the other the Main Spring. The springs had been enjoyed by the town for a period long antecedent to 1882. The danger that he foresaw in this matter was leaky drains, leaks from the pavements about the houses, and generally soakage from the habitations into the ground, and then finding its way into the springs. Speaking as a practical man, he considered that it was quite impossible to guarantee that sewers would not leak. He thought there was more danger from sewers than from surface drainage. In regard to Belvedere-avenue, witness thought there was a certain amount of danger to the Molteno Reservoir, and had he then known what he knew now he thought he should have advised the Council to oppose the construction of the houses so near the reservoir. Witness gave evidence in regard to observations

made after pits had been sunk in various parts of the ground. He was satisfied that the water in the springs came through the alluvial in the depression. He presented statistics as to the discharge of the springs which, he said, showed that the springs rose according to the rainy seasons within a period of seven days. Witness did not consider that the springs were deep. The time occupied in affecting the springs after rain was an indication to him that they were surface springs. Witness believed that the main spring had been in use by the town since about 1730. The nearest distance from the springs to the proposed streets was 20 feet. The area proposed by the Council was the least possible for the safety of the springs. The average given by Mr. Roffe was the average of springs arising on the Oranjezicht estate and springs outside. The map upon which Mr. Roffe gave his evidence was purely and simply for military purposes; since then a more elaborate map had been prepared. Witness saw nothing in the nature of pollution in the valley calling for attention.

Cross-examined by Sir H. Juta: The springs were fed from the catchment area of 150 acres. Taking the average rainfall at 40 inches, there would be a fall on the area of 134,000,000 gallons per annum. It was quite possible the springs were fed from other valleys, but the springs need not necessarily be deep-seated. Before the springs would respond to the rain, it would require a steady fall of an inch to an inch and a half. While steady inches fell from January to March, allowance would have to be made for the parched state of the ground. A paper by Mr. Wood on the rainfalls between 1863-1882 in the possession of the plaintiff company was not prepared for the edification of the City Corporation, but for the Institute of Civil Engineers, to which Mr. Wood belonged. The water from the springs was very pure, but witness was unaware that the City Corporation had allowed a brickmaking concern to construct a latrine in a deep hollow near the springs. That would have no influence on the water, and at no time were pigeries within the catchment area. He was unaware that as many as 30 pigs were kept there at one time. A duck-pond, when empty, was a dirty thing, but he did not think that it had contaminated the water. He could not say if refuse from a house there had had anything to do with the outbreak of typhoid in the city.

Thomas Wilson Cairncross, at one time City Engineer, said that from work conducted in the area in question he had come to the conclusion that soaking rains affected the springs.

Cross-examined by Sir H. Juta: The water from the spring bubbled up from



below, and as the hole he sunk increased in depth, so did the water bubble up.

Robert Charteris, a civil engineer, with eight years' experience of South Africa, thought the spring was fed by rain falling on the superficial catchment, and by some other source, of which little was known at present. It would be most dangerous if the Corporation passed the plans submitted by the plaintiff company. Underground drainage was more dangerous than surface drainage. The cutting of "benches" for house sites would render the access of underground drainage much more easier than it was at present.

Cross-examined by Sir H. Juta: The springs were not largely influenced by the rainfall. Sewage *per se* would not cause typhoid. If he were to take charge of the area he would allow no piggeries to be on it.

Andrew Young, professor of the Geological Department of the South African College, stated that he had particularly studied the geological aspect of this valley. He produced a diagram, and gave evidence on the composition of the valley. On the general marks of a deep seated spring the water should contain in solution mineral ingredients derived from its long passage through the rocks. It absorbed to some extent the substance in the rocks, and the temperature in a really deep seated spring was higher than that of a spring from the sub-soil. The temperature of the main spring that morning was 63 degrees. If the spring was really a deep seated one the temperature ought to have been higher.

Dr. Marloth stated that on the 18th April he took a sample of the water from the main spring at the request of the Town Council. The water contained some mineral ingredients, but he could not say how far it came from. If sewers were laid within twenty or forty feet of the main spring, they would be a great source of danger; in fact, it would be criminal to do such a thing. The danger from the sewers would be infinitely larger than any pollution on the surface. In his opinion it would be safer to reserve a larger area than that proposed by the Town Council.

By His Lordship: He could not say at what depth the spring began to rise.

Dr. Jasper Anderson, Medical Officer of Health for Cape Town, said to lay sewers within forty feet of the springs would be a most dangerous experiment. With the best of supervision, workmanship, and material it was difficult to prevent leakage. The area proposed by the Council ought to be reserved at any rate. The Town Council already had experience of pollution in a stream through a large number of houses erected above.

Cross-examined by Sir H. Juta: The area proposed to be reserved by the

Council would minimise the danger. There might be a risk even above the line stipulated. It was too dangerous an experiment to subject it to even weekly tests. He did not like the idea of "piggeries" there.

John Cook, City Engineer, stated at the present time there were no drainage pipes laid to the limit proposed to be reserved. In June, 1903, he reported against the plan because he thought it would prejudice their rights, and he was still of that opinion.

Dr. Gregory, Medical Officer of Health for the Colony, was also of opinion that there would be great danger of pollution to the springs from soakage from yards and leakage from drains. It was possible to make sewers watertight, but it would be a difficult thing to keep them in that condition. The danger would be considerably lessened by the area proposed to be reserved by the Town Council.

Cross-examined by Sir H. Juta: Even if the stream was slightly polluted, filter beds would obviate the danger. The River Thames received a tremendous amount of sewage. Yet, the water from there was properly filtered.

J. R. Finch (Town Clerk) stated that in May, 1902, the matter came before committees of the Town Council, and subsequently it was again brought forward, but on the advice of the Engineer and the medical officers, it was decided to oppose it.

Nicholas van Breda, son of the late Dirk van Breda, who was the owner of the Oranjezicht Estate, gave evidence as to the transaction with the Council in respect of the spring. As long as he was on the property there was no drain from the piggery to the springs.

Michael Alexander Wm. Breda, also gave evidence as to the alteration of the sewage system on the estate.

Mr. Searle closed his case, and after some discussion as to the digging of a trial pit adjacent to Westminster Avenue.

Mr. Schreiner: First of all as to the law on this question. The Town Council has misconceived its position. The plaintiffs are proprietors of a certain estate, and they cannot be estopped from sub-dividing their property save by law or by contract. (See Act 26 of 1893.) If the Town Council objects to the land in question being used for any specific purpose they expropriate it. As to the other part of my argument: the deed of submission is the foundation of whatever rights the Town Council may possess. (See Act 23 of 1882.) This Act is virtually a contract between the parties. Section 1 must be read together with the deed of submission to arbitration.

[De Villiers, C.J.: Your predecessor in title gave the Town Council the right to use this spring. Your client can have



no greater rights than those of Breda. If building on this property would lead to the pollution of the spring, surely the Town Council could prohibit it.]

All this should have been provided for by filtering beds. I do not say that we are entitled to commit a nuisance, and admit that we must not pollute the water. *Tulbagh Municipality v. Morrees* (2, C.T.R. 184). Our point is that there is no servitude over the land, further than that we cannot be allowed to commit a nuisance.

[De Villiers, C.J.: Do you say that you would be entitled to build around the spring?]

Not in such a way as to interfere with the waterworks. The evidence shows that the Town Council might take any amount of land. That is absurd. It is the duty of corporations to overcome sanitary difficulties, e.g., to make filtering beds and so forth, if required, and not to cast the burden on private people. In *Cable Company v. Tramway Company* expert evidence was heard at length, and there the Court refused an interdict. Now we contend that unless very strong proof is adduced in this case to justify an interdict the defendants cannot succeed.

[Counsel proceeded to argue on the facts as to the non-pollution of the water.]

As to the land, see *Breda v. Town Council*. The judgment of Smith, J., bears on this case.

[De Villiers, C.J.: You do not deny that the effect of these buildings would be to pollute the water?]

If so they must either sue us for nuisance or expropriate.

[De Villiers, C.J.: The onus seems to be on the Town Council.]

Exactly, and so I contended in opening the case.

Mr. Searle: I do not admit that the onus is on the Town Council. They might have applied for an interdict, as Act 26 of 1893 gives us a right to object to sub-division.

[De Villiers, C.J.: You might have asked for an interdict to restrain them from selling building lots.]

The Court will not interfere with the discretion of the Town Council, but see *Heynes v. Municipality of Rondebosch* (11 C.T.R., 792) and *Russell v. Municipality of Rondebosch* (15 C.T.R., 253).

[De Villiers, C.J.: You must use your discretion in a judicial manner.]

The Court has often left such matters in the hands of Town Councils. See *Estate Russell v. Rondebosch Municipality* (15 C.T.R., 253). Heynes' case, and *Clark v. Cape Town Town Council* (4 C.T.R., 42).

[De Villiers, C.J.: I have no idea of compelling the Council to consent to these buildings, but I will grant a declaration of rights.]

The Town Council has supervision of

the public health. Even if the water did not belong to the Council the Council could prevent it from being polluted.

[De Villiers, C.J.: Should the Town Council refuse to sanction these buildings, may we not say that they have acted from ulterior motives?]

Very strong evidence would be required to prove that. *Short v. Cape Town Town Council* (8 C.T.R., 224) and *Saacks Bros. v. Rondebosch Municipality* (13 C.T.R., 52). These cases show that the Court will not interfere unless a Town Council has acted not only improperly but corruptly. In *Town Council v. Shenker* (12 C.T.R., 120) the Court did interfere. See also Act 26 of 1893, Section 120, Sub-sections (2) and (10), Town Council Regulations Book, 14 to 22; Act 25 of 1897, Section 1; 41 of 1889, Section 1 (as to the definition of the term "New Street") and 41 of 1899, Section 7.

[De Villiers, C.J.: The regulation you have put in refers to old streets, and not to the making of new ones.]

No, see Sections 14 and 17; we have power to stop the making of any streets. In this matter the highest expert authorities available, all report unfavourably. What more could the Council do? Then again, as to the position the Council has taken up as proprietor. When we acquired this property it was not contemplated that a village would be built there.

[De Villiers, C.J.: On what did you rely?]

On Act 23 of 1882, Section 1.

[Counsel proceeded to argue at length on facts.]

The rights secured by the deed of submission are wider than the terms of the Act. The entail to Breda was very strict. He could not have let the property. As to pollution, the Council is not bound to show that the water has been polluted. Expert evidence has been called to show that some catchment area should be provided, and our case is that the area provided is insufficient. Melville's evidence shows that he anticipated the possibility of pollution. It has been argued for the other side that there is no property in running water. Young, Marloth and other witnesses all agree that the area proposed to be reserved is too small. Should the applicants be allowed to build right up to the stream, what right would the Council have? It could not warn occupiers off the property should it find that the water is being polluted. The Council has chosen the right moment for taking action, and the Court (I submit) will decide in our favour. The Woodstock case cited on the other side differs widely from this case. There Dr. Gregory said that drains would always leak. The case of the Cable Company is also different; see the judgment of De Villiers, C.J.,

in the case. The right to have water includes the right not to have that water polluted; see *Goddard on Easements* (p. 96 and 268, and cases there cited).

[De Villiers, C.J.: Do you abide by your offer?]

Oh yes. I might have taken my argument much further, but the defendants cannot be in a better position than Breda was. As to the underground water, see *Ballard v. Tomlinson* (26 Ch. D. 194, and 29, Ch. D. 115).

Mr. Schreiner, in reply, said that his learned friend had put forward a new case in part of his argument. It would be extremely prejudicial to the plaintiffs, he submitted, if the new case which his learned friend had endeavoured to press upon the Court's attention were allowed to be raised upon the pleadings that were now before the Court. It was not pleaded that they (defendants) had all rights to subterranean water, that they had rights to streams of water under the soil, and that those streams were the sources of their springs. The defendants had tried to raise the case that all the subterranean water on the estate was their sources of water. If that part of his learned friend's argument were to weigh with the Court, then he (Mr. Schreiner) should be allowed to meet that case.

[De Villiers, C.J.: The effect of Mr. Searle's argument has been very much to shake the opinion that I expressed that the onus lay upon the Council to prove that the necessary result would be to pollute the water. Would the Court interfere with the decision of the Town Council, as the health authority in a matter concerning the public health, unless there were impropriety on the part of the Council? Would not the onus lie upon the plaintiffs to prove that it was an improper decision?]

Mr. Schreiner submitted that the decisions of the Court pointed in the opposite direction to that argued for by his learned friend. In this case there was an attempt to interfere with a man who was making use of his proprietary rights in a perfectly proper fashion. All the cases relied on by Mr. Searle went to show that the Court would not on motion interfere to compel the Town Council to pass plans unless it were shown that there was improper conduct by the Council. But those decisions did not touch a man's legal remedy by action for a declaration of rights. He submitted that the onus could not be thrown upon the plaintiffs to prove a negative, viz., that there would be no apprehension of pollution.

[De Villiers, C.J.: It is not a negative. The onus is upon you to prove that the consent of the Council has been wrongfully withheld. It is an im-

portant point with me as to where the onus lies.]

Mr. Schreiner contended that the onus rested upon the Town Council from the first to testify an invasion of private rights. Counsel having quoted a number of authorities,

*Cur. Adv. Vult.*

*Postea* (June 1st).

De Villiers, C.J.: The plaintiff company is the owner of the Oranjezicht Estate, which is situated on the northern slopes of Table Mountain, and which, before the year 1882 belonged to the Van Breda family, subject to an entail. By Act 23 of 1882 a portion of the estate was released from entail, and all the springs and sources of water on the estate were declared to be vested in the defendant Council, with the right to dig, bore, excavate, and otherwise open up and carry out all such works on the estate as may be found necessary for the said purposes, and to construct filtering beds and all other works required to collect the waters of the estate and to lay down pipes in, on, and across the estate, so as to lead out the waters for the use of the city of Cape Town. For the acquisition of such rights and privileges the Act directed that the Council shall, in terms of an award previously made upon a deed of submission executed between the Council and the then proprietor, pay to the then proprietor and all future proprietors of the estate the sum of £700 per annum. Among the conditions agreed to by the parties to the deed of submission were the following: "That the said Town Council shall not be at liberty to enter upon or take possession for the purpose of constructing filtering beds, cisterns, or catchpits of any portion of the estate now under cultivation, or which has at any time previous to the 1st of January, 1881, been under cultivation as a garden, orchard, or vineyard, without the consent of the proprietor." "That in all cases where the Town Council shall construct or lay down drainage or water-pipes across roads or cultivated lands on the estate, such pipes shall be at least two feet below the natural surface of the soil, and the ground at such places shall be restored by the Council at their own expense to its original condition." By Act 10 of 1899 the then proprietor of the estate was authorised to sell the estate, and it was enacted that upon the completion of the sale and the payment of the price the entail of fidei-commissum should be removed. The plaintiff company thereafter bought the estate and duly paid the purchase price. The purchase was made with the view to sub-divide the estate and sell it in lots. From time to time the plaintiff company has sub-divided portions of the estate into lots, which have been sold after the sub-divisions had been duly approved of by the defendant Council under the

powers conferred on it by its Act of Incorporation (No. 26 of 1893, section 170, sub-sections 2 and 10). Being desirous of selling some more lots, the company submitted to the Council a plan of subdivision, by which that portion of the estate which immediately surrounds the main spring and a few other minor springs was reserved to the use of the Council, and 57 new lots, situated at a higher level than the springs, were laid out for future sale. The Council refused to approve of the plan, their refusal being based entirely upon the ground that, in the opinion of the Council, the sale of lots above the springs would lead to the pollution of the springs. The Council, however, was prepared to consent to the subdivision if a considerable extent of land above the springs were excluded from the area destined for building lots. The length of the strip of land claimed to be excluded is about 550 feet, and the breadth about 350 feet. It is the most valuable portion of the estate, consisting, as it does, mainly of alluvial soil, which had been utilised by the former proprietors for orchards, vineyards, and gardens. Beneath that alluvial soil, there is an impervious clay, consisting of decomposed clay slate, which is visible at the bottom of a trench which years ago was dug across the strip of land, and which is also visible at the surface on both sides of the strip of land in question. At a higher level than the strip of land, the soil is of the same nature, and if there is risk of pollution from the building of houses upon the strip of land, there would also be a risk of pollution, although in a somewhat lesser degree, from the building of houses above the strip of land, to which no objection is raised by the Council. The main object of the action is to have the respective rights of the parties declared, and the plea is to the effect that buildings upon the strip of land are likely to cause pollution of the springs.

I quite concur in the view that if the pollution of the springs might reasonably be anticipated as a consequence of the erection of buildings on the strip of land, notwithstanding all due precautions that may be taken by the Council, under its wide statutory powers, to ensure a proper system of sewerage, the plaintiff company would not be entitled to relief. The company has no greater rights than its predecessor in title, from whom the estate was purchased, enjoyed. He received ample consideration for the cession of the right to the springs, and he would not have been allowed to do any acts on the estate by which the cession would have been rendered useless and of no avail. The burthen, however, of proving that any legal acts of ownership would constitute a *culpa*, or would make the cession of no avail, would lie

upon the Council. It was clearly intended that he should be allowed to continue the cultivation of the land above the springs, and if the injurious effects of such cultivation could be prevented by means of proper precautions on the part of the Council it would be the duty of the Council to take such precautions, although they might entail some expense. Part of his dwelling house stood within the land in question, and he could not well have been asked to remove that part without, at all events, the clearest possible proof that its continued existence was a source of danger, which no reasonable precautions on the part of the Council could avert. The plaintiff company purchased the estate with the avowed object of selling it in building lots, and, finding no restrictions on the title deeds against building, it might fairly have concluded that the land in question could be utilised for building purposes. The question then arises whether, notwithstanding any reasonable precautions which might be taken, the public health would be endangered by the proposed sale of the lots in question. A great deal of interesting evidence has been produced on both sides from a meteorological, geological, geographical, medical, and engineering point of view, as to the sources and the depth of the springs, as to the risk of pollution from sewers above the springs, and as to the possibility of minimising such risk and neutralising the effect of any pollution. I have given the evidence most careful consideration, but, without entering into details, it is sufficient for me to say that, in my opinion, the springs are deep-seated springs, that with proper precautions there would be no appreciable danger of contamination as a result of buildings being constructed on the strip of land in question, and that any possible contamination would be so slight that it could be rendered harmless by a proper system of filtration. The fallacy which underlies a great deal of the scientific evidence given on behalf of the Council is the supposition that the catchment area for the water flowing over the surface of the plaintiff company's land is the same as the area the rainfall on which feeds the springs. With the information before the Court it is quite impossible to say where the water which rises in the springs really comes from. It is quite certain, however, that the vast bulk of that water is fed by rains which fall at a very much greater distance from the springs than the strip of land in question. There is just a possibility that some of the rain which falls on the strip of land may percolate to the springs, but as these springs are deep-seated and as the land surrounding the springs slopes considerably, such percolation may be prevented by either constructing a concrete wall across the valley above the springs or by lining the sides of the wells, beneath which the

springs issue to a sufficient depth. There is a further possibility that sewers laid in the strip of land might leak and pollute the percolating water, but the matter of drainage and sewerage is entirely in the hands of the Council, and with the large powers of control conferred upon it by the legislature it ought surely to be possible for the Council to see that a proper drainage system is adopted that the sewers are well constructed and periodically inspected, and that contamination from this source is rendered impossible. If, notwithstanding these precautions, any noxious matter should reach the springs it would be so infinitesimal that, with proper filtration all possibility of danger would be removed. That these precautions would be required, even if the plaintiff company should be prevented from selling any part of the strip of land for building purposes is clear from the evidence given on behalf of the defendant Council itself. According to some of the defendant Council's witnesses, great part of the water comes down from the mountain to the springs in subterranean streams by means of veins or fissures. If, as contended for by the defendant, these subterranean streams are liable to contamination from soakage through the alluvial soil on the strip of land in question, they would be equally liable to contamination at a higher level. A system of filtration would, in any event, be necessary, and such filtration would be quite sufficient to prevent any danger from any possible pollution that might affect the springs. If the plaintiff company is prevented from building on the strip of land there is a certainty that it will suffer serious loss by being prevented from utilising the most valuable portion of its property for the purpose for which the property was bought. If, on the other hand, buildings are allowed to be erected on the land there exists a remote possibility that notwithstanding a complete system of drainage, and inspection of drains, a leakage may occur, causing an infinitesimally small quantity of polluted matter to reach the springs, but such slight pollution may be rendered innocuous by a system of filtration which would, under any circumstances, become necessary. But supposing that this forecast should hereinafter prove to be incorrect, the Council will still retain the right to prevent anything being done by the purchasers of lots by reason of which polluted matter might reach the springs. It is true that in *Struben v. Waterworks Company* (9, Juta, 68) this court has decided that a person may dig a well on his own land, even if he thereby diminishes the water supply of his neighbour, but it does not follow that he may allow polluted matter to flow from his own land, either above or below the surface of the ground, on to his neighbour's land. It would be an act of

*culpa* on the part of an upper proprietor to use his land in such a way as to allow injurious matter from his land to contaminate a lower proprietor's springs, and for similar acts of negligence, our law has always held the doer responsible. But the Court would never restrain a person from making an otherwise lawful use of his land merely because there exists a remote possibility that at some future time negligence in such use of the land may result in damage to another.

Although the defence mainly relied upon by the plea is the alleged danger of pollution from the proposed sub-division of the land, the defendant's counsel, in his argument, has relied upon two grounds of defence, which I shall now proceed to consider. Reliance is placed on the 1st section of the Act 23 of 1882, which vests in the Council all the water-springs and other sources of water on the estate, and it is contended that by allowing buildings to be constructed on the strip of land in question the plaintiff company would prevent the Council from tapping the sources of water-supply thereon. If this contention were to prevail, it would be practically impossible for the company to sell any portion of the estate for building purposes, for there might be sources of water-supply upon every portion of the estate. The preamble to the Act says that it had been found necessary that the Council should acquire the right and title to and the ownership of "the several springs of water rising on the said estate," and it states the fact that the amount of compensation to be paid had been referred to arbitrators mutually appointed. The deed of submission—which fully states the terms of the contract between Van Breda and the Council—makes it clear that what was intended to be transferred was all Van Breda's "right, title, or interest in and to all and every the water-springs, fountains, and springs on the estate." Such a transfer would not carry with it the right for all future time to enter upon any portion of the estate for the purpose of opening springs or tapping the sources of water-supply. Springs, fountains, or streams which were known to exist at the date of the contract vest in the Council, which has the right to utilise such streams of water and to dig, bore, or excavate the springs or fountains, and to perform all such other works as may be necessary for conserving and distributing the water. It is true that one of the conditions mentioned in the deed of submission is that the Council shall not be at liberty to take possession of any portion of the estate then under cultivation for the purpose of constructing filtering-beds, cisterns, or catchpits, but I do not infer from this condition that the Council was intended to have the right to open up fresh springs on



portions of the estate then under cultivation. It would rather appear that the reason why the opening up of unknown springs was not also prohibited was because it was assumed that only known springs, fountains, and streams had been sold. The main ground of defence, however, relied upon by Mr. Searle is that, in the absence of any allegation of bad faith on the part of the Council, the Court has no power to interfere with the discretion of the Council in the exercise of its statutory power to grant or withhold its approval of plans for laying out streets or constructing buildings. He has cited several cases in which the Court refused to compel municipal bodies to give their consent to such plans, but in none of them was it laid down that the discretion of a public body in the exercise of statutory powers such as are now in question is an unlimited one. On the contrary, the Court has more than once expressed the opinion that powers given to a public body for one purpose cannot be used for ulterior purposes which were not contemplated at the time when the powers were conferred. In the case of *Dutch Reformed Church v. Town Council* (15 S.C.C., 14) an objection was raised by the Council to an award of arbitrators who had assessed the amount of compensation payable for land which the Council had expropriated. The objection was that the land could not be valued as a building site because the Council possessed the statutory power of withholding its consent to the building of shops and offices on the site. I always feel great reluctance to quote passages from my own judgments, but the remarks made by me in that case are so appropriate to the present case that I cannot do better than repeat them. "The contention," it was said, "is a startling one, and, if supported, will have far-reaching consequences. . . . Where, as in the present case, the plans are approved of, it would be preposterous to hold that the Council may withhold its consent for the purpose of obtaining the land cheaply. It was never intended that powers given for one purpose should be held *in terrorem* to compel owners of land to come to terms in connection with expropriation, which is a power given for a wholly different purpose." The purposes for which persons intending to lay out new streets are required to deposit plans for the Council's approval may be gathered from the 2nd and 10th subsections of section 170 of Act 26 of 1893. The Council may make regulations "for regulating the level, width, direction, and construction of new streets made by the Council or by owners of private property, and the sewerage or drainage thereof," and "for regulating the giving of notices, and the deposit for the Council's approval of plans and sections by persons intending to lay out

streets or to alter or construct buildings." In deciding whether the level, width, direction, construction, sewerage, and drainage of new streets conform to the standards laid down by the Council, that body performs its legitimate functions, and this Court would not, except on clear proof of bad faith, interfere with its decisions. Where, however, a dispute arises between the Council and the proposer of plans, which has no immediate reference to the conformity of the plans to the ordinary requirements of the Council, that dispute cannot be settled merely by the Council withholding its consent to the plans. In the same way as the Council cannot claim to expropriate land cheaply by holding out the threat that it would not allow such land to be built upon, it cannot, by refusing to approve of a plan of sub-division, obtain a settlement in its favour of a dispute as to whether building upon the land would pollute springs belonging to the Council. The other party to the dispute is entitled to have it settled by a court of law, and cannot be deprived of this right by the exercise on the part of the Council of powers conferred upon it for a wholly different purpose. In the case of *Clark v. Town Council of Cape Town* (4, C.T.R., 42), the Court refused to compel the Council to consent to certain alterations in a building, although it was suggested that consent had been withheld with the object of inducing the applicant to accept the amount of compensation which had been offered by the Council for the removal of the stoep. It is clear, however, from the judgment that if the suggestion had been supported by adequate proof the Court would have granted some relief to the applicant. In the present case the defendant's counsel has candidly admitted that the defendant could not object to the plan except on the ground that the effect of building on the proposed lots would be to pollute the water supply. He did not, of course, admit that the Council acted *mala fide* or was actuated by improper motives, but the legitimate inference from the admission is that if it should be proved to the satisfaction of the Court that the pollution of the springs cannot be reasonably anticipated as a consequence of the approval of the plan of subdivision, the Council would not be justified in withholding such approval. I am satisfied from the evidence that if the ordinary precautions which would be necessary even if the strip of land were not built upon be taken by the Council there will be no additional risk of pollution of the springs from the land being built upon. As such additional risk of pollution is the sole ground upon which the consent to the plan of sub-division has hitherto been withheld, I am of opinion that the further with-



holding of such consent would be illegal as being an exercise of a power conferred on the Council for a wholly different object from that which it seeks to attain by the exercise of such power. After this expression of opinion I feel sure that it will not be necessary to do more at this stage than to declare that if the Council shall not within one month after the submission of detailed plans approve of plan A attached to the declaration upon the usual and proper terms as to the level, width, direction, construction, sewerage, and drainage of the proposed new streets, the plaintiff company, after again tendering transfer to the Council of the portion marked yellow on the said plan, shall be at liberty to proceed with the sub-division in the same manner as if the requisite consent had been duly obtained. In regard to the claim for damages, there is no conclusive evidence that loss has actually been sustained by reason of the defendant Council's delay in approving of the plans. The defendant Council will bear the costs of this action.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

**Ex parte CUTLER AND MARSDEN, TRADING AS CUTLER AND MARSDEN.**

Mr. Uppington moved, as a matter of urgency, for a temporary interdict restraining Messrs Zoutendyk and Co. from paying over to one, Mrs. Jubb the proceeds of certain sale of furniture at Leeds Houses, No. 1, Riebeck-square. Petitioners said that they had let to Eliza Jubb, married to Richard J. Jubb, certain premises in Riebeck-square at a rental of £22 10s. per month, subsequently reduced to £15, and afterwards to £13. The rental included the use of certain furniture belonging to petitioners. There was now due to petitioners the rent for April and May, viz., £26. Petitioners called attention to an advertisement in the "Cape Times" of a sale of furniture at Leeds Houses, No. 1, and said that certain furniture and effects had been disposed of by Messrs. Zoutendyk and Co. for £22 3s.

Rule nisi granted, returnable on Thursday, May 3, calling upon respondent to show cause why an interdict should not be granted as prayed, rule to be served on auctioneers as well as respondent, and to operate as a temporary interdict, Messrs. Zoutendyk and Co. to show cause why they shall not retain the sum of £48 pending an action to be brought by petitioners.

**SECOND DIVISION.**

[Before the Hon. Mr. Justice MAASDORP.]

MOORE V. MOORE. } 1906.  
May 1st.

This was an action brought by Henry George Moore against his wife, Mary Jane Moore, for divorce, on the ground of her adultery. Mr. Rowson was for the plaintiff, and the defendant had been barred.

Henry George Moore, plaintiff, of Somerset West, stated he was married to the defendant at St. Mark's, Silverton, London, on the 14th June, 1891. A year later he left for South Africa with his wife's consent. Witness sent the defendant half of his earnings. The defendant, against the wishes of the plaintiff, subsequently took a position as a stewardess. In September last he received a letter from his daughter, and on account of it discontinued the payments to his wife. On the last occasion he heard of his wife she was a stewardess on the S.S. Oswestry Grange, travelling between Liverpool and Buenos Ayres.

The daughter, a girl of tender years, gave evidence to the effect that in September last for four days a man named Jack Maybrick occupied the same room as her mother at a house in Silverton, London, E. On account of that she wrote a letter to her father, which was produced.

Decree of divorce granted, the plaintiff to have the custody of the child.

**SANDERS V. METROPOLITAN TRAMWAY COMPANY.**

This was an action brought by William King Sanders, *in forma pauperis*, to recover from the defendants £400 damages by reason of their negligence in reconstructing certain tram lines in Sir Lowry-road, through which the plaintiff sustained injuries in a trap accident.

From the declaration it appeared that on the 1st August last plaintiff was being driven by a friend from Woodstock to Cape Town along Sir Lowry-road. When they came to a spot in Sir Lowry-road opposite Rosen's corner, where the Tramway Company was repairing the line, there was a lot of loose stones on the road. At this spot the mountain side of the track was laid five to nine inches above the level of the street. When they came to that spot plaintiff saw a tram-car coming towards him on the left-hand side of the track, and he had to turn off to make way. In going off from the rails to the street below, the shaft of the trap broke, and the horse

as a consequence ran away for about 300 yards, and then the right-hand wheel of the trap struck the rail, which was lying between the two tracks, and the cart was upset in the excavations. The plaintiff and his friend were thrown out, and suffered injuries.

The defendants' plea set out that the work was done under the supervision of the City Council, and that there was not a disused rail lying between the tracks. There was no negligence on the part of the defendants. The City Council was repairing the road, which action had been rendered necessary, and while the Council was at work the defendants had their rails re-graded. There were no barricades erected, the company not being compelled to erect them. The cart in which plaintiff was travelling was unfit to travel over such ground. The negligence of the driver caused the accident.

Mr. Watermeyer for plaintiff; Mr. Molteno for defendants.

James Wolland, an architect and surveyor, said that he made a plan of the vicinity ten days after the accident.

Cross-examined by Mr. Molteno, witness said that a Mr. Muzlak had got him to draw the plan, and he had had to sue Muzlak for the money. He could not say that three carts could proceed paralld to each other between kerb and track at the scene of the accident. In any case no light trap could travel over such a number of loose heavy stones.

By Maasdorp, J.: He did not see the track ten days before the accident.

William Sanders, a coachbuilder, of Woodstock, said that on August 1 he was driven in an American trap, drawn by a low-spirited bay horse, that used to work with another horse in a pantechnicon, by a Mr. Muzlak, from Woodstock towards Cape Town. Near Rosen's corner only one tram line was open for traffic. Plaintiff's friend drove along the track, and in making way for a Woodstock-bound car, the accident occurred. Plaintiff was removed to the Casualty Ward, where he was stitched and bandaged. For the next fortnight he was confined to his house, and received medical attention. His left knee was denuded of skin, the right was grazed, there was a big out in the thick part of one of his legs, two cuts on the head, and his ribs ached very much. His injuries precluded him from working at his trade. His usual earnings were from £20 to £25 per mensem, but between August and December last year he earned only £5. Soon after the accident he wrote to Mr. Giles, of the defendant company, but to his letter, as also to those of his attorney, no reply was accorded.

Mr. Watermeyer: Have you seen the horse used for any heavy weights?

Witness: I have seen Muzlak taking his wife out in it.

Is she a heavy woman?—Yes; I should say so.

And which side does she get in?—On the left side.

So that would be a good test for the shaft?—Yes.

Cross-examined by Mr. Molteno: The picture plaintiff was carrying in the trap was not as big as the etching of the "Defence of Rorke's Drift" (produced). Plaintiff and Muzlak drove on to the tram track near the Toll Gate, because the road on the mountain side was impassable for a light trap. He did not know that the shaft of the cart had been broken before. Witness knew nothing of a letter written by an attorney of the Supreme Court asking for adequate compensation on account of witness's likelihood to be permanently injured. Witness was acquitted on a charge of stealing a ring and a bracelet, and he was under arrest when Dr. Engelbacht discharged him from the Roeland-street Gaol on the 23rd August as entirely cured.

Re-examined by Mr. Watermeyer: The conveyance of the picture would not interfere with the driving.

Felix Muzlak, furniture remover, said the bogey was quite sound. The shaft never was broken. The plaintiff was asked to accompany witness with a picture, and when opposite Rosen's corner he saw a tram-car approaching, and, getting off the line, one wheel went down first and then the other. There was a bump, and that caused the shaft to break. From his experience as a driver, the picture would not interfere with him in controlling the horse.

Mr. Watermeyer: Have you any idea of what Mrs. Muzlak weighs?—About 160 or 180 lb.

On the Sunday in question, on what side did she get into the trap?—On the left.

Is that a very fair test of the left shaft?—I should say so.

Cross-examined by Mr. Molteno: If the road had been fit to travel on on the left-hand side he would have used it instead of taking the rails. After the present case he might take an action against the Tramway Company himself. He did not tell Mr. MacDonald that in trying to save the picture he was unable to guide the horse. It was untrue that he said if he got a small sum from the company he would give evidence against the plaintiff.

Thomas Edward Piers, a doctor, said that he attended the plaintiff after the accident from August 3 to August 14. The injury to the knee would have caused plaintiff acute pain.

Christopher John Anderson, a blacksmith, who kept Muzlak's vehicles in repair, said that as Sanders had described the accident to him, it was quite possible for the shaft to have been broken in the manner stated.

Francis Malleen, a carriage-builder, said that he had seen Mr. and Mrs. Muzlak and one whom he believed to be their daughter-in-law drive from Kenilworth to Mowbray, crossing in almost record time.

Cross-examined by Mr. Molteno: About 2½ years ago he was in partnership with plaintiff. He did not purchase his works from the trustees in the insolvent estate of plaintiff. When Sanders withdrew from the partnership witness paid him about £5,000.

P.C. 154 James Smith, who was on duty at the corner of Stuckeris-street and Sir Lowry-road on the afternoon of the accident, said that the men working in the excavation had to run "for their lives" when the horse bolted. The off-side wheel caught against a tram-rail and threw Sanders over the splash-board and Muzlak on to some debris. After rendering assistance, witness examined the rails, and found them to be above the level of the road.

Cross-examined by Mr. Molteno: He saw nothing of the accident until the horse had bolted. Muzlak was endeavouring to check the horse's flight, and only through throwing his body well back was he prevented from following plaintiff over the splashboard. Witness was not on regular duty at the time, but was proceeding to draw his monthly pay in uniform. The "beat" extended from the Sir Lowry Hotel to Barron-street, the Cape Town and Woodstock boundary. The excavated rails were laid alongside.

Re-examined: There was nothing to prevent a vehicle coming into contact with the exhumed rails.

Fred Abrahamse, an eye-witness of the accident, said that the picture carried by the plaintiff was not as big as the one produced in Court (about 5 ft. by 2 ft.). The road was in a bad condition, and he examined it on August 2.

Cross-examined by Mr. Molteno: He examined it because he knew Mr. Muzlak and thought that Muzlak might want him as a witness.

Mr. Watermeyer closed his case.

For the defence John Parry, engineer's assistant in the City Engineer's Department, who was in charge of the work at the time, said the work was done with the entire approval of the Council. The Tramway Company was supplied with levels by witness, to which their rails should be lifted. The road party of the Town Council was working from the Castle end. At that time the bulk of the traffic was being confined to the Mountain side. Four sets of carts could move along abreast between the tram-line, and the kerb on the Mountain side.

Cross-examined by Mr. Watermeyer: Although the rails were above the level of the street, the thoroughfare was quite safe for traffic.

Wm. H. Turner, Superintendent of Roads for the City Council, said the work was done with the sanction and ap-

proval of the Council. The work was to improve the crown of the road. The traffic was never interfered with where the plaintiff alleged he went off the line. Both the plaintiff and Muzlak admitted that the cart was an old one.

Alex. Gordon Balfour, permanent way engineer of the Tramway Company, who was engaged in the reconstruction of the line, said that at the point from where the plaintiff left the lines back to the toll was fit for traffic.

W. B. Shaw, who acted for the defendant company, stated that he was approached by Muzlak, who stated that he had been to Mr. MacDonald in connection with a claim in connection with a claim pending. Muzlak said if the company settled his claim he would give evidence so that Sanders would lose his case.

Donald MacDonald, superintendent of the Cape Town Tramways, said that young Muzlak told him of the accident. Witness visited Muzlak, who said that in trying to save the picture he could not guide the horse. Witness examined the trap and found that the shaft had snapped at a portion that was in a rotten condition. Muzlak on three or four occasions offered in consideration of money to give evidence so that Sanders would not win his case.

Mathias Munro, foreman platelayer, who saw the accident, said that owing to the picture being in front of the cart the driver first pulled the horse one way and then the other. It looked at one time as if the cart was going to collide with the tram. There was about thirty-three feet of room on the mountain side.

Martin Overberg, a cab proprietor, of Woodstock, who has driven along Sir Lowry-road for many years, said that he did not experience any difficulty when the road was "up," either by day or night.

Robert Henry Wilson, a contractor, of Woodstock, said that at the time Sir Lowry-road was "up" he drove along that thoroughfare daily. He never experienced any difficulty, although he drove a blind fast pony.

Michael Muzlak, son of Felix Muzlak, said he was present when Mr. MacDonald examined the cart. Where the shaft broke the part was faulty. Sanders on several occasions offered witness £25 to contradict Mr. MacDonald's evidence.

Mr. Molteno closed his case.

Mr. Watermeyer having been heard in argument,

Maasdorp, J.: If the plaintiff had succeeded in proving the facts as alleged in the declaration, then undoubtedly there would have been a great deal of weight in the legal argument used by Mr. Watermeyer, but in my opinion it is on the question of fact that the plaintiff must fail. Upon the conclusion of the evidence for the plaintiff, it appears to me that the question of the condition of the road at the time of the accident was

left in great doubt. There was some evidence which might have led to suspicion that there were some obstructions in the road, which ought not to have existed, but there is no clear proof that the road was in a condition from the negligence of the defendants or of the Town Council, which rendered it dangerous to the public, and after hearing the evidence for defendant, all doubt has been removed in favour of the defendant. Judgment will be entered for the defendants.

#### BERLYN V. BERLYN.

Mr. J. E. R. de Villiers was for the plaintiff, and the defendant was in default. The action was brought by Abraham Berlyn against his wife for restitution of conjugal rights, failing which a decree of divorce.

Abraham Berlyn, plaintiff, stated he was a dentist practising in Cape Town, and that he was married in Bristol on March 14, 1893. In October, 1898, he came to South Africa. In August, 1904, his wife went to Somerset West for a change, and as a matter of economy. Plaintiff visited her each week end. He had to complain to the defendant on account of her drinking too much, and he suggested that she should go home to both his and her parents in England, in order that they might exercise some influence over her. This she refused to do, and subsequently she sent her daughter to witness, and then went off to Johannesburg, from whence she had written a letter that she could no longer be a wife to him.

Decree of restitution of conjugal rights granted, the defendant ordered to return or receive the plaintiff by June 1, failing which to show cause in terms of the intedit by June 14 why a decree of divorce should not be granted, and the plaintiff have custody of the child.

to be of Observatory-road, against her husband, James Woodall O'Connell for restitution of conjugal rights, failing which a decree of divorce.

Mr. Benjamin was for plaintiff; defendant did not appear.

Mr. Benjamin said that when the matter was last before the Court, it was found that the service was not in order, and the Court extended the return day and allowed the evidence of plaintiff, who had come down from Bulawayo, to be taken on commission.

The evidence of plaintiff, read by counsel, showed that the parties were married in Glasgow, Scotland, on March 5, 1895, and that there had been no issue. In December, 1900, they came to this country with the intention of founding their home here. They established a home at Claremont. While they were living here defendant joined Roberts's Horse and proceeded to the front. He returned after an absence of a year. He was addicted to drink. In December, 1902, defendant proceeded to England for the benefit of his health. Plaintiff casually met him in 1905 in Cape Town; but defendant did not make any provision for her, and he had not contributed towards her maintenance since 1902. Defendant was of intemperate habits.

Mr. Benjamin said that defendant was last heard of at 51, Addison Gardens, West Kensington, London.

Order of restitution granted; defendant to return to, or receive the plaintiff, on or before August 1, failing which, to show cause on August 16 why a decree of divorce should not be granted, personal service, failing which, publication, as before.

NATIONAL BANK V. PEEL. { 1906.  
May 2nd.  
" 3rd.  
&c.

[At the time of going to press this case was standing over for argument and judgment. It will be reported under the date on which judgment shall be given.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

O'CONNELL V. O'CONNELL. { 1906.  
May 2nd.

This was an action brought by Isabella Scott O'Connell, who was stated

# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### ADMISSIONS.

*Ex parte* DAVIES. { 1906.  
May 3rd.

Advocate of Supreme Court—  
Admission.

*Those who wish to be admitted as Advocates of the Supreme Court should appear in person to take the oath of allegiance before the Court. In special cases they may obtain permission to dispense with personal appearance and to take the oath before one of the superior Courts.*

Mr. Sutton moved for the admission of John Evan Davies as an advocate, and for leave to applicant to take the oath before the Registrar of the Witwatersrand High Court.

Buchanan, J.: It has frequently been intimated that in courtesy it is the least to be expected from gentlemen who wish to be admitted to the privileges of advocates of this Court that they should appear when they apply for admission. The Court sometimes, for special reasons, dispenses with such appearance and allows the oath to be taken before one or other of the Higher Courts.

Mr. Sutton said he thought that the practice only applied to attorneys.

Buchanan, J., granted an order for admission of the applicant, oaths to be taken before the Registrar of this Court.

Dr. Greer moved for the admission of Petrus Abraham le Roux as an attorney and notary.

Application granted and oaths administered.

Mr. Gutsche moved for the admission of John William Francis Hartnady as an attorney and notary.

Application granted and oaths administered.

Dr. Greer moved for the admission of Charles Friedlander as a sworn translator in German.

Application granted and oaths administered.

### LIBERMAN AND BUIRSKI V. HERMAN.

Mr. Inchbold moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### STEYTLER AND CO. V. CAMP.

Mr. Long moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### PRITCHARD V. MALAN.

Mr. De Waal moved for provisional sentence for £302 on a promissory note, payable at the Standard Bank, Prince Albert.

Order granted.

### TRILL V. ANWYL.

Mr. Sutton moved for provisional sentence on a mortgage bond for £2,720, with interest, less £34 7s. 6d., paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for rents due and about to become due to be attached.

Order granted.

### HUGO V. PENDERIS.

Mr. Toms moved for provisional sentence on a mortgage bond for £300, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### LIEBERMANN AND CO. V. SHUTTE.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### MOLEWELD V. VAN ROOYEN.

Mr. Bailey moved for provisional sentence for £500, less £182 10s. 9d., paid on account, on a promissory note, with interest.

Order granted.

### SPIRO V. PENDERIS.

Mr. Bailey moved for provisional sentence on a mortgage bond for £75, with interest, the bond having become due



by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**S.A. MUTUAL LIFE INSURANCE SOCIETY  
V. MARAIS AND ANOTHER.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £6,000, with interest, less £90 paid on account, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**S.A. MUTUAL V. MELMAN.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,200, with interest, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Defendant said that he had been promised a postponement until May 10.

Judgment as prayed, execution to be stayed for a week.

**WICHT V. EIDELBERG.**

Mr. Rowson moved for provisional sentence on a mortgage bond for £1,600, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**ZACHON V. ARP.**

Mr. Roux moved for provisional sentence on a promissory note for £82 10s.

Order granted.

**HERMAN AND CANARD V. BARROW.**

Dr. Greer moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

**ILLIQUID ROLL.**

**LITTMANN AND CO. V. KUSSEL.**

1906  
May 3rd.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £35, being part of indebtedness to plaintiff of one Philip Goldberg, for whom defendant was surety.

Order granted.

**WOLHUTER V. RUSSELL.**

Mr. W. Porter Buchanan moved for judgment under Rule 329d for £25, five months' rent of certain stables in Rosmead-avenue, Kenilworth, and for order of cancellation of lease. Counsel also applied for the applicant for damages in the sum of £500 to stand over.

Order granted in terms of application.

**WOODHEAD V. LOCHNER.**

Dr. Greer moved for judgment, under Rule 319, for £1,132 6s. 5d., money advanced, with interest *a tempore morae*, and costs.

Mr. Searle (for defendant) moved upon notice for removal of bar, and for leave to file plea on or before the 31st May.

Affidavits having been produced on both sides,

Mr. Searle submitted that this was a case where there should be an investigation. The action was for money lent between the end of 1903, and beginning of 1904, when plaintiff and defendant were in England. It was important that there should be an investigation as to defendant's estate in England, which, it was said, had been assigned, and to which assignment the firm in which plaintiff was a partner had assented.

Dr. Greer pointed out that there was absolutely no affidavit of merits in this case. Defendant's attorney had been in communication with defendant, and yet there was no statement that there was a genuine defence to the claim.

Buchanan, J.: The bar will be removed on condition that defendant pleads before the 31st May. If the plea is filed in time, costs to be costs in the cause; if no plea is filed, applicant is to pay costs of this application today, and the application for judgment will stand until the 1st June.

**GENERAL MOTIONS.**

**VAN ZYL V. PRITCHARD** { 1906.  
May 3rd.

This was an application calling upon respondent to show cause why provisional judgment given in this court, under Rule 319, on the 17th April, at the suit of the plaintiff, by reason of the defendant's default to file his plea, should not be set aside, and why applicant should not be allowed to purge his default and defend the action.

The affidavit of Mr. Hartnady, of the firm of Dold and Van Breda, attorneys, said that, owing to the difficulty of communicating with defendant, it was impossible to file his plea before he

was barred. Defendant had a *bona fide* defence to the claim, and certain of the items brought up in plaintiff's claim were repudiated. Defendant also had a claim in reconvention.

The answering affidavit of Mr. S. S. Jacobsohn, of the firm of Walker and Jacobsohn, attorneys, stated that before being barred defendant had had ample time to prepare his defence, if any. He had on more than one occasion admitted the correctness of the claim. Respondent had always been ready to hand over the shares in question to the applicant. As a matter of fact, the shares were worthless. If the case were re-opened, defendant should pay all the costs which had been incurred.

The replying affidavit of Mr. Hartnady having been read, Mr. Benjamin (for applicant) submitted that in this matter there had really been no unnecessary delay in preparing the defence. The whole matter was very complicated, and related to a considerable number of share transactions. Defendant was out of postal contact with Port Elizabeth, and it took eight days for a letter to reach him from Cape Town.

Mr. Van Zyl, for respondent, submitted that there had been no undue haste by respondent, and that applicant had been guilty of great and unnecessary delay. Applicant had no *bona fide* defence to the claim.

Buchanan, J.: I think practitioners should have a little more consideration for each other in these matters, instead of snapping at the strict rules of Court and taking judgment, and thus entailing extra expense upon their clients. Under all the circumstances, I think this should be re-opened. The bar will be removed, and defendant allowed ten days in which to file his plea, defendant to pay costs of bar, other costs to be costs in the cause.

#### *Ex parte RALANI.*

Mr. Benjamin moved on behalf of petitioner as executor dative in the estate of Thomas Ralani for an order authorising the Registrar of Deeds to pass transfer of certain property in the district of Glen Grey. Counsel said that testator had left his property to certain of his children, and the question now arose whether the surviving son, Stephen, was not absolutely entitled to the farm. He added that he thought it was desirable that the minor should be before the Court.

The matter was ordered to stand over, to enable the minor to be represented, and Mr. Douglas Buchanan was appointed *curator ad litem* of the minor, and Messrs. Silberbauer, Wahl, and Fuller as attorneys.

#### GUNTER V. LIQUIDATORS SOUTH AFRICAN NITRATE SYNDICATE, LTD.

Mr. W. Porter Buchanan moved, on the petition of Pieter Albertus Gunter, for an order calling upon Messrs. D. C. Andrew and Edward Gibbon, of Cape Town, as liquidators of the respondent syndicate, to show cause why a certain notarial servitude giving the syndicate the right to work, extract, and sell nitrates found on the petitioner's farm in the division of Prieska should not be cancelled. Counsel said that all he could do at present was to ask for a rule.

Rule *nisi* granted, returnable on the 1st June, calling upon all persons interested to show cause why the prayer of the petition should not be granted, rule to be published once in the "Government Gazette" and "Cape Times," and to be served on the liquidators and trustees (if any).

#### *Ex parte VOS AND WIFE.*

Mr. W. Porter Buchanan moved for an order authorising the registration of a certain notarial contract excluding community of property.

Order granted giving leave to petitioners to register an ante-nuptial contract in terms of the ante-nuptial agreement, the rights of all creditors accruing prior to registration reserved.

#### *Ex parte CAMPBELL AND OTHERS.*

Mr. Douglas Buchanan moved, on the petition of the executors testamentary in the estate of Peter S. Campbell, for leave to mortgage certain property for £600.

Order granted as prayed.

#### *Ex parte SONNENBERG.*

Mr. Douglas Buchanan moved, on the petition of Mr. Sonnenberg, attorney, Cape Town, for an order authorising registration of a certain ante-nuptial contract of clients. Petitioner stated that by an oversight the contract was omitted to be lodged in the office of the Registrar of Deeds within the time specified by the Act, petitioner having been absent at Simon's town in connection with the Volunteer manoeuvres during Easter.

Order granted as prayed.

#### *Ex parte FLUCKIGER.*

Mr. Rowson moved for leave to sue by edictal citation *in forma pauperis*. Respondent, it was stated, was resident in Switzerland.

Rule *nisi* granted, respondent to show cause on the 1st August, service to be effected upon respondent by registered letter.

**NEUCHÂTEL ASPHALT CO., LTD. V. ALLEN.**

This was an application for an order calling on the respondent, Andrew Allen, to hand over the books, papers, etc., of the company in his possession, and restraining him from representing himself as the agent of the company in South Africa.

Mr. Searle, K.C., was for the applicants and Mr. Alexander (in the absence of his leader, Mr. Burton) appeared for the respondent.

Counsel having been heard in argument on the facts,

Buchanan, J., said the applicant was an agent of an English company, and he also held a power of attorney from them. An agreement was entered into between the applicant and the company for a period of three years, but it was possible for either party to terminate the contract on a breach of the agreement. The respondent stood in the position of a servant to the plaintiff company, and the applicants, thinking they had good grounds for doing so, terminated the agreement. He was no longer their servant, and they were entitled to cancel the power of attorney and demand delivery of any property in his possession. He ceased to be a servant, and he must hand over to the company any property in his possession. If the respondent was wrongfully dismissed from the company he had a right to bring proceedings for wrongful dismissal, but he could not claim to continue in the service of the company against their will. Here was a company, carrying on business in South Africa; they dismissed their servant and appointed another, and they were entitled to have any assets forthwith handed over. The respondent's rights would be protected in view of any action he might take. The respondent stated that he did not intend representing himself as agent of the company, or holding himself out as such. It would be ordered that the respondent forthwith hand over the books, papers, documents, and assets of the company, the respondent to have access to them at all reasonable times, the respondent to pay the costs of the application, with leave to claim repayment of the costs in any proceedings against the applicant company.

*Ex parte* ESTATE MOSTERT.

Mr. Alexander moved to make absolute a rule calling on all concerned to show cause why a meeting should not be

called for the appointment of an executor *dative* in the estate.

Rule made absolute.

*Ex parte* NEWMAN.

Dr. Greer moved to have a rule *nisi* to show cause why leave should not be granted the applicant to sue in *forma pauperis* made absolute.

**SHERWOOD V. HOWARD AND SCOTT.**

Mr. McGregor moved to have this matter set down for final trial by jury.

Case set down for trial by jury on May 30, costs to be costs in the cause.

**JAREY V. MULLER.**

Mr. McGregor, for the defendant (applicant), moved to have this case postponed until next term, on the ground that the defendant was detained in German South Africa to give evidence in a criminal case.

Mr. Douglas Buchanan opposed on behalf of the respondent on information that the defendant could come to Cape Town before the criminal case would be called on.

It was ordered that the case be postponed until June 20.

*Ex parte* ESTATE LUCK.

Dr. Greer moved on behalf of the petitioner, the surviving spouse, for an order authorising the transfer of certain property.

Order granted.

*Ex parte* OLIVIER.

Mr. P. S. T. Jones moved for the appointment of a curator *ad litem* to Margaretha C. Olivier, whose sanity was in doubt.

Application granted, Mr. Vincent Cloete appointed *curator ad litem*, the lunacy to be proved by affidavit, summons returnable 7th June.

*Ex parte* JOHNS.

Mr. J. E. R. de Villiers moved, on behalf of the petitioner, the wife, for leave to sue her husband, Benjamin Evans Johns, by edictal citation, for restitution of conjugal rights, by reason of his malicious desertion.

Leave granted to sue by edictal citation, personal service if possible, returnable 21st June. Failing personal service, one publication in the "Star,"

Johannesburg, and "News," Pretoria, with leave to serve the intendment, and notice of trial at the same time.

*Ex parte JOOSTE.*

Mr. Inghbold moved for an order authorising the Master of the Supreme Court to pay out an allowance of £5 per month for the maintenance and education of the minor, J. M. M. du Toit.

Order in terms of the Master's report.

*Ex parte WOLFAARDT.*

Mr. Pohl moved for an order authorising the Registrar of Deeds to amend a certain transfer.

Order granted.

*Ex parte EDDIE.*

Mr. Palmer moved for an order authorising the amendment of a certain entry in the Debt Registry.

The matter was ordered to be referred to the Registrar of Deeds for report.

*Ex parte BUSBRIDGE.*

Mr. W. P. Buchanan moved for leave to the petitioner to mortgage certain property registered in the name of his minor daughter. The property was a gift from the petitioner to his daughter. The petitioner undertook to repay the loan in quarterly instalments.

Order granted in terms of the Master's report, and subject to the Master's approval.

*Ex parte MARTIN.*

Mr. W. P. Buchanan moved for leave to sue one Harry Morser *in forma pauperis* for seduction. Petitioner was a minor, of 16 years, and was assisted by her mother in the application.

A rule *nisi* was granted, returnable May 10.

*Ex parte INSOLVENT ESTATE HOFFMAN.*

Mr. W. P. Buchanan moved to make absolute a rule *nisi* calling upon all concerned to show cause why a certain diagram should not be passed by the Registrar of Deeds, with certain roads deleted.

Rule made absolute.

*Ex parte ESTATE CAROLUS.*

Mr. Lewis moved for an order authorising the cancellation of a certain bond.

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A rule *nisi* was granted, returnable on 7th June, calling on all concerned to show cause why the application should not be granted, one publication in the "Gazette" and one in the "Cape Times."

MAY V. GOLDSTEIN.

This was an application brought by George May, of Plein-street, Cape Town, upon notice to George Goldstein, to show cause why respondent should not be interdicted from issuing a writ under a judgment obtained against applicant under Rule 329d, and why applicant should not be allowed to re-open the proceedings, with a view of entering appearance and contesting the claim.

Mr. Close was for applicant; Mr. Benjamin was for respondent.

The affidavit of applicant was to the effect that a summons had been served upon him for payment of £30 10s. for professional services rendered by Goldstein. Deponent had not previously been summoned, and at the time he thought it was merely a letter of demand, and therefore he did not enter appearance. He did not know that judgment had been taken against him until he saw a paragraph in the "Cape Times." He repudiated liability for the claim of Goldstein.

Mr. Benjamin read replying affidavits.

Judgment set aside, defendant (May) to pay costs of judgment, defendant allowed to enter appearance, costs to be costs in cause.

*In re KRAAIFONTEIN HOTEL COMPANY (IN LIQUIDATION).*

This was the return day of a rule *nisi* calling upon certain persons to show cause why they should not be included in the list of contributories. Mr. Van der Byl was for the liquidators. Mr. Molteno appeared for two respondents (Carl Otto Bauman and Vincent A. van der Byl).

Mr. Van der Byl said that the liquidators had gone thoroughly into the matter since the case was last before the Court, and he had now to ask that all the names should be withdrawn from the provisional list, except those of J. L. Irvine, E. F. Lance, and A. J. Bethell. In regard to two of the parties named, he was informed that they were insolvent, and leave should, therefore, be reserved to the trustees to move within a certain date for their removal from the list, if need be.

Mr. Molteno said that, on behalf of his clients, he had to ask for costs of appearing that day.

Buchanan, J., said that the list of contributories would be settled by omitting all names from the provisional list, except those of Messrs. Irvine, Lance,

and Bethell, and costs incurred by Messrs. Bauman and V. A. van der Byl would be allowed to them.

**INCORPORATED LAW SOCIETY V.  
A. AND M. COHEN.**

**Law agent—Contempt of Court.**

This was an application, upon notice, calling upon respondents to show cause why they should not be attached for contempt of Court by reason of having issued letters of demand to one Louis, sealed and bearing the Imperial arms, thereby intending the public to believe that this was a process issued out of a Court of Justice.

Mr. Searle, K.C., was for applicants; Mr. P. S. T. Jones was for respondents.

[Buchanan, J.: Who are the respondents?]

Mr. Searle: They are merchants in Cape Town.

An affidavit by the Secretary of the Law Society (Mr. R. B. Sanderson) was in support of the application.

The affidavit of Morris Cohen, one of the partners in respondent firm, stated that there was no intention to convey to the addressee the impression that the demand had been issued out of a court of law. If the firm's conduct was improper in this matter, he (deponent) humbly apologised to the Court. He undertook that no demands would be made by his firm on such forms in future. He submitted to the judgment of the Court. An affidavit was also put in from an employee of respondents, stating that he had purchased the letter forms from W. A. Richards and Sons, and that they informed him that the forms were used by merchants in town.

[Buchanan, J.: If the firm have been circulating these, I wonder that we have not had other cases before the Court.]

Mr. Searle: I question whether we should not take proceedings against the printers also.

Counsel having been heard in argument,

Buchanan, J.: This seems to be a similar form to the one used in the case of Doner, when my brother Maasdorp used strong remarks as to the highly improper conduct of persons using these forms. I endorse those remarks. Mr. Jones has said that he might have something to say, but for the fact that respondents have submitted to the judgment of the Court, I think it is a piece of good fortune for respondents that they did submit to the judgment of the Court. As this conduct is highly reprehensible and decidedly wrong, and as they say they have stopped and do not intend to continue this practice, they will be let off this time, but they must pay costs.

If a similar matter comes before the Court again, no doubt it will take a more serious view of it. Respondent must pay the costs of this application.

**BRIDGMAN V. PRICE.**

**Dental surgeon—Discovery order  
—Interdict.**

This was an application upon notice for an order upon respondent to make discovery of certain documents.

Sir H. Juta, K.C. (with him Mr. Benjamin), was for applicant; there was no appearance on the other side.

Buchanan, J., pointed out that there had been no service of notice of motion.

Sir H. Juta said that he had an affidavit of service. He had expected that his learned friend Mr. Bisset would have appeared for respondent. Counsel went on to say that an action was instituted by Mr. Price against Mr. Bridgman for an interdict restraining the defendant from practising as a dentist in Cape Town. Defendant filed a plea, and there was a claim in re-convention, and in the meantime the Court granted an interim interdict, to be suspended pending an action, defendant to keep an account of his earnings in the interval. The defendant called upon the plaintiff to make a proper discovery on affidavit of certain books, etc., and asked for permission to see certain accounts in the Standard Bank. Upon a motion being served to this end, defendant received notice from plaintiff's attorneys that he (Price) withdrew the action and asked for defendant's bill of costs. Thereupon the defendant's attorneys pointed out that that did not settle the matter, because they had the claim in re-convention, which was for a declaration that defendant was entitled to practise in Cape Town or that Price should pay £1,700, which they said was due. Correspondence followed between the parties' attorneys, and finally the defendant's attorneys submitted to plaintiff's attorneys for signature a consent to all proceedings being withdrawn on the following terms: (1) The interdict granted on the 22nd February, 1906, restraining defendant from practising as a dentist or dental surgeon in Cape Town or elsewhere in the Cape Division without first obtaining the written consent of plaintiff is discharged; (2) the defendant is declared entitled to practise as a dentist or dental surgeon in Cape Town and elsewhere in the Cape Division, without requiring the consent of the plaintiff; (3) plaintiff is to pay all costs. That consent was not signed on behalf of plaintiff. Counsel added that unless the Court would grant judgment in terms of consent he had to move for the discovery order.



Buchanan, J., said that all the Court could do at present was to discharge the interdict.

Sir H. Juta: That won't help us; it will not prevent them from beginning an action *de novo* against us to-morrow. Counsel then proceeded to move for disclosure of certain documents, etc., in accordance with the notice of motion. He read an affidavit by Henry Bridgman (the applicant), who said that the moneys of the firm, of which he was a partner, were deposited in the private account of the respondent, and that he had relied entirely on the statements made by respondent from time to time as to the condition of the firm's finances. Deponent had reason to believe that during the partnership respondent did not pay to him his full half-share of the earnings after expenses had been paid. Respondent had refused access to the books of the partnership, and to his banking account. From the correspondence, it appeared that the respondent's position was that the books of the partnership had been destroyed, and that his (Price's) private banking account contained other transactions quite apart from the partnership.

Buchanan, J.: I had grave doubts whether the applicant should come before the Court with this application, and but for the fact that there is an interdict still pending I should have refused the application altogether. Respondent may now have a technical right to come into court and apply for the interdict to be discharged. The applicant, who obtained that interdict, does not now support it, and he has withdrawn the action which he had commenced, and costs of that action he offers to pay. I think, as the matter has now been brought into Court, to make a final settlement of the case, it may as well be recorded that judgment will be given for the defendant in the action withdrawn, with costs, and the interdict of 22nd February last will be discharged, with costs. This will dispose of the matter between the parties. As to the application for an order of discovery upon plaintiff, I shall not make an order. Defendant having come into court, he can take an order for costs of the action, and, further, an order that the interdict be discharged, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ROUS V. ROUS.

{ 1906.  
{ May 4th.

This was an action brought by Augusta Alice S. Rous, of Ponterville-road, against Arthur William Scaly Rous, now believed to be in the Transvaal, for restitution of conjugal rights, failing which a decree of divorce, and custody of the child of the marriage.

Plaintiff, in her declaration, said that prior to and since December, 1904, defendant had failed to contribute to her support.

Mr. Benjamin was for plaintiff; defendant did not appear.

William Thomas Birch, clerk in charge of the Marriage Records, Colonial Office, produced certificate of the marriage.

Augusta Alice S. Rous said she was married in community of property to defendant on the 21st February, 1900, at Cape Town. Her husband, who was a plumber, then lived at Rosebank, where they remained about three years. Then they went to Ponterville-road, where defendant commenced a brickmaking business on her father's property. After he had been there about twelve months, he gave up that business and went to the Transvaal, where he got work. Witness also went to the Transvaal, but defendant could not afford to support her, because he was always gambling and racing his money away. She afterwards worked for her livelihood, and kept house for her father.

Mr. Benjamin read a number of letters written by defendant to his wife, in which he said: "I ask you, for God Almighty's sake, and our boy's, not to take action against me. If you are going into the Divorce Court to rip myself from you, I would sooner leave you a widow than that there should be a separation between you and I. Before God, I promise I will do right to you and Cecil. I admit I have been a cad, and am quite ashamed of my actions."

[De Villiers, C.J. (to witness): If the defendant wishes to take you back, you will be prepared to go?]

Witness: Yes, if he will provide a home for me.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 15th July, failing which a rule to issue calling upon defen-

dant to show cause on the 1st August why a decree of divorce should not be granted, with costs, with custody to plaintiff of the child of the marriage and maintenance at the rate of £2 10s. per month, until such child attains the age of 16 years.

#### BIRCH V. BIRCH.

This was an action brought by William Alfred Birch, a railway employee, of Woodstock, against his wife, who was stated to be residing at Dock Cottages, Cape Town, for a decree of divorce by reason of her adultery with some person or persons to plaintiff unknown.

Plaintiff claimed a decree of divorce dissolving the bonds of marriage, and an order declaring the defendant to have forfeited all benefits of the marriage in community.

Dr. Greer was for plaintiff; defendant did not appear.

Wm. Thos. Birch, clerk in charge of the Marriage Register, Colonial Office, produced the certificate of the marriage.

Stephen Hy. Elliott, an ex-sergeant of police, at present employed by Osberg's Inquiry Agency, said that he received instructions to watch 30, Porter-street, Woodstock, occupied by Mrs. Birch. On the night of March 3 he saw a man walking on the platform of Woodstock Station, adjacent to which was the cottage. The man had some carpenter's tools. Witness saw him enter the defendant's house. The man remained there some time. Mrs. Birch was the only occupier of the house. The man afterwards left by the 11.30 train for Maitland. Witness had not seen him since.

William Alfred Birch, a travelling ticket examiner, said he was married to defendant in St. Mark's Church, Cape Town, in 1897. His duties about once a month took him away from home for about 16 or 17 days. About the end of last year he returned home a day before he was expected. In the early hours next morning a railway man in uniform knocked at the window, and witness put up the blind. The railway man then said, "Are you Mr. Birch?" Witness replied, "Yes," and the man then said, "Mr. Joubert wants to see you in the morning." Witness did not know a Mr. Joubert. Witness was suspicious, but he took no steps until he was about to go away again on the 25th January. Defendant was now staying with her mother in Cape Town.

Decree of divorce granted, and defendant declared to have forfeited benefits of the marriage.

DAVIDS V. ESTATE DAVIDS. { 1906.  
May 4th.

Griqualand — Marriage — Community of property.

*Under Griqua law, as it existed among the Grikwas before the annexation of their territory, the survivor of two spouses was entitled to one half of the immovable property of the deceased spouse.*

Fortuin's executor v. Abrahams (7 C.T.R., 30) commented on.

This was an action brought by Magdalena Carolina Davids, of Kokstad, against Marthinus Jacobus Davids and Frederick Davids, as executors testamentary in the estate Davids, for a declaration of rights.

The declaration set out that plaintiff was a widow of the tribe known as Grikwas, and resided at Kokstad, East Griqualand. She was married to Marthinus Davids at Emfundisweni, Eastern Pondoland, by the Rev. Thos. Jenkins, according to Christian rites, and in accordance with the rites of the Griqua tribe. In 1893 she and her husband executed a mutual last will and testament, disposing of their joint property. At the time of his death the late Marthinus Davids, who was married to plaintiff in community of property, owned a certain piece of ground, Lot B, in Kokstad, in extent ten morgen, 522 sq. roods, which piece of ground was still registered in the name of the late Marthinus Davids. Plaintiff had not alienated and had not intended to alienate her share in the said piece of ground, and she had repudiated the said last will and testament, and she had claimed and still claimed her half-share of the said estate free and unencumbered. The executors had refused and failed to file an administration account or to pass transfer of one-half of the ground belonging to the joint estate. Plaintiff prayed for an order declaring that she was entitled to one-half of the joint estate, for transfer to her of the aforesaid ground, alternative relief and costs of suit.

Mr. Roux was for plaintiff, who sued *in forma pauperis*; defendants were in default.

Mr. Roux proceeded to read the record of evidence taken on commission before the Assistant R.M. of Kokstad.

The first witness examined was William Murray, who said that he had been preacher and assistant pastor of the Griqua Church since 1879. In 1891 he became chief pastor. He drew up the joint will of Martinus Davids and his wife, and attested the same as a wit-

near. Before there was a minister at Kokstad, Griquas used to go to the nearest missionary to be married. He knew of his own knowledge that Mr. and Mrs. Davids were married by the Rev. Thomas Jenkins at Emfundisweni, Pondoland East. This was looked upon as a valid marriage by the Griquas. Griquas always married in community in the fullest sense of the term.

Cornelius George de Bruin, headman of the Griqua people, said that they were descended from Europeans and Hottentots. Their law of succession was the same as that of the Colony. For the last sixty years marriage, to be considered legal, must be before a minister of religion. Marriages were always in community of property, and as a consequence the surviving spouse was always entitled to half of the estate, and could claim it.

Plaintiff gave evidence as to her marriage, and stated that she became engaged to her husband on the road when Adam Kok trekked to East Griqualand. As soon as the people decided to settle there she and Davids decided to get married, and went and got married at Emfundisweni, there being no minister at Kokstad. Kok gave land to all the families, and the land apportioned to witness and her husband was apportioned to them after their marriage. Frederick Davids was one of the deceased's children by his first marriage. She was married to Martinus Davids in community of property, and at the time neither had any immovable property. Before they went to Pondoland they had chosen this country (Griqualand) as their domicile with their tribe. All the property they got after their marriage they looked upon as their joint property. Her husband and herself made a will in 1893. Some time ago she wished to find out what had been done under the will, and what her rights were in regard to the property. After it had been explained to her that she had a right to repudiate the will, she signed a deed of repudiation. She had never received any benefits under her late husband's will. She never bound herself to carry out her husband's wishes in his will. She was told by her stepchildren, including defendant Frederick, that as her name was not mentioned in the will she had no rights under it. The three sons mentioned in the will lived with her after her husband's death, and she supported them instead of their supporting her. She lived on a small piece of Lot B with her two sons. She had never received any benefit from the rest of the ground, which was being ploughed and sown by white people.

Frederick Werner, another Griqua, who went to Kokstad with the original trekkers, said that community of property had always been the custom in Griqua marriages. During Adam Kok's time witness was a Circuit Judge and

Raadsman. Adam Kok's cousin, Jan Kok, died before they went to Kokstad. His estate was divided and his wife got half and the children got half. Witness always regarded Jan Kok's estate as being correctly administered. The surviving spouse had a right to claim half of the estate, even though there was a will.

Louis Pretorius, a former member of the Raad during Adam Kok's time, said that marriages amongst Griquas were always in community of property unless a contract was made to the contrary, and generally the law of succession was the same as it was now, but executors did not get letters of administration.

Frederick Simon Berning, attorney, Kokstad, said that during the last five years he had had considerable experience in administering Griqua estates. Without exception, these estates had always been administered according to Roman Dutch law. Searches in the Chief Magistrate's Office, where these estates were formerly administered, showed that the same principles governed them.

Other evidence was also given on commission.

Mr. Roux said that he had certain witnesses whom he proposed to call, including Mr. L. Zietsman, M.L.A.

De Villiers, C.J., however, intimated that he did not think it was necessary to lead additional evidence.

Mr. Roux (in reply to the Court) said that he did not think there was any movable property in the estate.

De Villiers, C.J.: An order will be granted as prayed, except on the first prayer, which is general. The order of the Court will be confined to a declaration that plaintiff is entitled to one-half of the immovable property in the estate of herself and her husband, and a direction that half of that property be transferred to plaintiff, costs of this action to be paid by defendants, in their capacities as executors of the late Martinus Davids. The plaintiff does not claim the right to remain in possession of the whole of the property, and the question as to the right during her lifetime of her children by her deceased husband to one-half of the property does not arise. The plaintiff's case is that under Griqua custom before annexation she was entitled, on the death of her husband, to one-half of the farm, and the evidence given in this case entirely supports the existence of such a custom. In the case of *Fortuin's executor v. Abrahams* (7, C.T.R., 30) a child of a deceased spouse claimed his maternal portion of a farm during the lifetime of his father, and the Court held that his right had not been proved. The Court, however, intimated that a modified community seems to have existed among the tribe, and this modified community is quite consistent with the claim now made by the plaintiffs.

AREND V. RIX. { 1906.  
May 4th.

**Trespass—Cutting down trees—  
Measure of damages.**

*Where, in an action for trespass, it is proved that trees which enhance the value of the property have been cut down, the measure of damages is not the actual value of the trees, but the damage done to the property by deteriorating its value.*

This was an action brought by Hadje Omar Arend, farmer and produce dealer, Claremont Flats, against August Hendrik Frederick Rix, also a farmer, of Claremont Flats, for a declaration of rights, damages, and an interdict.

Plaintiff, in his declaration, said that he was the owner of a certain piece of redeemed quitrent land situate at Claremont Flats, and that defendant was the owner of certain adjoining property. On the 15th June, 1905, certain natives wrongfully and unlawfully trespassed on plaintiff's land, and did cut and carry away two trees, the property of plaintiff, and of the value of £5. The natives were afterwards summoned before the Assistant Resident Magistrate, of Claremont. At the hearing the defendant gave evidence, and claimed that the ground upon which the two trees had been standing was his property. The Magistrate dismissed the charge, on the ground that there was a *bona fide* dispute between the plaintiff and defendant as to the ownership of the land. Plaintiff prayed for damages in the sum of £20, a declaration that the ground in question was his property, and an interdict restraining the defendant from further trespassing on his land.

Dr. Greer was for plaintiff; defendant was in default.

Hadje Omar Arend (the plaintiff) said that he was a farmer, produce dealer, and speculator, residing at Claremont Flats. The river formed the boundary between his estate and defendants. He saw the poplar trees in question cut down on his estate; the trees had been growing on his side of the river banks. The trees were removed across the river. He estimated that his loss was £20. He had instituted proceedings in the Magistrate's Court against one Brown, who was discharged on the ground Rix gave him permission, and that Rix said he was owner. Witness brought a surveyor to the Court, and then the Magistrate told him it was a waste of time, and that he had better take the case to the Supreme Court. He was put to some expense in consequence.

[De Villiers, C.J.: Yes, but that can-

not be claimed in this Court as damages.]

B. G. Bisset, land surveyor, Cape Town, said that he had inspected the plaintiff's ground, and he found from the diagrams and transfers that the portion on which these trees had been cut down belonged to plaintiff.

De Villiers, C.J.: Judgment will be given for plaintiff for £10, with costs. That amount is given, not on the basis of the value of the trees, but I have no doubt that the property itself has been deteriorated in consequence of the trees being cut down. The Court will, therefore, give judgment for £10, with costs, and declare that the land upon which the trees had been standing is the property of the plaintiff. There is no threat to further trespass, and there is no necessity for an interdict, and no order will, therefore, be given on that part of the claim.

[Plaintiff's Attorney: C. Brady. Defendant in default.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

VAN ZYL V. ESTATE SLUITER. { 1906.  
May 4th.

This was an action brought by Saul Francis van Zyl, a farmer, residing in the division of Colesberg, against the executors of the estate of the late Dirk Sluiter, represented by Mr. Roos, as secretary of the Board of Executors, to recover certain amounts stated to be due under certain agreements between the late Mr. Sluiter, and Mr. Van Zyl, in connection with the taking charge of certain stock on his farm. An arrangement was entered into to share certain kids. As an alternative to an amount claimed under one of the agreements, remuneration was claimed for services rendered by taking charge of the cattle, in case it should appear to the Court under the circumstances that the amount for commission could not be strictly due. The late Mr. Sluiter had an amount of stock, and Mr. Van Zyl owned an adjacent farm. For years past plaintiff and Mr. Sluiter had different agreements under which the plaintiff took charge of certain stock on the farm, and there were considerable transactions. The plaintiff sold from time to time large amounts of stock for Mr. Sluiter, and received certain amounts for commission. In December, 1899, after the war broke out, Mr. Sluiter was anxious to quit the neighbourhood. Mr. Sluiter asked the plaintiff to take particular charge of his stock during his absence, when he went to Europe, and did not

return until 1902. In June, 1904, Mr. Sluiter again went to Europe, and died there in August, 1904, at the age of 86. Certain of these amounts were outstanding, and the plaintiff sent in a claim. Mr. Roos went up to the farm, and plaintiff said, a certain basis was arrived at in regard to all the agreements but one. Herman Sluiter, the deceased's nephew, was present when this agreement was arrived at. The items agreed upon amounted to £50. In addition there was an amount of £40, claimed for commission in connection with the sales of cattle. The plaintiff stated if the defendant did not wish to pay the commission he would alternatively claim £390 for simply taking charge of the cattle.

The plea admitted the formal allegations, and put the plaintiff to the proof of the agreements, which the defendant denied were entered into. The defendant tendered the plaintiff £25, which was refused.

Mr. Searle, K.C. (with him Mr. Swift), was for the plaintiff, and Mr. Burton (with him Mr. Lewis) was for the defendant.

Sarel van Zyl said that agreements were entered into between him and the deceased in April and June, 1899. When the Boers were in Colesberg, December, 1899, Sluiter repeatedly asked him to take charge of his stock, as he was anxious to leave the vicinity. Witness declined asking if the belligerents raided the stock how he would stand. Sluiter replied that he would sell the cattle to witness, and wrote in a rough diary that he had sold his stock to Van Zyl, although no exchange was made between the parties. Witness had never claimed the cattle on the strength of the document, as he could have easily done. On his return from his trip Sluiter paid witness £30 by cheque as a gratuity, and went so far as to insert a sort of proclamation in the Colesberg paper to the effect that he was greatly indebted to Van Zyl for all he had done, that in times of trouble one learned who was who, and which concluded as follows: "Long live Sarel van Zyl. Would that the sheep had remained under his care." Witness took charge of Tygersfontein, one of Sluiter's farms, and in March, 1903, he took charge of a number of sheep. Witness proceeded to give evidence on the different sales of stock, the prices realised and the commission due from Sluiter. In June, 1904, when he sent the last account to Sluiter, it had nothing to do with the commission on cattle. As soon as he heard of Sluiter's death witness put in his claim. Mr. Roos agreed to the plan suggested by Mr. Herman Sluiter with regard to plaintiff's share in the sale of the sheep, mohair, and kids. Mr. Roos did not promise anything on the commission; he merely said he would consider the matter.

Cross-examined by Mr. Burton: He had never lived on the farm of the deceased. Witness gave orders as to the shearing, and the work was performed by Sluiter's own men. He had told Mr. Roos that Sluiter had promised him 2½ per cent. on the cattle on Tygersfontein.

You did not do badly in the matter? —I did not do the best.

Continuing, witness said that a man named De Villiers, who was on Tygersfontein on the "halves" principle, looked after the cattle, and another named Steyn, in the employ of Sluiter, cared for the sheep and goats. Witness supervised.

Herman Jacobus Sluiter, of Taaiboschfontein, manager for many years of the deceased's farms, supported plaintiff's claim. During the war all the work had fallen upon plaintiff.

Cross-examined by Mr. Burton: His uncle usually sheared once a year, but witness recently had sheared thrice in two years, because the price of wool had gone up. Mr. Roos agreed to the arrangement as set out by the plaintiff.

F. P. Potgieter, of Colesberg, who was well acquainted with the parties, stated he took the cattle the plaintiff had charge of to Springfontein for sale. The 109 cattle realised £616.

Tobias de Villiers stated that when Sluiter left the farm the plaintiff looked after the whole stock.

Mr. Searle closed his case.

Johannas Neethling Roos, secretary of the Board of Executors and as executor to the estate defendant in the case, stated he had nothing to go on except the documents. The claim of the plaintiff was carefully considered by witness. When he visited the farm witness distinctly refused to have the sheep shorn. The question of the value of the wool was merely discussed, but there was nothing definite fixed upon. Witness suggested that the plaintiff should accept half a crown each for the kids. It was virtually to settle the case that he made an offer of £25 to the plaintiff.

Mr. Burton closed his case; and counsel having been heard in argument on the facts,

Buchanan, J.: The late Mr. Sluiter and the plaintiff, Mr. Van Zyl, were very great friends. Mr. Sluiter was a man of considerable wealth, and he owned property and stock, and he wished Mr. Van Zyl to take charge of his stock and supervise his farm arrangements, for which he promised certain remuneration. Accounts were settled from time to time up to June, 1904, when Mr. Sluiter left the Colony for Europe, and shortly afterwards died, and the defendant in the case is the executor in the estate. The claim in this case was really for remuneration which came



under the previous agreements for work done by the plaintiff between the time of the last settlement and the time the property of the estate was handed over to the executor. The first paragraph of plaintiff's prayer referred to a claim connected with sheep and goats running on the farm. The plaintiff undertook to supervise this stock, and Mr. Sluiter promised him one bale of wool out of every twenty-five, and also  $2\frac{1}{2}$  per cent. on all wethers sold, half the wool from the goats, and twenty in every hundred lambs. The plaintiff said he was about to shear the sheep, but the executor preferred that the sheep be sold with the wool on. The defendant denied that he came to any positive agreement, but certainly an impression to that effect was conveyed to the minds of the plaintiff and Herman Sluiter. It was clear that the actual amount could not be fixed at that interview, because it had to be ascertained what were the previous transactions between the parties. It was clear also that something must be allowed to the plaintiff for his share of the wool, and his proportion of the goats. It was clear that the tender of £25 was insufficient on the whole of the claim. His Lordship, using his judgment as a juror, as to what was a fair amount in a rough and ready estimate, and putting the two claims together as he preferred to do, gave judgment for the plaintiff for £65, that was £40 on the first and £25 on the second count, with costs. The executor, His Lordship added, was in a difficult position, as he could not have definite proof as to whether he was justified in paying this liability. The costs would come out of the estate.

[Plaintiff's Attorney: G. Trollip.  
Defendant's Attorneys: Van Zyl and Buissinne.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BRADY V. S.A. TURF CLUB. ( 1906.  
May 7th.

Sir H. Juta, K.C. (with him Mr. Molteno) was for the applicant, and Dr. Greer was for the respondent.

The application was to have the case postponed from to-morrow to a later date.

Sir H. Juta said the parties had agreed by letter that the case should not be heard sooner than the 11th, and now, in the distribution of the work, the case was put down for the 8th. At the time when the trial was fixed the applicants were unable to inform the Court of this arrangement, and it was impossible for them to go to trial to-morrow, so that counsel would ask that the case be put down for trial at a later date.

[De Villiers, C.J.: Do you oppose, Mr. Greer?]

Dr. Greer: We oppose to this extent—we say they ought to have taken action sooner. The statement of your lordship appeared in the press on Monday and Tuesday last, and my client will be caused considerable inconvenience if the case is not heard to-morrow. I am instructed to oppose, but, of course, it is a matter that must be left in the hands of the Court.

Sir H. Juta: I would draw your lordship's attention to your statement that you thought the case of such importance that it should be tried before a full court. Counsel then read the letter from Mr. Brady to Mr. Fairbridge.

De Villiers, C.J., ordered the case to be set down for trial on the 18th inst., costs to be costs in the cause.

### INSOLVENT ESTATE STEVENS V. GILCHRIST AND POWELL.

This was an application on notice of motion, calling on the respondents to show cause why they should not be ordered to hand over to the applicant 45,000 shares in Sacco, Ltd., belonging to the insolvent estate, and at present in the possession of Mr. Gus. Trollip.

From the affidavits it appeared that Stevens was the promoter and holder of a very large number of shares, practically the whole of the holding of the company called Sacco, Ltd. Mr. MacCallum had a claim against Stevens for professional services, and an application was made to the Court on January 20 last to interdict the alienation of 55,000 shares which belonged to Stevens. It was subsequently found that 45,000 shares were in the hands of Mr. Gus. Trollip, and held by him on behalf of the present respondents. Stevens went insolvent, and now the trustee asked that these 45,000 shares should be delivered to him as belonging to the estate.

The answering affidavit of Mr. H. A. Payne, an attorney of the Supreme Court, set out that the only director of the respondents at present in South Africa was at Johan-

nesburg, and time would not allow of an affidavit being prepared. Deponent knew that respondents undertook, in consideration of the shares, to pay the liabilities of the Sacco Company. At the time of the sale the company was on the verge of compulsory sequestration, and respondents were ready to carry out the terms of their contract.

Mr. Burton was for the applicant, and Mr. W. P. Buchanan appeared for the respondents.

De Villiers, C.J., said it appeared to him this case could not be disposed of on motion. He did not see why the trustee should not bring his action against Gilchrist. The shares were quite safe in the hands of Mr. Trollop. In giving judgment, his lordship said: The shares are at present under attachment in the hands of Mr. Trollop. That stands pending a further order of Court. That order of Court will remain. Now, it is quite clear that the plaintiff will have to proceed by action in order to obtain the remedy sought for. It seems to me to make no difference who brings the action. At present the applicant is quite secure by the fact of the attachment. There will be no order in this application, the applicant to proceed by action, costs to be costs in the cause.

#### LAW SOCIETY V. KRIGE.

This was an application by the Law Society against one Evelyn Wm. Krige, an attorney, of Ceres, calling on him to show cause why he should not be struck off the roll of attorneys and notaries by reason of his knowledge that his client, Mrs. Hough, had already put in a claim for compensation when he forwarded the same claim on a second occasion to the War Losses Compensation, and by adding the words "or any other persons," and "either against the Colonial Government or the military" without the claimant's knowledge. Certain items which had previously been disallowed were reclaimed. The commission made no award on the claim, as the statement was false, and no previous claim had been made, and the evidence on the other matters was unsatisfactory. The respondent, who appeared before the commission, admitted that in 1903 he was suspended for six months, but said that in this matter he was told by the Magistrate's Clerk to fill in the words complained of. In an affidavit, in reply to those of the applicants, the respondent stated that when he sent the forms to Mrs. Hough he requested her to insert all her losses which she had not previously claimed. He could remember generally that her previous claim was for jewellery. Had he known she was claiming the same items, he could easily have forwarded her a form for

review. The words be inserted must have been on the paper before the claimant signed.

Mr. Searle, K.C., was for the applicant, and Mr. Burton was for the respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: Upon the evidence which was given before the Compensation Commission, that Commission was perfectly justified in taking a very serious view of this case, and in sending the papers to the Law Society to deal with. The charges are three-fold; but the gravamen of the charges is contained in the third: that in the printed declaration he inserted the following words in ink: "or any other persons," and further: "either against the Colonial Government or the military," and that he did so after the declaration was signed by the claimant and without her knowledge, and to make it appear that these additions were made by her after she signed it. Upon the evidence given by the respondent himself before the Commission this charge was supported. He said it was customary to do so, and that he did this at the request of Mr. Cloete, the Magistrate's Clerk. It turns out now that nothing of the kind was done, that in point of fact this document was submitted after it had been signed by Mrs. Hough, and whatever interlineations appeared on that document were there before Mrs. Hough signed the document. That, of course, takes away the whole sting of the charge, but there still remains the fact that the Commission was led to believe, when the claim was signed that no part of the claim had been previously dealt with. In point of fact, part of the claim had been dealt with by a previous commission. It is important therefore to consider whether, although this appeared on the face of the claim, that a representative of that Commission, Mr. Horne, was duly informed of the fact that part of the claim had been previously dealt with. On the evidence given on behalf of the respondent, Mr. Horne, the representative of the Commission, was informed of this previous claim. That was so stated by Mr. Krige in his letter of the 6th December, 1905. He said that during the course of her evidence before the Magistrate the claimant distinctly stated she had already given evidence on the question of the jewellery before Mr. Innes, and received no compensation. Then the Commission referred the matter for report to Mr. Horne, who indignantly denied the statement. He said, "As to the statement made, that I had not recorded her evidence in regard to the claim for jewellery, it is incorrect." Mrs. Hough and Miss Hough and all the witnesses for the respondent support

the statement. When Mr. Horne is asked to make a statement on oath he tacitly admits the correctness of the statements of these witnesses. Under all the circumstances, I think that the Court could not now impose any punishment upon Mr. Krige for what at the utmost was very great carelessness, but there was certainly no professional impropriety to justify the Court in imposing any punishment upon him. But whatever has been done, the applicant is greatly to blame himself for his explanation before the Commission condemned him. He made an admission there that he made these interlineations after his client had signed the document, and without obtaining her consent. That was an impropriety for which the Court would have been justified in giving some punishment. Under all the circumstances, as it now appears that his admissions made before the Commission had been made under an erroneous impression and have been entirely disproved by the facts subsequently deposed to, I am of opinion that there should be no order; and as to costs, I also consider that there should be no order.

#### ST. JOHN'S LODGE BENEFIT SOCIETY V. COATES.

This was an application for an order compelling the respondent, one of the trustees of the society, to sign an order to pay the costs of a previous application.

Mr. J. E. R. de Villiers was for the applicants, and Mr. W. P. Buchanan was for the respondent.

Mr. W. P. Buchanan said his client did not refuse now. He would not pay until he was satisfied that the moneys required were for the proper and legitimate business of the society. There had been letters between the parties, and now the respondent objected to pay the costs of the application, which the applicants intended bringing.

*Cur. Adv. Vult.*

*Postea* (May 8th).

De Villiers, C.J.: The object of this application was to have an order declaring respondent liable to pay costs of an application which was brought before this Court some time ago. (16. C.T. R., 37) Notice of the applicant was given, but was ultimately withdrawn on the respondent consenting to comply with the order asked for. It is quite clear to me that the respondent took up a wholly untenable position. He had originally made an application against the present applicant for the purpose of having a declaration in regard to certain resolution passed by the St. John's Benefit Society. The order made in that case

was: "That the resolution that the St. John's Benefit Society should in future work under the Charter of England, and that the sum of £10 be paid out of the funds of the said society for the purpose of defraying the expenses of the initiation of twelve of the members into the British order of Free Gardeners passed at a meeting of the said St. John's Benefit Society duly convened for that purpose, and held on the 20th September, 1905, at Wynberg, be cancelled; and further ordered that the resolution be expunged from the minutes and an interdict restraining the secretary or any other member from paying out of the funds of the said society any money for the purpose contemplated by the said resolution pending an action to be forthwith instituted by the applicants to have the matter properly decided." So that, according to this order, it was not a final decision. The respondent, instead of bringing the action which it was intended that he should bring for the purpose of the final decision, took up a wholly untenable position, and claimed that he had the right to insist upon the return of the charter of Scotland being procured. It is stated that the society holds that it is not incumbent, nor can it be compelled to return the charter of Scotland. That was what was demanded. The first reason given by the present respondent for not complying with the application was that that would be inconsistent with the order of the Court granting an interdict, but it is quite clear that the interdict granted by the Court had no reference to the then application. The then application was to have the means of satisfying the judgment of the Court. The judgment of the Court previously had been that the society was to pay the costs, and, without the assistance of the respondent, it was wholly unable to pay those costs. Respondent was one of the trustees, and he held this *in terrorem* over the society, seeing that he refused to comply with his duty as one of the trustees for the payment of costs, until certain things were done which he had no right to claim from the other side. Under these circumstances, it seems to me that the applicant had no other course but to come into court for the purpose of obtaining redress. Respondent ultimately consented to it, but it was too late, it was after the costs had been incurred, and it is only fair, therefore, that those costs should be paid by the respondent. Of course, the costs of the present application must also be paid by the respondent. An order will, therefore, be granted as prayed.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

REX V. SCHUR. { 1906.  
May 7th.

This was an appeal from a judgment of the R.M. of Namaqualand, who had found appellant guilty of contravening section 22 of the Stock Theft Act, No. 35, 1893, by receiving certain stolen goats without having reasonable belief that they were the property of the seller. Appellant was fined £10, or in default three months' imprisonment.

From the record it appeared that the goats in question had been stolen by one Gert Coetzee, who had been arrested on a charge of theft, and who was called as the principal witness against appellant. Coetzee, it was stated, was a son and member of the Concordia Community. The goats were sold on two dates to accused at O'okiep. Defendant, in his evidence, said that he lived at O'okiep, and was a partner in the firm of Schur and Son, retailers and butchers. Coetzee looked a respectable man, and there was nothing to arouse suspicion that the goats might have been stolen.

Mr. Benjamin was for appellant; Mr. Howel Jones was for the Crown.

Mr. Benjamin said that he admitted that the *onus probandi* under the section was upon the accused. But in such a case as this the quantum of proof required (in view of the fact that the Magistrate had found that accused had paid a fair price, that he had entered the transaction in his book, except the name of the party from whom he bought, and that, in addition, the accused had not for one moment the slightest idea that the stock was stolen) was much smaller than ordinarily. He submitted that the evidence before the Court below was sufficient to find that accused had reasonable cause for believing that this stock belonged to Coetzee. The stock was such as was ordinarily possessed by people of the class of Coetzee, who was one of the miners at Concordia.

Without calling upon Mr. Howel Jones,

Maasdorp, J.: In this case the accused is charged with having received stolen stock from a thief without having reasonable cause for believing that the stock was the property of the person from whom he received it or that such person was duly authorised by the rightful owner to deal with and dispose of it. The Magistrate had to ascertain in this case whether the accused had such *bona fide* belief. That is a question of fact which he had to determine, and the burden of proving that fact lay upon the accused. The Magistrate came to the conclusion that the accused had not satisfied him that he

had such *bona fide* belief that the seller had the right to sell this property. Now, the circumstances under which the Magistrate came to that conclusion are the following: It seems that a young coloured man of the age of 20 years came to the accused with these goats, and the accused, without making any inquiries as to the manner in which these goats had been acquired by the seller, to ascertain whether he carried a pass with him, which would to some extent establish his ownership, bought the goats from this "boy." It seems that the "boy" was wholly unknown to the accused. Now, on the whole, one would say the circumstances were suspicious; that a young "boy" of this class should be the owner of those goats persons knowing that district would not readily believe; and it is quite reasonable, therefore, to expect that the accused should have made inquiries to satisfy himself that there was no ground for these suspicions, and that this coloured boy had the right to sell this property. He made no attempt to remove the suspicions which ought to have existed in his own mind. He purchases the six goats from the accused, and then he makes this extraordinary observation to him, he says himself: "After purchasing the first lot of goats, I told him to look round amongst his friends to see if they had any." That was a very dangerous suggestion to make. This boy does look round amongst his friends, and, for a second time without making inquiries, the accused bought four goats from this boy. On the second occasion again, the circumstances were suspicious, and any person who had used his common-sense would have had grave doubts whether this young lad could be owner of the goats, and have the right to sell them. Under the circumstances, I think the Magistrate was right in coming to the conclusion that the accused had no *bona-fide* belief that the seller of the stock had a right to sell the stock, and that, consequently, the accused had not discharged the burden of proof which lay upon him when he had such belief, and the Magistrate was right in coming to the conclusion that there was a contravention of the section. The appeal will be dismissed.

Mr. Benjamin called the attention of the Court to the fact that the record said appellant was charged under the provisions of section 22, Act 35, 1893, with the crime of theft. That was not correct, and he applied for an amendment of the record.

Mr. Howel Jones acquiesced in the application.

[Maasdorp, J.: The record will be amended, and instead of the word "theft" the following words will be substituted: "Contravention of the provisions of section 22 of the Act."]



# **REX V. DHARMADAS.**

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape, who had convicted appellant of perjury, and sentenced him to six months' imprisonment, with hard labour.

From the records it appeared that the Assistant Resident Magistrate of the Cape in March last convicted the appellant of perjury. The case had been sent to the Attorney-General, who had remitted it to the Magistrate for decision, and the Magistrate sent appellant to gaol for six months without the option of a fine. Three records were brought before the Court in this matter. On the 31st March, 1905, the appellant, who was an Indian trader, alleged that he had been assaulted by one Fatichand, another Indian trader, and he swore an affidavit to that effect. On that affidavit a warrant for the arrest of the other man was issued, but the police did not execute that warrant, certain facts, as they said, having come to their notice. In consequence, a charge of perjury was laid against the present appellant on the ground that he had sworn a false affidavit, and evidence was taken, and the appellant produced the evidence of two European witnesses, viz., Stockberg and Van Dyk. A preliminary investigation was held, and the papers were sent to the Attorney-General, who declined to prosecute on the charge of perjury. After that the appellant, Dharmadag, brought an action against Fatichand for malicious arrest and false imprisonment, claiming £20 damages in the R.M.'s Court. The appellant, during the course of the case, repeated on oath what he had previously stated in his affidavit. The Magistrate heard the case, and found in favour of the defendant. Proceedings were then instituted afresh against the present appellant on a charge of perjury, based on the statement that he had made during the hearing of the civil case. Appellant was at the remitted hearing unable to produce the evidence of Stockberg and Van Dyk, which he had produced at the first trial.

Dr. Greer was for the appellant; Mr. Nightingale was for the Crown.

Mr. Nightingale: That is not on the record, I think.

Dr. Greer: The record says that appellant did not produce the evidence of these men at the trial, but I am instructed that they were subpoenaed.

Mr. Nightingale: I don't know whether subpoenas were issued. There may have been a good reason why they were not issued.

Dr. Greer (proceeding) said that the appeal was brought on four grounds, as follows: (1) That the judgment and convictions were not supported by the evidence; (2) that evidence was admitted

which was illegal and incompetent; (3) that the A.R.M. of the Cape, who tried the case, before recording such conviction or sentence was incompetent to deal with it on the ground of interest, or on the ground that he was a witness duly summoned for the defence in the civil case, and that the Taxing Officer had allowed him one guinea for attendance as witness in such case; (4) that, if the evidence warranted the conviction, and there was no other ground for exception, having regard to the circumstances, the sentence of the Court was unwarranted. He (counsel) did not propose to support the fourth ground.

Counsel having been heard in argument on the facts,

Maasdorp, J.: It seems that in this case a civil action was brought by the accused against Fatichand for malicious prosecution. This was in respect of a charge of perjury made by Fatichand against the accused. It appeared that the accused had laid a charge of assault and robbery against Fatichand, and after some inquiry by the police the charge was allowed to drop. Thereupon Fatichand laid a charge of perjury against the accused for having alleged in his affidavit that he (Fatichand) had assaulted and robbed him. In that case also, after the proceedings had been laid before the Attorney-General, he refused to prosecute. Thereupon, a civil action is brought by the accused against Fatichand in respect of a malicious charge, in alleging this perjury against the accused. The Magistrate in that case gave judgment for the defendant, with costs, and it seems that it was in that civil case that the accused virtually repeated the charge which he had made in the first instance against Fatichand. He gave evidence in substance amounting to a statement that Fatichand had assaulted and robbed him. That statement is now alleged in the present prosecution to have been false, and constitutes the perjury upon which the present proceedings are based. The Magistrate in the civil proceeding had to ascertain whether the offence of assault and robbery committed by Fatichand had not existed. He came to the conclusion that it had not been satisfactorily proved that any such assault had been committed, and that any assault had been committed, and he found the accused guilty of perjury. It is said that his finding is based on insufficient evidence. The evidence given in this case consists of that of Fatichand himself, against whom the charge was made, and he gives the clearest evidence and makes the most positive statement that he had never at any time committed an assault upon the accused, and never deprived him of his property. This direct and positive statement is not



met by any contradiction on the part of the accused himself or any witnesses on his behalf. It is said that it is not contradicted by witnesses for the accused, because there was some difficulty in obtaining the evidence of two persons who had on a former occasion given evidence in favour of the accused, and it is also said that the accused himself did not give evidence because it was considered sufficient on his part merely to put in the civil record. Now, it is impossible for the Court to go outside the record in order to discover what might have been the result if certain evidence had been produced which might have been produced. The Court can only take the record as it stands, and decide whether the Magistrate on the evidence he had before him was right in coming to the conclusion that he arrived at. We may take it for granted that the defendant had, in his plea, denied the charge, but he was not put into the witness-box to deny the charge upon oath. It is said that that might be attributed to some oversight. The accused was represented by an agent in this case, who seems to have conducted the matter with proper skill, and I do not for a moment suppose that he would have committed such a grave error as to close the case without producing evidence on behalf of the accused, even if that evidence was only that of the accused himself, if such evidence was forthcoming. The Court must, therefore, only treat the evidence on the record now as it stands. It is contended that it was not this direct statement of Fatichand, that he had not committed the assault, which influenced the Magistrate, but some opinion that he must have formed upon the rest of the evidence. Now, it is impossible for the Court to dive into the mind of the Magistrate as to his finding upon details, when he has evidence of such weight and directness as was given before him. The evidence referred to as misleading the Magistrate is said to consist of a statement that the goods that were alleged to have been stolen from him were taken out of boxes which had been shortly before opened, and that, consequently, the goods could not have been in the possession of the accused, because they had only just been taken out of the newly-opened boxes. Counsel for the appellant contends that the conclusion that the goods had been taken out of the newly-opened boxes is not justified by the evidence, because there is no evidence which goes in so many words to show that the boxes had been opened before the goods had been taken out. Upon the whole of the evidence, it appears that when search was made in Fatichand's shop certain bundles were examined, and none of the contents were identified by the accused when search was made and it does not appear that there were

newly-opened boxes, and that there were parcels which were wrapped in tissue paper, which there is reasonable ground for concluding upon the evidence had just been taken out of these boxes. I come to the conclusion, therefore, that, even if the Magistrate was influenced by this evidence, he was influenced upon reasonable grounds, and upon the whole of the case it seems to me that there is clear and uncontradicted proof that the evidence which had been given on oath by the accused was false, and that the crime of perjury was committed. There is another ground upon which this appeal is brought, and that is that the Magistrate was really interested in the case: If that were proved it might be that the Court would grant some redress; but there is no positive proof of any such interest beyond the mere statement that the Magistrate was subpoenaed to give evidence upon some point or other in the civil case, and that he was called as a witness in favour of Fatichand against the accused. As a matter of fact, he gave no evidence, there is no proof upon what point his evidence was required, and it might have been wholly immaterial, and it may not have been in respect of knowledge which affected his decision in the present case. Upon that ground also the Court must hold that the appellant has failed in his appeal. The appeal will be dismissed, and the sentence confirmed.

#### ADAMS V. MOWBRAY MUNICIPAL COUNCIL.

Municipal rates — Owner and tenant — Notice — Act 45 of 1882, Sec. 134.

*Sec. 134 of Act 45 of 1882 provides that if an occupier's rates remain unpaid for three months, the Council may within twelve months after the making of the rate serve notice on the owner of the property and recover from him. A's tenant being in default, the Town Council of M. delivered a notice to their messenger, to be served on A. This was done within the prescribed twelve months. A. denied having received this notice, but admitted having received a demand for the rates within the said period.*

*Held on appeal, that although the mere fact of a letter having been handed to a messenger is*

*not presumptive evidence of its delivery to the addressee; the subsequent demand made upon A. was due notice in itself.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Wynberg, who had found for the Mowbray Council in an action which they had brought, under section 134 of Act 45, 1882, against appellant.

The ground of appeal was that the notice of the rate was not duly published, and that, therefore, appellant, who was owner of the property assessed, was not liable to pay the tenant's rate.

From the record it appeared that the rate had been assessed against one Abrahams, as tenant of a house, No. 15, Vine-street, Mowbray, of which the appellant was owner. Abrahams had not paid the rates, and the owner was sued.

The Magistrate, in his reasons, said that in giving judgment for the plaintiff Council as prayed, he held that timely notice was given to the owner.

Dr. Greer (for the appellant) said that if it were clear that a rate was struck on the 13th January, 1905, and if there were a letter, as was admitted, sent on the 11th January of the following year, demanding the rate from the landlord, it would still be within the twelve months stipulated by the Act. One might argue, however, that there was a certain amount of neglect on the part of the municipality, and that the landlord had been prejudiced by notice not having been sent to him until within two days of the utmost time allowed by the Act. But, then, arose the question of whether due notice had been given of the striking of the rate. The Act provided that notice must be given within 30 days that such a rate had been struck by advertisement in a newspaper (if any) circulating in such municipality, and any such other mode as the Council may by resolution direct. There was, he submitted, absolutely no proof given in the Court below that publication had been made in a newspaper.

Mr. Upington (for the respondent Council) said that the rate book was produced, and that that was sufficient *prima facie* evidence as provided by section 132. Furthermore, at a later stage, owing to an oversight as to the provisions of section 132, the advertisement was put in.

Dr. Greer having been heard in reply,

Maasdorp, J.: It seems that under section 134 of Act 45, 1882, where the rate for which a tenant or occupier is liable remains unpaid for three months, then the Council's collector may, by notice, de-

mand from the owner of the property within a period of twelve months the rate which remains unpaid, and, if such sum is not then paid by the owner for a period of one month after the demand is made, the Council can take proceedings to enforce payment. In this case the question arose whether the proper notice had been served upon the owner within twelve months. It seems that it was considered necessary by the Council to serve notice within twelve months, and then, in addition to the notice, to make a demand later on. The question arose whether the first notice had been served within the twelve months. The Magistrate found upon all the evidence that the notice had been handed to the messenger by the secretary of the Council, and he came to the conclusion that, under ordinary circumstances, it had been delivered in the same manner as it appeared other notices had been delivered about the same time. I am rather doubtful whether the Magistrate had sufficient evidence before him to find that the first notice was actually served. The mere fact of a letter having been given to a messenger does not make it, by itself, presumptive evidence of the subsequent delivery of the letter to the person to whom it is so addressed. But then it seems to me that, failing that notice, the defect has been rectified by the actual demand which was made, within the twelve months, upon the owner. It is admitted that he received the demand for this account within the twelve months. That demand, in my opinion, was sufficient notice within the meaning of this section to render the owner liable. The appeal must therefore be dismissed, with costs.

[Appellant's Attorney: E. J. Sydney.  
Respondent's Attorneys: Dold and Van Breda.]

#### VAN ZYL V. TRUTER.

#### Insufficient tender—Costs—Magistrate's decision over-ruled.

This was an appeal from a judgment of the Resident Magistrate of Calvinia, who had found for appellant for £16 9s. in an action for £28 7s., produce sold to defendant, but had ordered appellant to pay all costs.

From the record it appeared that appellant had summoned respondent in the Magistrate's Court for £28 7s., for certain sweet potatoes, oats, oranges, and tobacco sold and delivered to defendant. Defendant pleaded tender of £16 4s. The principal question between the parties was the rate at which the tobacco and oranges should be paid for. Plaintiff claimed 4s. a roll for the tobacco, and 6s. per 100 for the oranges; defen-

dant tendered 3s. 3d. for the tobacco, and 4s. for the oranges. Defendant also deducted from the plaintiff's claim 5s. in respect of sweet potatoes, which, he said, were rotten. The Magistrate gave judgment for plaintiff for £16 9s., but directed that he should pay all costs.

Mr. J. E. R. de Villiers was for appellant (Paul Hendrik Stephanus van Zyl); there was no appearance for respondent.

The Magistrate, in his reasons for judgment, said that he had come to the conclusion that the defendant's version of the transaction was correct, and also very probable under the circumstances. He gave judgment for £16 9s., taking the prices tendered by defendant, but making no allowance for the damaged oranges. He considered that the tender was a fair and reasonable one, and such a tender as might well have formed the basis of settlement between the parties. For this reason, he (the Magistrate) thought it only fair and equitable that the plaintiff should bear costs.

Mr. De Villiers said that there were two grounds of appeal—(1) that, on the merits of the case, the Magistrate should have awarded more to plaintiff, and (2) that, having been awarded an amount in excess of the tender, plaintiff should not have been condemned to pay costs.

Maasdorp, J.: It appears that in this case there was a direct conflict between the evidence for the plaintiff and the defendant. The Magistrate, after going carefully through the evidence, is satisfied that he can rely on the evidence of the witnesses for the defence, and I see no reason why this Court should differ from the magistrate upon his finding in that respect. The question was as to whether all the articles had been purchased by the defendant at the prices stipulated for by the plaintiff, and the Magistrate came to the conclusion that only a portion of the stuff was bought at those prices, and that some of it was bought from a person whom he regards as the plaintiff's agent at a less sum than is stated by the witnesses for the plaintiff. I do not think the Court can interfere with the finding of the Magistrate upon this point. The Magistrate has come to the conclusion that the plaintiff is entitled to receive £16 9s. It appears that the defendant only tendered £16 4s. The Magistrate gave judgment for £16 9s., but ordered the plaintiff to pay the costs of the case. Under ordinary circumstances, where a tender is insufficient, then the plaintiff who obtains more than was tendered is entitled to his costs and sufficient ground must be shown why that rule should be varied in this case. Costs are, generally speaking, in the discretion of the Magistrate, but that must be a judicial discretion, and it is quite within the province of the Court to consider whether the dis-

cretion has been properly exercised by the Magistrate. The Magistrate gives as his reason for making the plaintiff pay costs that this tender was of such a character that it should have formed the basis of a settlement between the parties. Under these circumstances, considering that it should have led to a different result from that contended for by defendant, as well as that contended for by plaintiff, the consequence of his reasoning would be that both parties were to blame and each should pay his own costs. but I do not think the reason given by the Magistrate—the fact of the tender forming a good basis of settlement—should have weighed with him so as to make the successful party pay the costs. Such reasoning could be used in very many cases where tenders are made which would become the basis of some settlement between the parties, but on the whole I do not think that the Magistrate has properly exercised his discretion. The tender was found insufficient, judgment was given for the plaintiff for more than the amount of the tender, and the plaintiff was entitled to his costs. The appeal must be allowed with costs, and the judgment of the Court below altered to the extent that the defendant is ordered to pay costs in the Court below.

PALMER V. MORRIS. { 1906.  
May 7th.

Act 40 of 1905—Review—Gross irregularity — Exclusion of evidence.

*M. was employed by P. as a barman, and having during such employ sustained certain injuries, applied to a Magistrate to assess compensation under Act 40 of 1905. The Magistrate made an order for a weekly sum of more than 50 per cent. of M.'s regular wages. Thereafter P. applied under Sec. 14 to have the order set aside, and tendered evidence to show that his injury was due to his own misconduct and gross negligence, that his misconduct had further retarded his recovery, and that he had sufficiently recovered to be fit for work.*

*Held, that in refusing to admit evidence on these points, the Magistrate had been guilty of gross irregularity, and the case was referred back to him to*

*take the evidence in question  
and decide on the merits.*

This matter came before the Court upon review of certain proceedings in the Resident Magistrate's Court, Cape Town, under the Workman's Compensation Act (No. 40 of 1905), on the ground of gross irregularity. This was the first case under the Act brought into the Supreme Court.

The application was brought upon notice to the Magistrate to produce the record of proceedings in an application made by Palmer for a provisional order granted by the Magistrate, upon the application of Morris under the Workman's Compensation Act, on March 6, 1906, for payment of £2 a week to be set aside on the ground that the Magistrate exceeded his jurisdiction in allowing £2 a week instead of £1, that he rejected competent evidence to the effect that the said Morris had recovered sufficiently to resume work, and that subsequently while under the influence of liquor he had again injured himself and retarded his recovery from the effects of his first accident. The notice also called upon Morris to show cause why the judgment of the R.M. should not be reviewed and set aside.

It appeared that the respondent Morris, who was employed by Palmer as a barman, fell and fractured his leg. He was awarded £2 a week as compensation during the period that he was incapacitated, but this was afterwards reduced to 30s. a week, and, as a matter of fact, it transpired that the employer had not paid Morris anything, but had undertaken to provide him with board and lodging during his period of incapacity. The allegation now made by Palmer was that Morris had actually worked on three or four days, that he had sufficiently recovered to resume work, but that, owing to his intemperate habits, he had met with another accident, in consequence of which he had had to be treated at the hospital, and had thus retarded his recovery. The applicant took proceedings in the Magistrate's Court to have the provisional order set aside, and tendered certain evidence as to Morris's conduct in retarding his own recovery, and the Magistrate, in refusing to take the evidence tendered by Palmer, said: No evidence can be admitted as to whether, since the original accident, the injured party has been under the influence of liquor, and while in that condition has re-injured himself, and so retarded his recovery. The Magistrate also expressed the opinion that if the man was addicted to drink, as alleged, then his employer was himself imprudent for keeping him on his premises, and also inducing him to work when not in a fit condition.

Mr. Burton for appellant. Dr. Greer for respondent.

Mr. Burton submitted that the Magistrate acted quite irregularly in refusing to admit the evidence tendered by the applicant when he applied to set aside the provisional order.

Dr. Greer submitted that the Magistrate found that the accident was not due to neglect on the part of claimant, and that he could not be required to go back on his own decision.

Maasdorp, J.: In this case the applicant moved in the Magistrate's Court to have a provisional order granted to the respondent under the 11th section of the Workman's Compensation Act for a payment of 50 per cent. of his wages set aside, on the ground that the injury in question did not rise out of or in the course of employment, that the injury was caused by the plaintiff's gross carelessness, in that he was intoxicated, and that the plaintiff was sufficiently recovered to resume work. The first question that arose in this case was whether the employer could move under section 14 to have an order set aside in a case in which he had himself had notice to appear at the first inquiry, and whether he had so appeared in order to put his case before the Magistrate. Now, it seems to me to be quite clear, even referring merely to section 14 itself, that it must be within the power of the employer to make this application even if he had appeared before the Magistrate in the first instance, because one of the grounds there given for having an order set aside or varied is that the claimant has sufficiently recovered to resume work. It is quite possible, after an order was given, whether it was after notice to the employer or not, if it is shown that the claimant has sufficiently recovered, the employer could move, and in the majority of cases that question would really arise after the order had been given, and, as I say, it certainly may arise even in a case where the master had in the first instance appeared to represent his case to the Magistrate. But I think that the matter is made perfectly clear under the 15th section, where it is provided that any person adjudged to pay wages to an injured workman under such judgment or order, may, at any time, upon obtaining further evidence, take further proceedings to terminate the said judgment or order. It might reasonably be said that in giving that power to the employer, the workman might from time to time be harassed by these proceedings on the part of the employer; but in order to prevent that the legislature has provided in the same section that the Magistrate shall impose double costs in case such court is of opinion that the proceeding is

frivolous or vexatious. It is, consequently, provided that the employer can at any time he secures fresh evidence bring the matter before the Court again, and this section specially points, among other sections, to section 14 as one of those under which the proceedings may be taken. The employer could therefore, at any time, upon receiving fresh evidence, proceed under section 14, and establish the grounds for setting aside the order, which are those actually set forth in the application by the applicant in the case before the Magistrate. Upon the applicant obtaining evidence under the first ground, that is that the injury sustained by the workman did not arise out of or in the course of his employment, the Magistrate rejected the evidence tendered, upon the ground that that point had already been settled by his previous decision. The question could be reopened before him, and the evidence could properly be led to establish the applicant's case. Evidence was also tendered to show that the injury had been caused by the workman's own gross neglect. This also was refused by the Magistrate. He further rejected evidence to prove that the workman was sufficiently recovered. Except in so far as, upon that ground, he himself took the evidence of the district surgeon, and upon the district surgeon certifying that the man was not sufficiently recovered, he regarded that he had sufficient evidence before him. Now, in my opinion, it was his duty to hear all such evidence as the applicant might tender, in order to establish his case under any one of these grounds set forth in his application. The Magistrate was, therefore, in dealing with this case, guilty of gross irregularity in refusing this evidence, and it is upon that ground that the Court is now asked to set aside the order of the Magistrate. The effect of the finding will be that the matter must now be referred back to the Magistrate for him to take the evidence tendered by the applicant, and then decide the case upon its merits. This is, as I stated, a question upon review under the 190th rule, in which the Court is asked to review the proceedings of the Magistrate's Court. It is not an appeal. It seems to be provided by the Act that if the Magistrate had acted regularly, and had made a finding in dealing regularly with the case no appeal would lie to this court. The matter will be referred back to the Magistrate to admit the evidence tendered, and decide the matter upon its merits.

Mr. Burton applied for costs of the application.

Dr. Greer said that the respondent in this case was the Magistrate. No notice had been given that costs would be asked for.

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Mr. Burton: Both the Magistrate and Morris are called upon. The Magistrate is only called upon to produce the record, and the real respondent is Morris.

[Maasdorp, J.: Is there anything in the Act that protects workmen in matters of this kind?]

Mr. Burton: There are sections dealing with costs, but nothing that would affect this question.

Maasdorp, J.: It would appear upon the record that in the first instance it was not the respondent's agent that raised the question which has raised this difficulty, but the respondent has appeared in this case to support the finding of the Magistrate, and his opposition has caused these costs. Respondent will be ordered to pay costs.

[Applicant's Attorney. A. J. Mc. Callum: Respondent's Attorney: E. J. Sidney].

#### *Ex parte* ZEEDERBERG.

Mr. Douglas Buchanan moved, as a matter of urgency, for a temporary interdict restraining one Joseph Gibson from removing goods at certain premises, No. 66, Bree-street, Cape Town, pending an action to be brought by petitioner for arrears of rent, amounting to £45. Petitioner stated that he had let the premises to respondent at £15 a month rent, to be paid in advance; that the rent for March, April, and May was still unpaid; and that he apprehended that, unless interdicted, the respondent would remove the goods, which petitioner believed were the only assets that he had.

Interdict granted, pending action, with leave to respondent to move to set aside if so advised.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

COLONIAL GOVERNMENT V. ( 1906.  
HOULDER BROS. ( May 8th.

This was an application brought by the Colonial Government upon notice calling upon the respondents, Houlder Bros., to show cause why an order



should not be granted authorising an extension of time until the August term wherein the applicants should prosecute an appeal from a decision of a Divisional Court in an action brought by the present respondents against the applicants for demurrage.

The affidavit of the Commissioner of Public Works stated that the petitioner had noted an appeal from the decision of the Hon. Sir John Buchanan, sitting as a Divisional Court of the Supreme Court, given on the 1st March in the action of *Houlder Bros. v. Colonial Government*. (16. C.T.R., 103) A case was now pending between the same parties in the High Court of Justice, King's Bench Division, in England, which would probably be heard in June. Considerable expense might be saved if the decision were given in the case in England before the appeal here was heard. Petitioner applied for an extension of time for the prosecution of the appeal until the August term.

The answering affidavit of Mr. W. G. Fairbridge, one of the attorneys for plaintiff in the action, stated that the applicants had paid the amount of the judgment and interest in the case, viz., £11,170 odd. The said amount was paid without any reservation or condition of any kind, and was accepted by plaintiffs as a settlement of the claim. Applicants, he said, had shown no good and sufficient cause for not proceeding with this matter in due course. There would be no saving of expense unless applicants were prepared to agree that if the decision in the other case was adverse to them they would abandon the appeal in this court.

The replying affidavit of Mr. Reid, one of the attorneys for the applicants explained that the amount of the judgment and interest was paid over as soon as possible in order to save further interest from accruing.

Mr. Searle, K.C. (with him Mr. Burton and Mr. Howell Jones) for applicants; Mr. Close (with him Mr. Struben) for respondents.

Mr. Searle said that, as regarded the prosecution of the appeal, it was quite clear under the Charter of Justice that they had the *Jones v. Cape Town Council* (12 Supreme Court Reports, 144) the Court decided that if an appeal were brought within 21 days, they could proceed in the appeal at any time within twelve months. The applicants thought that it would save costs, not only to themselves, but also to respondents, if the appeal were not proceeded with until the case in England, in which similar questions were raised, had been decided. If the Court in England decided in the same way as the Divisional Court in this colony had decided, then the applicants in all probability would not go farther.

Mr. Close submitted that the case had really nothing to do with *Jones v. Town Council of Cape Town*, inasmuch as in that case the point was as to noting an appeal, while here the question was as to prosecuting an appeal. He contended that applicants had not shown a "good and sufficient cause" for an extension such as was asked for. Even if the issues raised in the case in England were identical with those raised in the case in this court, what effect, he asked, would it have on postponing the appeal here? Respondents were entitled to some finality in these proceedings, and that could only be obtained if the applicants were confined to their strict rights in law. If the applicants had agreed to bind themselves not to proceed further with the appeal if the decision of the case in England were against them on similar points to those raised in the case in the Divisional Court, then there might be something to be said for the argument that this application was in the interests of a saving of expense. But they had made no such undertaking.

Mr. Searle said that there was just as much reason, indeed, perhaps more, why the action should have been brought altogether in England, than for bringing the case in this court. A great deal turned upon the actual construction of a contract entered into between the Agent-General in London and Houlder Bros., as to the supply of Welsh coal to be delivered at Cape Town and Port Elizabeth.

De Villiers, C.J.: One of the grounds upon which this application is opposed is that there could be no right of appeal after the Government had voluntarily paid over the whole amount of the judgment. That appears to me a wholly untenable position. It may well be that the Government could not claim security after paying money voluntarily in the manner in which they have paid it, but they are not prevented from appealing in terms of the 24th section of Act 35, 1896. If within 21 days after judgment, notice of appeal is given to the respondent and the Registrar of the Court, the applicant would have the right to appeal. But then applicant now asks the Court to go further, and act under the last proviso of the 24th section, where it is provided that it shall be lawful for the Court, if good and sufficient cause be shown, to extend the time within which the applicant shall prosecute his appeal. The "good and sufficient cause" alleged in this case is that there is an action pending in the High Court in England, in which questions similar to those raised in the present case will be raised. Now, if that court by which this case was to be tried, were, say, the Privy Council, which is a Court of Appeal from the Court here, no doubt that would be

"good and sufficient cause," because that would be an authoritative decision which would be decisive of the rights of the parties. But the decision of the High Court is no authority in this court. It would probably be before a jury, or if there is no jury, it would probably be before a single judge, and the decision of the High Court would be no authority in this court. Therefore, I am unable to see that the fact that there is such an action pending is "a good and sufficient cause." It may be a matter of convenience, but it is not, in my opinion, such a "good and sufficient cause" as would justify the Court on appeal now in further extending the right of appeal. The application must, therefore, be refused, and with costs.

[Applicants' Attorneys: Reid and Nephew. Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

#### KEMLO V. KEMLO.

This was an application brought by Alexander Kemlo upon notice to his brother John Kemlo, calling upon him to show cause why an order should not be granted authorising Sidney St. John Henley, of Butterworth, auctioneer, to dispose of certain perpetual quit-rent land situate at Kei Mouth, district of Kentani, Transkei, and why respondent should not forthwith deliver possession of the said land.

From the affidavits, it appeared that the parties had carried on business in partnership as Kemlo Bros., but that the partnership had been dissolved, and that, in the course of the winding-up, certain disputes arose which were eventually referred to arbitrators, whose award was on the 17th October last made a rule of Court. In that award a certain sum was directed to be paid to the applicant; it was ordered that respondent should continue to occupy the land to the end of 1905 on payment of a certain rental, and that the land should then be sold, and, if any surplus should remain after payment of the awards and the debts on the farm, it was to be divided between the two brothers.

Applicant said that before the sum of £1,600 which was found by the arbitrators to be due to him could be paid the mortgages on the farm now in dispute must first be paid off, and applicant was responsible for these mortgages.

Respondent said that he had no objection to the farm being sold, but he did not think that the present was an opportune time, and he thought that if the sale could be deferred for four or five years the farm might then be sold to advantage.

In support of respondent's affidavit an affidavit by John Crosbie, sworn ap-

praiser, Butterworth, was read. Mr. Crosbie said that the present was a most inopportune time in which to sell properties in Butterworth and Willowvale districts. It was said that the railway to Butterworth would be completed in about two years, and it was anticipated that this railway would open up the districts round about, and that properties would increase in value. At the present time there was no market for stock, farming produce, or land in those districts, but he believed that in two or three years there would be a good market.

Applicant, in a replying affidavit, said that he was prepared to grant a lease of the farm or take a lease of it for three years on and from the 1st July, 1906, at a rental to be fixed by arbitration, and postpone the sale until the expiry of that lease.

Mr. Van Zyl was for applicant; Mr. P. S. T. Jones was for respondent.

Counsel stated that the parties had been trying to arrive at a compromise, and that this was as near as they had been able to go.

De Villiers, C.J.: It appears to me that if the applicant had insisted upon this application the Court would have had to grant it. The terms of the award are such that it seems clear that the sale should take place at the expiration of the lease. The lease expired on the 31st December, 1905. Therefore, there must be an order as prayed, with costs, but the Court will direct that the sale be postponed for a period of three years, and that in the meantime the respondent would be entitled to a lease of the land in question until the expiration of such period, at a rental to be fixed by two arbitrators, one of them to be appointed by applicant and the other by respondent, and that if the respondent should refuse to take such land on the terms agreed upon by the arbitrators applicant will take the lease on such terms.

#### CUTLER AND MARSDEN V. JUBB.

This was an application to make absolute a rule *nisi* calling upon the respondents to show cause why an interdict should not be granted restraining certain auctioneers from paying over proceeds of a sale of goods at Leeds Houses, Riebeeck-square, or at least £48, pending an action to be brought by applicants.

A rule *nisi* had been granted on an *ex parte* application last week, the applicants alleging that their landlord's lien was in danger, and that Messrs. Zoutendyk had been selling by auction certain furniture which was on the premises, and which belonged to applicants. They said that respondent, Eliza Jubb, wife of Richard James Jubb, was

in arrear with rent for April and May at £13 a month, payable in advance.

The answering affidavit of the respondent denied that the rent was payable in advance. She said that the rent for April was not demanded, and that it would have been paid in due course. No rent was due for May at present. Notice to vacate the premises had been duly given to applicants and accepted. On the 1st May the key of the premises was handed to Mr. Marsden, who accepted the same, saying that he was glad to get it. The whole of the furniture belonged to deponent; none of the furniture mentioned in the schedule to the petition had been sold, and petitioner was prepared to defend any action the applicants might be advised to bring in connection with the sale. She was at present the lessee of two large boarding-houses in Cane Town, and also of a large boarding-house at Sea Point. The furniture sold by Messrs. Zoutendyk was the surplus furniture that she did not require for her businesses. Supporting affidavits by the respondent's husband, who acted as manager for her, and also by Mr. Sidney, attorney, who testified to having tendered £13 rent for April to applicants' attorney, were also put in.

Mr. Upington was for applicants; Dr. Greer appeared on behalf of Mrs. Jubb to show cause.

[De Villiers, C.J.: They tendered the rent after the rule had been granted.]

Dr. Greer: The application for the rule was made *ex parte*. Counsel went on to read a further affidavit by R. J. Jubb, to the effect that none of the goods belonging to the applicants had been disposed of by the auctioneers.

Mr. Upington read a replying affidavit by Alexander Grieg, cabinet-maker, who said that he had taken a portion of Leeds Houses from R. J. Jubb at a rental of £1 10s. per month, which rental was payable and had been paid in advance. Jubb afterwards told him that he was giving up Leeds Houses, and that he must leave, but deponent said that he must have one month's notice. An affidavit by Thomas Marsden, of Cutler and Marsden, was to the effect that it was arranged that the rent should be paid in advance when the rent was reduced. He admitted that it was not customary for respondent to pay the rent in advance; but, nevertheless, it was agreed that respondent should so pay the rent, and it had been paid in advance at times. He admitted that, on further inquiry, he found that his firm's furniture had not been disposed of by Messrs. Zoutendyk and Co., but he said that all the furniture in question had been removed out of the said house, and he, therefore, had no direct knowledge as to the sale of the said furniture. He also said that he only re-

ceived notice from the respondent on the 28th April that she intended to vacate the premises at the end of that month. An affidavit by a partner in Zoutendyk and Co. was also read.

Dr. Greer submitted that if the facts now before the Court had been before the Court when the application was made by the landlords, the temporary interdict would not have been granted.

De Villiers, C.J., informed counsel that he proposed to continue the interdict pending the action.

Dr. Greer submitted that there was evidence of *bona fides* on the part of respondent, and that she had given notice to the landlord of what she was going to do. The rent for April was admitted, but the rent for May and the ownership of the furniture were both clearly matters of dispute.

Without calling upon Mr. Upington,

De Villiers C.J.: There are two questions in dispute between the parties, and they are as to whether the second month's rent is payable, and whether certain furniture still belongs to the applicant or not. Those questions cannot be decided upon this motion; they can only be decided by action. But one thing is perfectly clear—that the applicants were entitled to apply for their interdict. They are the landlords of these premises; on the 1st May there was rent, at all events, admittedly one month's rent, due to them; and they saw a notice to the effect that all the furniture and effects contained in the houses belonging to the applicants were to be sold. They were bound to protect themselves by preventing the loss of the landlord's lien, and they, therefore, applied for an interdict to restrain the auctioneer from paying over the whole of the money to the respondent. The Court confined the amount in respect of which the interdict was given to the amount of the rent for two months, and to the value of the furniture. No doubt, one month's rent is tendered, but I do not think that that should affect the question as to whether the interdict should continue. The amount is not large, it is only £48, and an action must be brought forthwith, and the interdict will be continued, pending action to be forthwith brought, costs of application for interdict to be paid by respondent, but the question of further costs to be costs in the cause, i.e., costs beyond the mere application for the interdict on the 1st May to be costs in the cause.

Dr. Greer asked whether the Court would not be prepared to order alternative security being given in place of the interdict.

[De Villiers, C.J.: The interdict to be discharged upon security to the satisfaction of the Registrar of the Supreme Court being given. Although I make this order, I do hope the parties will come to terms now, and prevent the

further waste of money by this petty squabble.]

[Applicants' Attorney: J. E. Bernard.  
Respondent's Attorney: E. J. Sydney.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ALLEN V. COLONIAL GOVERN-  
MENT. { 1906.  
May 8th.  
&c.

[As this case has only been part heard at the date of going to press, the report is held over till the date of judgment.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

INHAMBANE OIL AND MINERAL DEVELOPMENT SYNDICATE, LTD. V. MEARS AND FORD. { 1906.  
May 9th.  
" 11th.  
" 15th.

Contract of sale of mining rights  
—Warranty of title—Redhibitory action—Measure of damages.

*The defendants sold to the plaintiffs all their right and title to the concession of certain mining rights in Portuguese Africa, guaranteeing the existence of such rights, and that there would be no obstacle to the passing of legal transfer to the plaintiffs. The defendants, however, possessed only prospecting rights for a short period and were unable to pass legal transfer of title authorizing the purchasers to exercise the full mining rights purchased. The purchase price was not paid, but before the plaintiffs discovered that the*

*defendants would not be able to give full title, they had incurred certain expenditure in Portuguese Africa for the protection of their interests in connection with the purchase, including the expenses of a drill which, under the contract, the plaintiffs had to buy and maintain.*

*Held, that the plaintiffs were entitled by means of the redhibitory action to be placed in the same position as if the sale had not been effected and were consequently entitled to have the sale cancelled and to claim as damages the expenditure reasonably incurred in connection with the purchase.*

This was an action brought by the Inhambane Oil and Mineral Development Syndicate, Limited, against Walter Mears and Herbert James Ford, described as speculators, residing in the Transvaal, to recover £50,000 damages for alleged breach of contract.

The plaintiffs' declaration was in the following terms:

1. The plaintiff is a company duly registered in this colony as a limited liability company. The defendants are speculators residing in the Transvaal. By order of this Honourable Court, dated the 16th February last, jurisdiction in this suit was duly confirmed by the attachment of certain shares in this colony.

2. On the 30th October, 1903, and at Cape Town, an agreement was entered into between the defendants and Carl Jeppe, the chairman of, and acting for and on behalf of a certain syndicate, known as the Inhambane Oil and Mineral Development Syndicate, Limited, and which was to be registered under the Companies' Act of 1892. Copy of the contract is hereunto annexed.

3. On the 21st November, 1903, the plaintiff company was duly incorporated and registered under the said Act of 1892, one of its objects being to take over the said agreement of October, 1903, and to work and develop the property rights therein mentioned and the said company, with the knowledge and consent of all parties to the said agreement, and are entitled to all the rights and privileges, and are subject to the obligations thereunder, and the defendants became entitled to one thousand shares in the plaintiff company, subject to the matters hereinafter set forth.

4. The plaintiff has duly performed all the obligations undertaken by the said syndicate, by the said agreement, but



the defendants wrongfully and unlawfully; and in breach of their said agreement, have wholly failed to perform their obligations thereunder, and have wholly failed to obtain the complete and entire proof that their titles to the rights in the said agreement mentioned have been fully verified, which verification and the details thereof, are fully set out at the end of the said agreement in sub-sections 1, 2, and 3, and although more than a proper time therefor has elapsed, the defendants have, as aforesaid, failed to complete their contract, and though called upon so to do neglect and refuse so to do.

5. By reason of the aforesaid breach of contract, the plaintiff company has suffered great loss and damage, and was put to expense in the purchase and conveyance of the drill in the said contract referred to, and incurred other expense, and advanced moneys in the carrying out of their obligations, all of which have been lost to the plaintiff, and in all has sustained damage to the extent of £50,000, wherefore the plaintiff company claims: (a) The sum of £50,000 as and for damages aforesaid; (b) alternate relief; (c) costs of suit.

Defendants' plea was as follows: For a plea to the plaintiff company's declaration, the defendants say:

1. They admit paragraph 1 thereof, save that they crave leave to refer to the order of the Honourable Court dated February 16, whence it will appear that only the right of defendants to receive the said shares was attached.

2. They admit paragraph 2 thereof.

3. As to paragraph 3 thereof, they admit that the plaintiff company took over the said agreement of October, 1903, with its rights, privileges, and obligations, and that they (the defendants) became entitled to receive 1,000 shares in the said company.

4. At the date of the said agreement the titles to the rights of the defendants had still to be verified, as was well known to the syndicate, purchasers under the said agreement; and they crave leave to refer specially to the clause at the end of the said agreement providing for the manner of verification.

5. Subsequently to the signing of the said agreement, and in accordance with the last clause thereof, the first-named defendant proceeded with one E. B. Watermeyer, a land surveyor, who represented the purchasers, to Inhambane, and in or about December, 1903, the defendants' titles and rights to the concession were verified by the said representative, who was satisfied with the defendants' rights and their titles thereto.

6. They deny paragraph 4 thereof, and especially that they failed to carry out their portion of the said agreement in any respect, or to have their rights and titles verified.

7. They deny paragraph 5 thereof, and especially that they have committed a breach of contract, or that plaintiff company has sustained damages in the sum of £50,000, or any damage at all, or any damage for which they (the defendants) are responsible.

8. They admit that the purchasers or the plaintiff's company have expended certain sums of money in carrying out obligations under the said agreement. They say that the said moneys were expended subsequent to the verification of titles as aforesaid, and as provided in the said agreement. Wherefore they pray that the plaintiff company's claim may be dismissed, with costs. And for a claim in reconvention, the defendants (now plaintiffs in reconvention) say:

9. They crave leave to refer to paragraphs 1, 2, and 3 above pleaded, and to the said agreement, and especially to clause 1 thereof, whereunder their right, title, and interest in and to thirty mining titles were sold by them to the purchasers, who thereafter formed the defendant company now sued in reconvention.

10. It became and was the duty of the defendant company to have the said titles made final by the survey of the areas covered by the same, and the taking out of final title, according to the law of Portugal, in force in the territory where the said areas were situate.

11. In breach of their obligations, the defendant company allowed the said titles to lapse, in consequence whereof the said areas have been pegged off by others, and the plaintiffs in reconvention have lost all their rights in and to the said areas, and mining thereon.

12. The damages thus sustained by the plaintiffs in reconvention amount to the sum of £30,000.

13. The plaintiffs in reconvention have further expended the sum of £1,500 in prospecting on the ground covered by the said mining titles, pegging it out, purchasing, conveying, and putting down a drill, and other expenses advanced and incurred on the said areas; the said sum has been wholly lost to the plaintiffs in reconvention through the defendant company allowing the said titles to lapse, and the plaintiffs in reconvention are entitled to recover the said sum as damages. The plaintiffs in reconvention claim (a) The sum of £31,500 as damages; (b) alternative relief; (c) costs of suit.

Mr. Schreiner K.C. (with him Sir H. Juta, K.C.) for plaintiffs. Mr. Searle, K.C. (with him Mr. Joubert) for defendants.

Mr. Schreiner, in opening the case, stated that the matter came in point of jurisdiction upon an order of the Court granted on February 15, 1905, attaching the rights of the defendants to certain shares not yet issued, but which were to be issued to them as vendors. (See 15 C.T.R., 113.) The con-



tract sued upon was an agreement, dated 30th October, 1903, which was attached to the declaration. Counsel proceeded to call the Court's attention to the principal features of the agreement, under which the vendors and co-vendors agreed to sell to Carl Jeppe, as representing the plaintiff syndicate, all the right, title, and interest of Mears and Ford in (1) certain mining titles obtained by the said W. Mears and H. J. Ford from the Portuguese Government over certain 30 areas, comprising approximately 14 square miles, situate in Inhambane, north of Lourenco Marques, as shown in the map attached, and conferring on the holders the right to work for combustibles, bituminous substances, and mineral oils, subject to a payment of one-half per cent. on the profit of the output payable to the Portuguese Government. (2) The right obtained by the vendors from the Portuguese Government on the conditions hereinafter mentioned to a concession for all mineral rights on an area comprising approximately 240 by 280 miles in the said district of Inhambane, as shown in the sketch map attached. This concession carries with it the right to surface ground for machinery and other purposes connected with mining, as also the first right for railways, pipes, and trams from any part of the mines to the coast. It is subject to a charge of 5 per cent. on the profits of the output. The area embraces the above fourteen square miles, as also another area of six square miles, on which the rights to mineral oils are held by the Inhambane Oil Syndicate of Johannesburg. The concession to this 240 by 280 miles area will only be handed over by the Portuguese Government on proof that a drill is being worked on the ground by the 28th December, 1903. Four prospectors will also have to be employed on the ground during the healthy seasons. The area of about 20 square miles referred to in the annexed report of Mr. J. Dampier Green given as a "known area containing oil," comprises the fourteen square miles above referred to and the six square miles held by the Inhambane Syndicate. The vendors Mears and Ford guarantee the existence of the hereinbefore mentioned and described rights. The vendors, Mears and Ford, further guarantee that copper ore is to be found on the property, containing about 70 per cent. of copper. The agreement went on to say: "The party of the first part undertakes to purchase the above rights from the parties of the second part for a sum of £25,000 (twenty-five thousand pounds) in a company of £50,000 (fifty thousand pounds) to be appropriated as follows: Concessionaires in shares, 1,000, £25,000; co-vendors, 250, £6,250; working capital, present issue, 160, £4,000; reserve shares (of which the vendors will be entitled to 20 shares of £25 each at par),

590, £14,750; 2,000, £50,000. The syndicate agrees to issue in payment of the purchase price, to the vendors, one thousand (1,000) fully paid up shares in the said syndicate, and to the co-vendors for the valuable services rendered in promoting the syndicate and for finding all expenditure in connection with the flotation, two hundred and fifty (250) fully paid up shares in the said syndicate. The vendors, Mears and Ford, guarantee that there will be no obstacles to the passing of legal transfer to the parties of the first part, of the said rights, provided however that the Portuguese Government shall be allowed to retain the right to appoint two directors on the Board of the said syndicate. The purchase herein referred to is subject to complete and entire proof by the vendors, Mears and Ford, that their titles to the rights hereinbefore mentioned have been fully verified." Counsel stated that the fundamental clauses of the agreement were: "It is hereby agreed by the parties to the agreement, that the verification of titles, which will be required by the purchasers from the vendors, will be as follows: 1st: Official confirmation will have to be obtained, showing that the area marked "30 areas" in the map attached to the said agreement, is about fourteen square miles, and that it is covered by the thirty mining rights attached to the agreement. 2nd: The confirmation of the Governor of Inhambane or other proper authority will have to be obtained in due and sufficient form, showing that the vendors, Mears and Ford, have obtained the right to a concession of all mineral rights on an area of about 240 by 280 square miles, as shown in the sketch map attached to the said agreement, in terms and on the conditions set forth in the said agreement. 3rd: It is further agreed on the part of the Vendors that Mr. Mears will, on their behalf, proceed to Inhambane to obtain said verification within fourteen days from the signing of these presents, and the purchasers on their part undertake to send a representative to meet Mr. Mears at Inhambane for the purpose of receiving the above verifications."

[De Villiers, C.J.: You have spoken of the thing that was sold. But do you say there was a sale?]

There was a sale of their rights. They represented that they had rights. They had to perform that condition to verify their rights.

[De Villiers, C.J.: You have spoken of the thing that was sold. But do you say there was a sale?]

There was a sale of their rights. They represented that they had rights. They had to perform that condition to verify their rights.

[De Villiers, C.J.: Was there a sale which could be put an end to in case there was no verification of titles, or was there no sale at all?]

There was a sale, but not a sale which would be put an end to in case there was no verification of the vendors.

[De Villiers, C.J.: I mean a right on the part of the purchasers to put an end to it?]

Yes, I submit that.

[De Villiers, C.J.: You don't seem to be quite clear what your position is? Was there a sale or not?]

Certainly there was a sale.

[De Villiers, C.J.: Then there was a sale which could be put an end to by the purchasers in case there was no verification of title?]

That was the condition on which they could put an end to it. Your lordship means was the whole purchase by that clause a nullity?—Oh, no.

[De Villiers, C.J.: Subject to an action for damages, of course.]

Mr. Schreiner: I have not really considered that construction of the word "purchase."

[De Villiers, C.J.: Do you proceed upon the guarantee or upon the sale?]

Mr. Schreiner: We proceed upon the sale. We say they sold certain things to us.

[De Villiers, C.J.: The only point I want to make clear upon is, what is the effect of this clause? Have the purchasers the right to say there is no sale at all because there is no verification? Is it a mere right on the part of the purchasers to rescind the sale upon non-verification?]

That is the way we put it. It is a right to rescind if there is a breach of the guarantee. I would not like finally to say that until I have considered the matter with my learned friend (Sir H. Juta). I have not considered the actual point as to whether it was a resolute or suspensive condition. Counsel, in answer to further questions by the Court, added: We have given them time in reason to verify the title, they never verified it, and they have not verified it till to-day. Then we came to the conclusion that we could no longer give them time, and we sued. We set forth a total failure of consideration. We ask to be put in the same position as we stood in before. We have spent a great deal of money, and the syndicate is such that if these concessions had gone through the shares would have been very valuable indeed, and the result has been to leave this syndicate stranded in regard to means.

Evidence was called on behalf of the plaintiffs.

Carl Jeppe said that he resided at Wynberg, and was chairman at the outset of the plaintiff syndicate, and signed the contract dated 30th October, 1903. The syndicate was duly constituted afterwards. The negotiations for the contract went through Mr. Mears. A drill was afterwards pur-

chased through Mr. Mears, the drill being at the time in Johannesburg. Mr. Watermeyer was in November, 1903, sent to Inhambane with complete instructions. Mr. Watermeyer returned somewhat stricken with fever, and his report was delayed until January. Mr. Watermeyer had not verified the titles. Mr. Mears came down early in February, 1904, and met the directors of the syndicate, and submitted a report, of which the original was put in. In March witness arranged for Mr. Ford to come down. Ford attended two meetings of the Board. Witness in May went to England, but before he went away the syndicate resolved to send up to Inhambane Mr. Windley, whose report came in after witness had gone to England. Witness was absent from May to October; on his return he again took up the matter. He then saw correspondence calling upon the vendors to fulfil their obligations, and in which £9,600 was demanded to be paid by the syndicate to secure the granting of what was called the big concession. Witness learnt that the syndicate refused to pay £9,600. Witness went to Johannesburg with Mr. Chiappini, who had then become and was at present chairman of the syndicate. Certain negotiations took place with Mears and Ford. Then for the first time he saw a copy of the document which the Portuguese Government had given in regard to the big concession. In this document the Portuguese authority required payment of 50,000 million reis. Mr. Mears indicated the expense to which they were put in getting the concession. They were told that they would still get the concession. At that time they did not know the Portuguese law. The vendors led them to believe that there would be no obstacles in the way of transfer to them of all these rights. Certain negotiations took place with regard to the possibility of a settlement, but these broke down. After witness's return he sent Mr. Gordon le Sueur, as the third representative of the company, to Inhambane to try and put things straight. The thirty mining titles had never been verified. The syndicate found that the vendors had no mining rights whatever. They were simply manifests which ran for three months. Then if the prospector found anything of value he applied for demarcation and survey, he could mine, but only for a year, and he must then apply for a proper mining concession. When these manifests were given to the syndicate they received no right to mine at all. If they had commenced to mine under those titles they would have been fined. Mears had undertaken to pay for the survey. A most expensive and laborious process would have had to be gone through to get mining rights. Within his knowledge, no demand was ever made by Mears

and Ford that the syndicate should provide those sums of money.

Mr. Schreiner asked witness whether the concession was looked upon as of great value.

Witness: It was so valuable, and looked upon as so certain, that a Johannesburg company have put down £20,000 in working capital to develop this area falling within the concession, which we could have had under that agreement.

Witness, in further evidence, said that when the syndicate did not get rights promised by Mears and Ford, they obtained 10 acres which the syndicate were putting into the company that was being formed in Johannesburg. They had received no ground whatever from the vendors under the big or little concession.

Mr. Schreiner: Can you give the Court any indication of the value of the big concession?

Witness: The indication is that a mere rumour that the vendors would be able to carry out their agreement came, and the shares rose from £25 to £50 and £75, and sold at that price. That was what happened on a mere rumour. Witness (continuing his evidence) said that in order to complete the manifests into mining rights, such as were contemplated by the concession, would cost at least £100 an area. It was very difficult to know where the oil regions were. The present areas were only likely places, but the less likely places sometimes contained very large quantities of oil. They had a deposit analysed in London, and they found it to be worth a great deal of money. The syndicate had been put to an expense of over £3,000 in connection with this contract. As indicating the value of the concession, witness stated that the areas alone—which had recently been sold—were worth £30,000, and they only found a small portion of the oil regions, so that, not taking into consideration the copper rights and the railway rights, he thought their claim of £50,000 was a very moderate one. The vendors valued their so-called prospecting right at £100,000. If damages were awarded by the Court, and the vendors got their shares, then they would be getting back two-thirds of the judgment. As far as witness knew, the syndicate would be satisfied if they got back the money they had paid, provided the vendors did not get the shares. The Syndicate had no vindictive feelings against the vendors but they wanted to get their own back. If the syndicate got the value of the 30 areas by the judgment of the Court, then the vendors would get their shares. His position was that if the syndicate just got back the money they had expended, then the vendors would get no shares.

Cross-examined by Mr. Searle: No shares had been issued to Mears and

Ford. The value of the shares had fluctuated a good deal, according to whether there was news that Mears and Ford would get the mining rights. A number of reserve shares had been issued last year. They had had 10 claims—which they got in September or October, 1904. They had been dealing in the shares in the sure and certain hope that Mears and Ford would get the concessions through. Mears had been very enthusiastic about these matters, and had said that he had had to pay £3,000 in Lisbon, having had to deposit £2,000. Mears and Ford never represented that a good deal of money would have to be spent by the syndicate before the concession would go through. They would have to make a deposit and pay other charges before the concession went through. The vendors did not represent that they were selling a right of concession to the syndicate; they sold what they said was a mining right. Mears had said that he would go straight to the Cortes and get a title for 99 years, because he had friends among both parties.

Mr. Searle informed witness that he could not understand his legal position at all. "Do you," he asked, "say that these gentlemen never carried out their contract at all?"

Witness: I do say that.

Mr. Searle: Then, I say, if they did not carry out their contract at all, there never was any purchase.

[De Villiers, C.J: Surely, Mr. Seale, that is a matter that you might argue afterwards. Really, it seems to me that the question is largely one as to the construction of this contract.]

G. B. Watermeyer, Government land surveyor, spoke to a visit which he paid to Inhambane on behalf of the plaintiff company, in November, 1903. He saw Mears. Witness did not get any verification of the big concession. Mears said that he had not got it, but was getting it. With regard to the 30 areas, he had to get certain official confirmation, but he received nothing from Mears. Witness took with him the manifesto. At Lourenço Marques, he found that unless certain conditions were fulfilled, the concessions would lapse. He denied that he had been satisfied with the defendants' titles, as alleged in their plea. Witness was not satisfied that there was any big concession. He found that there were very many obstacles to the passing of legal transfer to the syndicate. Mears, later on, told him that he had made an application for new manifests, and that it would be all right. When they got to the ground, Mears showed him, approximately, what were the areas, but he did not even know where the centre of demarcation was. Mears seemed to be building all the time on the big concession.

**Cross-examined:** Witness dismissed from his mind the thirty areas of which Mears had obtained manifests, because they had not been demarcated.

**Re-examined:** Certain distances were shown on the manifests, but, of course, it was impossible to measure those distances without knowing where to commence, and Mears could not show him where to commence. Witness saw so many difficulties in the Portuguese law, that he told Mears it was important that someone should go to Lisbon.

**By the Court:** Witness was not satisfied with the verification. He was satisfied that the area marked "30 areas" on the map attached to the agreement was about 14 square miles. He was not satisfied that the mining manifests which Mears had were of any value, and, even if they were of any value, he knew there were great legal obstacles in the way of transfer. He did not get the confirmation of the Governor of Inhambane, as stipulated in the agreement.

Gordon le Sueur also gave evidence as to a visit that he paid to Inhambane, in November, 1904, when he met Mears. Mears he told them that he had come there to peg off 60 areas. Witness went to ascertain whether Mears and Ford were in any better position with regard to negging off than anybody else. He told Mears that he was not in any better position, and Mears acquiesced. Mears said that if he got his big concession, he would be in a better position than anybody else. Witness called upon the Governor. He found that there were 216 claims pegged by other people in the area around the Jake. Witness was given applications for manifests and two cheques by Mears. He pointed out to Ford that the applications had been sent in, and that Mears' cheques, of £141 each, had been dishonoured. Ford said that that was like Mears. Witness told Ford that the syndicate, therefore, had nothing at all, and Ford agreed. Witness saw the ten areas of the Johannesburg company. He saw the drill at work on those areas.

**Cross-examined:** Witness did not go up with the idea of making arrangements with Ford with a view of pegging 60 new areas. Ford was willing to peg off the areas, but witness took up the position that he could peg the areas off on behalf of the syndicate as well as anybody else could, and that it was not necessary for Ford to peg off. Witness sold his shares in the syndicate at par, except one, for which he obtained £50. He sold about 12 or 14 shares for £25.

De Villiers, C.J., pointed out to counsel that these details were of no importance so far as the construction of the agreement was concerned.

**Cross-examination continued:** Witness did not know whether Mears and Ford had applied for their shares. He knew that no scrip had been issued to Mears

and Ford. This syndicate, of which he was a director, had now been amalgamated with another company. The syndicate had not gone into voluntary liquidation preparatory to amalgamating. Witness and his brokers, Le Sueur and Co., got about 40 of the co-vendors' or promoters' shares.

**Re-examined:** Witness did not see a scrap of work that had been done by a drill on any ground outside the areas of the Johannesburg Company.

Sir H. Juta: You have been asked if this company has been amalgamated?

Witness: The Oil Union is a new company, which has been formed, and it embraces the others. It is not exactly an amalgamation.

Alexander John Chiappini, chairman of the plaintiff syndicate, corroborated the evidence of Mr. Jeppe. Witness produced an account of the expenses to which the syndicate had been put in connection with the working of the contract, the total amount shown being £3,269. There had been no profitable results of any kind from that expenditure. The syndicate subsequently gave authority to Mr. Horsfall to peg 10 areas. Those 10 areas had gone to the new company in Johannesburg, and in return the new company had given certain shares. It was not an amalgamation, none of the members of the syndicate had any knowledge of the Portuguese law when they went into the contract with Mears and Ford. Mr. Watermeyer afterwards got a copy of the law and translation at a cost of about £40.

**Cross-examined:** Witness would not swear that they were not mining rights that were attached to the agreement, but he was very confident that they were not mining rights. No survey fees had been paid upon those rights. Horsfall had now got charge of the syndicate's interests at Inhambane. Witness thought that the drill was worthless. Horsfall had informed them officially that the drill was of no use. The drill, he believed, never went deeper than 90 ft., and it took something like six months to go that depth.

This concluded the evidence for plaintiffs.

Walter Mears (one of the defendants) said that he lived in Johannesburg. For some years past he had been interested in Inhambane. In 1902 he went to Inhambane, obtained 60 titles, 30 of which he afterwards sold to the Johannesburg Oil Syndicate. He gave an option to Moodie and Van Rensburg for a month, and he afterwards came down to Cape Town, where the agreement was come to. Witness had had no benefit from this matter, and had not made a penny for himself. He did his best for the company until Mr. Windley took the business out of his hands, and put in Mr. Horsfall. He



had not since been to the ground. Witness spoke of his visit to the ground with Mr. Watermeyer, and the conveyance of the drill. He said he knew the manifests had lapsed, and he proposed to take out new manifests. He spoke of his negotiations on the oil-bearing grounds with Mr. Watermeyer, and said that he pointed out the beacons of the syndicate's ground. It was a very unhealthy region. Mr. Watermeyer and witness decided to fix the drill within the thirty areas. The drill was never on the Johannesburg Syndicate's ground. Witness did not say at that time that they had got the big concession; they said that certain conditions must be fulfilled before they got the concession. They had an agent working for them in Lisbon. He explained to Mr. Watermeyer that he did not know the exact terms of the big concession. All they sold was what they had been told they had got. He gave everything that he had in the option to Mr. Moodie. Mr. Watermeyer interviewed the Governor of Inhambane, who said that it was purely a Lisbon transaction. Witness spoke as to certain expenditure that he and Ford had incurred in connection with the concessions. Watermeyer, he said, told him that he was satisfied that they had a valuable asset, and said that he would have to remain behind to have the company made into a Portuguese company.

Witness spoke to his second visit to the oil-fields, in company with Mr. Windley, the second representative sent up to Inhambane by the syndicate. Mr. Windley, in his evidence on commission, had said that Mears, in conversation, told him that the titles had lapsed, and witness told Windley that the first titles had lapsed, but that the syndicate had got new titles, and that the new titles had not lapsed. He denied having said that Ford had got a certain sum of money to survey the ground. Ford had, as a matter of fact, been given money to go and survey ground for the Johannesburg syndicate. That was the only ground that had been surveyed. If the second titles had been surveyed, the time would have been extended. Witness was willing to have the titles surveyed, provided the syndicate would furnish the money. An application was lodged with the Portuguese authorities for a third series of fifty manifestoes, but these were never taken out. Cheques were actually lodged with Mr. Cottar, the Government Secretary, the account being on behalf of the syndicate, but in witness's name. Witness did not, at that time, hold a power from the syndicate. He had had some serious attacks of fever in the country, and he had to stay at the hospital at Delagoa Bay when Windley returned to Cape Town. He denied that he had

ever made a promise to pay the survey fees, as alleged in Windley's evidence. Witness told Windley that there had been some delay on account of the stipulation of the authorities that Ford must become a Portuguese subject. He told Windley that Ford's birth certificate had to be lodged before Ford could get his naturalisation papers issued, and that that had caused some delay. Witness was also examined at considerable length in reference to the items of expenditure claimed by the syndicate.

Cross-examined by Sir H. Juta: When witness left here in 1903 he went to Inhambane for the purpose of the verification of the titles, and to obtain information of his titles, and a representative had to meet him for that purpose.

Sir H. Juta: Your plea says that you fulfilled your conditions. Did you give Mr. Watermeyer verification, and obtain confirmation?

Witness: As far as I could.

Counsel called witness's attention to a letter which he had written to the Syndicate, saying that he had agreed to give to a Portuguese official or lawyer—whom he described as the "Portuguese K.C."—£1,000 in cash or shares in the Syndicate, no shares or cash to be paid to the K.C. before the papers had been handed over to him (witness).

Witness assented to the letter.

Sir H. Juta: You calmly say "Yes." Here, as late as April 26, 1904, neither titles or papers were in order on your own showing, and you come here and say that Mr. Watermeyer agreed to that?—That was only in regard to the big concessions.

I don't know. He refers to all the titles?—No; only the big concession.

Cross-examination continued: When witness entered into the contract with the plaintiff syndicate, the Johannesburg syndicate had only 10 claims. They had allowed 20 to lapse. Witness had got the rights to the big concession, and these he sold to the syndicate.

Sir H. Juta: These letters show that there was absolutely nothing that you had obtained

Witness: We had obtained the sanction to get that concession. Our application had been accepted.

Sir H. Juta: Well, you are a sanguine person, when you consider that a sanction is a concession. On January 27 you wrote from Lisbon that you had heard that the concession in Inhambane had been granted, and asked for £120 to pay fees, which you say: "I have cabled"?

Witness: Yes.

According to that, you were to get this concession that you had sold to the syndicate, if you paid these fees?—Yes.

That was money due by you?—Yes.

At that time a large number of areas had been pegged off by other people



within the big area of the big concession?—Yes.

You write that a hitch had taken place, which prevented the big concession from being granted?—Yes.

What was the hitch, the obstacle?—It was the birth certificate of Ford.

You swear that?—That was what I was informed from Lisbon.

That was the only thing?—Yes.

Now we will turn to what you wrote. You said you had heard from your Lisbon agent, Mr. Becker, and that there seemed to be no obstacle, with the exception of ground pegged by Ford and his party, which you (Mears) were thoroughly convinced that, had it not been that Ford had used his influence with the Governor, he would not have issued the licence?—Yes. The ground pegged there was certainly an obstacle to my agreement with the Cape Town Syndicate, in so far as that ground was within the concession.

In answer to a further question, witness said that he only sold the rights that he had in his possession.

Sir H. Juta: Oh, no; you did nothing of the sort. You not only sold the concession, but you guaranteed transfer of mineral rights, subject to 5 per cent. of the profit, Mr. Mears. It is no use trying to evade that. Who was it that caused these areas to be pegged which prevented the concession being granted to you?—Harlington, Watts, and others, and Mr. Ford.

That's the defendant Ford. Ford then went at the time you were trying to get the papers for this concession, and got a large number of areas pegged out on the very ground you said you had got for us?—Yes.

On the 26th February you wrote: "I am absolutely certain that Ford has interested himself in the ground pegged round your syndicate's areas, as he told me so himself, and then offered me an interest, which I naturally refused"?—Yes.

"I am not at all surprised at his action." Why weren't you surprised at his action?—Well, I can easily explain that. I found out that Ford always opened my wires. I had wires from Mr. Le Sueur asking me officially to sell shares for him at tremendous figures. Mr. Ford had received no shares, and he was under the impression that I had received my shares, and he had not received his. He was trying to secure his right.

By pegging out on the ground that you said belonged to us?—Yes.

Ford thought you had got a lot of money, and he had got none?—Yes.

Cross-examination continued: In January, 1904, he had heard that Ford had begun to peg the ground. On the 7th he asked the syndicate to bring an action against Ford for pegging. This was at a meeting in Cape Town at the secretary's office, at which Mr. Chiapini and Mr. Le Sueur were present.

He wanted the Board to take steps immediately to bring that point of the pegging of the ground to a head.

Sir H. Juta: It was only by protesting, and getting the protest confirmed against these areas that had been pegged off, that you could exercise the rights under the big concession. That is quite clear, is it not?—Yes.

Then those areas which had been pegged out hold good?—All those that were pegged at that time were allowed to lapse and others were pegged a long time after that.

Do I understand that there are a large number of areas that have been pegged out in the big concession?—So I believe.

And they hold good?—Not until the deposit is made.

You know that people are acting on them, and are on the ground?—Yes.

You say if a deposit is made?—Yes, a deposit of £9,600.

If £9,600 is now deposited with the Portuguese Government, you will get the big concession?—Unless it has lapsed. They gave notice that unless the money was paid by January or February it would lapse.

Surely the Lisbon Government did not grant a concession over the heads of these people that had pegged in the meanwhile?—That is what they gave me.

Replying to further questions, witness said that he had a document from the Portuguese Government. That was the document put in under article 220 of the Portuguese Mining Law.

He had been in negotiation with Lisbon in order to have the concession extended over 99 years. It would be necessary that the concession should pass through the Cortes.

Sir H. Juta: Clearly, then, this was to be a concession for 99 years?—I sold them what rights I had got.

How much money had you deposited in Lisbon for that purpose?—No answer.

Three thousand pounds, was it not?—I would like to see the letter.

Three thousand pounds was deposited in Lisbon to get the concession?—It was money I spent in obtaining the concession.

[De Villiers, C.J: You mean distributing it amongst the members of Parliament?

Witness: No, your worship. We had to spend so much money before we could get the concession and show that we had been so many years in the country working up to that stage.

You say you did not deposit £3,000. Where did you spend it?—We spent it according to the account there.

Sir H. Juta: £3,000 is what you spent in Lisbon?

Witness: It was not spent in Lisbon. Your letter says, "Have spent £3,000 in cash payments to the Portuguese

Government." Where was that money paid to the Portuguese Government?—I had to pay certain moneys away which they distributed. Where it was distributed I am not going to say.

[De Villiers, C.J: Have you got a receipt?

Witness: No. We had to pay Becker, who was in Lisbon.

That is not the Governor?—No, Becker distributes it.

That is in Lisbon. Did you send it by cheque?—Some of the amounts have not been paid yet.

Then you have not spent £3,000?—We are responsible for it.

Cross-examination continued: Witness denied that he had told Mr. Jeppe that he had deposited £2,000 in Lisbon. According to the law of Portugal, he could have mined and taken the yield of the area without surveying. Witness valued the 30 titles at £30,000, and his position was that they had lapsed because they had not been surveyed by the syndicate. He had asked Mr. Windley for money for the survey; he had not written to the plaintiff syndicate asking them for money for the survey. He did not know that the claims had to be surveyed until Mr. Watermeyer and he (witness) read the law together. The drill went down about 40 feet.

By the Court: They had not found any oil yet. There was oil on the ground, but not in the bore-hole.

De Villiers, C.J, said that the question of whether there was oil, it seemed to him, would greatly affect the question of damages. If there was no oil, it seemed to him that there could be no damages.

Mr. Schreiner pointed out that they had the opinion of a great chemist that the deposit shown to him was very valuable.

[De Villiers, C.J: I am afraid the best chemists have told us that Cape Town contains gold in immeasurable quantities. The best chemists in Cape Town have told us that there was more gold in the Lion's Head even than there was in Johannesburg.]

Further cross-examined: Witness still thought there was oil in the ground. He valued his 30 areas at £30,000, and the big concession at £100,000. Had he not thought that oil was there he would not have risked his life two or three times in going to the spot. He was sure that the drill was at work on the syndicate's ground.

[De Villiers, C.J: Has anyone else found oil in payable quantities?]

Witness: Not as far as I know.

Cross-examination continued: Witness was not interested in the Johannesburg Oil Wells or in any of the companies that had combined.

Re-examined: The Cape Town Syndicate were clearly informed about the areas of the Johannesburg Syndicate.

Herbert James Ford (the other defen-

dant) said that in 1898 he formed a small syndicate in connection with the piece of ground constituting the 30 areas. The place was very unhealthy, and often caused fever. In 1902 Mears became connected with him in the 30 areas. Mears took out the 30 manifests in November, 1902. Moodie and Rensbury had an option, and in October, 1903, they came to Cape Town, witness being in Johannesburg. Witness went to Inhambane about the end of December or beginning of January. Certain ground was pegged off. Witness came down to Cape Town in March, 1904, and met the directors of the plaintiff syndicate. At the Board meetings he gave full information as to the position of affairs. He had assisted one Watt in the matter of pegging, his reason being that he could get no satisfaction from the Cape Town people, who would grant him no shares or interest. All the claims pegged at that time had lapsed. Pegging had been going on on the ground since 1898. The large concession was to be obtained in witness's name. There was a delay of two or three months owing to his birth certificate. He finally obtained his naturalisation, and got the concession in August, 1904. Witness received notice that £9,600 had to be paid to get the concession. The first amount mentioned was £2,000, but it was afterwards increased to £9,600. The drill was fixed on the ground pegged for the plaintiff syndicate, and not on the ground of the Johannesburg Syndicate. He considered that the big concession was most valuable, and that it gave a prospecting right over the whole of the ground. They would have a prior right against anyone else to beacon off any oil bearing ground within the whole area.

Mr. Schreiner: You had not got the shade of a shadow of right over this ground at the time when the other persons pegged off claims?

No answer.

Had you a shadow of right over this ground?—Which right?

The big concession.—Most decidedly.

I am speaking of the persons whom you aided to peg on this ground. When those persons pegged you had a right to that ground, the big concession; had you a right in respect of the big concession to the ground that was pegged?—I had not any title.

Have you any right?—Will you give me the date?

You have provided the date. I cannot give you the date. When you aided in the pegging you had no right to the big concession?—Yes, we had. Mr. Becker was then applying for it.

Had you a right?—We had not received our right.

Before the 2nd August, 1904, you had no right. Had you obtained certain rights as to railways, tramways and pipes from the mines to the coast?—Yes.

Where is the document showing that?  
—It is there.

Show it to us.—The granting of the concession is here, but £9,600 is to be paid.

Now, Mr. Ford, don't shuffle. Where is this right?—It is in the mining law of Portuguese territory.

You refer his Lordship then, as conferring those rights, to article 220 of the mining law?—Yes.

Where is the document that shows that this concession obtained already by you in October was subject to a charge of 5 per cent. on the profits of the output? Is his Lordship going to find that in the mining law of Portugal?—No, I do not think that is stated in the mining law.

Replying to further questions, witness admitted that he had received no document except that dated the 2nd August, 1904.

Mr. Schreiner: Upon which document being signed you demanded that the syndicate should pay the deposit of £9,600? You have no other?—No.

Cross-examination continued: Witness formed a small syndicate to work the ground in 1898. That came to nothing, because all the men died there. He claimed against the plaintiff syndicate expenses dating back to 1897 and 1898. He regarded those items as part of the development work.

[De Villiers, C.J.: Surely that had nothing to do with the present contract.]

Further cross-examined: Witness was interested in five oil companies. He had bought and sold shares in the Transvaal Inhambane Oil Wells, which was formed to exploit ground near the lake in the area of the big concession. He had bought shares in the Transvaal company at 2s. 6d., and sold them at 10s. 6d. to 12s. 6d. He could not give the date of his naturalisation as a Portuguese subject. He could not get his papers until the £9,600 was paid. He did not remember when he sent in his birth certificate, which he had had to cable to Huntingdon for.

By the Court: Witness had paid £30 for his naturalisation papers. He could not get his letters of naturalisation without paying the £9,600.

Cross-examination continued: Mears had deposited some hundreds with Pattison and Becker, the agents in Lisbon. He received a wire from Becker in June, 1903, inquiring if he was a Portuguese subject. He answered "No" to the inquiry; he felt confident that he cabled "No." He valued the big concession at £100,000.

Mr. Schreiner: In the correspondence Mr. Mears says that the fault at the back of the concession was that you had represented yourself as a Portuguese subject?

Witness: No, because Mr. Becker took the papers to get me naturalised in Lisbon.

Re-examined: Witness's name had appeared in the "Gazette" as a naturalised Portuguese subject.

Jan Hendrik R. Moodie (one of the co-vendors), Ernest Albert Rhodes, driller; and Malcolm Moritz Moodie, farmer, also gave evidence.

Mr. Searle closed his case.

Counsel were heard in argument, and in the course of the hearing His Lordship allowed the plaintiff company to amend their declaration by adding after the first prayer the words, "declaring the said agreement cancelled, and forfeiting the right of the defendants to the said 1,000 shares."

*Postea* (May 15th.)

De Villiers, C.J.: The case has occupied a considerable portion of the time of the Court, but the points to be decided lie within a very narrow compass. It is common cause that on June 30, 1903, a contract was entered into between the defendants and a representative of the plaintiff syndicate. The recital of the agreement is as follows: "Whereas the vendors have obtained from the Portuguese Government certain rights hereinafter described, and whereas the said vendors have given to the above-named co-vendors the right of floating a syndicate, and whereas a syndicate has been formed represented by the said Carl Jeppe for the purpose of purchasing the said rights, now, therefore, these presents witness that the parties of the second part sell to the parties of the first part the following rights, that is to say, all the right, title, and interest of the said W. Mears and H. J. Ford." Then come the stating exactly what rights were sold. The first is as follows: "Certain mining titles obtained by the said W. Mears and H. J. Ford from the Portuguese Government over certain 30 acres, comprising approximately 14 square miles, situate in Inhambane, north of Lourenco Marques, as shown in the map attached, and conferring on the holders the right to work for combustibles, bituminous substances, and mineral oils, subject to a payment of one-half per cent. on the profit of the output to the Portuguese Government." This contract was entered into not in Inhambane, or in Portuguese territory, but in Cape Town. The parties were here at the time, and it was signed in Cape Town. This clause which I have just read clearly represents to the purchasers that mining titles giving the right to work for, that is, to mine for combustibles, bituminous substances, etc., would be conferred upon the purchasers, and the only condition was that about payment of one-half per cent. on the profit, payable to the Portuguese Government. The second right granted is still a wider one, and it is as follows: "The right ob-

tained by the vendors from the Portuguese Government on the conditions hereinafter mentioned to a concession for all mineral rights on an area comprising approximately 240 by 280 miles in the said district of Inhambane, as shown in the sketch map attached. This concession carries with it the right to surface ground for machinery and other purposes connected with mining, as also the first right for railways, pipes, and trams from any part of the mines to the coast. It is subject to a charge of 5 per cent. on the profits of the output. The area embraces the above fourteen square miles, as also another area of six square miles, on which the rights to mineral oils are held by the Inhambane Oil Syndicate of Johannesburg. The concession to this 240 by 280 miles area will only be handed over by the Portuguese Government on proof that a drill is being worked on the ground by the 28th December, 1903. Four prospectors will also have to be employed on the ground during the healthy seasons. The area of about 20 square miles referred to in the annexed report of Mr. J. Dampier Green given as a 'known area containing oil,' comprising the fourteen square miles above referred to and the six square miles held by the Inhambane Syndicate." Now, a great deal has been said in regard to the Portuguese law, upon which however, I shall say very little—for the simple reason that the conditions, which are mentioned here, do not form part of any conditions imposed by the Portuguese Ordinance. I see nothing in the Portuguese Ordinance about the "first right for railways, pipes, and trams for any part of the mines to the coast," and in regard to other matters mentioned here, and I gather, therefore, that the vendors intended to represent to the purchasers that a special right had already been acquired quite independently of the ordinance, which the vendors had the power to transfer to the purchasers. This is clear from what follows. The words are: "The vendors, Mears and Ford, guarantee the existence of the hereinbefore mentioned and described rights." There is, therefore, a full guarantee that these rights already exist, that the mining rights exist, and that the right to this concession already exists, and there is a guarantee that it shall be transferred. Then there is, moreover, a guarantee that copper ore is to be found on the property containing about 70 per cent. of copper, but I lay very little stress upon that, because nothing is made of that concession by the plaintiffs. Then the contract goes on to speak as to the price, which was to be £25,000, but the money was to be paid by shares—1,000 of £25 each. Then we find that "the purchase herein referred to is subject to complete and entire proof by the ven-

dors, Mears and Ford, that their titles to the rights hereinbefore mentioned have been fully verified." Then comes the following clause: "The vendors, Mears and Ford, guarantee that there will be no obstacles to the passing of legal transfer to the parties of the first part of the said rights, provided, however, that the Portuguese Government shall be allowed to retain the right to appoint two directors on the Board of the said syndicate." Now action is brought for rescission of the contract and for damages. The main defence to the action is that the plaintiffs had sent Mr. Watermeyer, a land surveyor, to represent them at Inhambane, and that in or about December, 1903, the defendants' titles and rights to the concession were verified by him as the syndicate's representative, and that he was satisfied with the defendants' rights and their titles. Now, in my opinion, that plea wholly fails. The evidence satisfies me that Mr. Watermeyer never was satisfied that the defendants had complied with their contract. It is true that he did not insist upon a demarcation of the areas comprised in the smaller concession, but the reason why he did not insist upon that demarcation at the expense of the defendants was because it was represented to him by Mears that, inasmuch as these areas fell within the larger concession, it would be a waste of expenditure to go to the expense of demarcation. This is the report of Mr. Watermeyer, which he confirmed by his evidence before the Court: "I inquired from Mr. Mears whether he had obtained the grant of the claims of the thirty titles or declarations referred to; he said 'No'; but he assured me that everything was in order, that all deposits had been made, but as this ground would fall into the larger concession, he considered it a waste of money to have the claims surveyed." Now, in point of fact, all the deposits that they required for the purpose of protecting this concession had not been made. It is clear that the survey expenses had not yet been paid, that no demarcation ever took place, and therefore the defendants at no time were in a position to transfer to the plaintiffs what they were entitled to in regard to the first part of the concession. But whatever doubts there might have been upon the minor concession, there can be no doubt whatever that in regard to the so-called "big concession," there was a total inability and a total failure on the part of the defendants to observe their part of the contract. It had been represented to the plaintiffs that the concession had already been obtained from the Portuguese Government. In point of fact no such concession was ever obtained until some time afterwards, and even that concession, which was obtained, does not appear to my



mind to have been such a concession as the plaintiffs were entitled to under the contract, and, strangely enough, the defendants were not prepared to transfer that wholly inadequate concession, unless there were paid to them a sum of £9,600, a sum which clearly it was their duty to have paid, in order to enable themselves to acquire the title which they promised to confer upon the plaintiffs. If we look at the representations made by Mears himself, it would appear that a 99 years' concession was anticipated, but I prefer in this matter to rely entirely upon the terms of the contract, and not upon any side issues. It is clear to me at no time have the defendants been in a position to transfer any portion of this larger concession to the plaintiffs, and, after all, the minor concession was to a great extent merged in the larger concession. But, then, it is said that there has been this considerable delay on the part of the plaintiffs, and that if there was a breach at all it was immediately upon Mr. Watermeyer arriving upon the scene of action. But it does not appear to me that this is an argument that can well be used by the defendants. It was at their desire that the matter was postponed; they made every effort, no doubt, to obtain the major concession, and they represented to the plaintiffs that the major concession would, in course of time, be forthcoming, and, therefore, I consider that it was quite reasonable on the part of the plaintiff company not to have proceeded to extremities at once, but to use every reasonable effort to come to terms before they brought an action. It is upon these simple grounds that I am of opinion that there has been a breach of warranty of a good title to the mining concessions, and that the plaintiff company is now entitled to rescind the contract. It is not as if there had been a partial failure on the part of the vendors to fulfil their contract, but there seems to me a total failure to fulfil their contract, but, even if the failure did not relate to the minor concession, to my mind, the most important part of the contract is the major concession, and inasmuch as there is a failure in respect to that, there seems to me to have been such a failure as would entitle the plaintiffs to claim that the sale be cancelled. Then comes the further question as to what damages should now be awarded to the plaintiff company for this undoubted breach of contract on the part of the defendants. Unfortunately, in this case, probably from the very nature of the case, it was impossible to give definite evidence as to what the value of this concession would have been if it had been completed in terms of the contract. There has not been sufficient development of the ground to know whether it was a valuable concession or whether

it was not. There is no evidence that any oil in appreciable quantities has been found, or that any of the other minerals, with the object of procuring which the contract had been entered into, had ever been found on this property, and, in the absence of any evidence, any trustworthy evidence, as to damages, I am of opinion that the Court should not award damages upon the ordinary basis where there is a breach of a contract of sale. The ordinary measure would be the difference between the value of the property as sold, and the value of what was tendered. But there would be extreme difficulty upon the evidence before the Court to estimate that damage. It is, however, clear to me that the plaintiff company is entitled to be placed in the same position in which it would have been if it had never been led, or misled, by the defendants into entering into a contract of this nature. All expenses, therefore, that the plaintiff company has incurred, all reasonable expenses, all such expenses as might reasonably have been anticipated by the parties at the time when the contract was made, as expenses which would be incurred—all such expenses, I say, which have become valueless, the plaintiff company should now be entitled to recover by this action from the defendants. This would be allowed in the case of redhibitory action, and this action, to my mind, partakes very much of the redhibitory action of the Roman-Dutch law. There was a warranty; it was said and promised that certain things exist, that certain rights exist, and these rights do not exist. Plaintiffs, therefore, are entitled to put an end to this contract. If they had paid any part of the purchase price they would be entitled to recover the purchase price thus paid. They are entitled now to say that the contract be rescinded, but "let us be placed in the same position in which we would have been if no such contract had been entered into." It is impossible in such a case as this to award all the expenses that the plaintiff company has incurred, but all costs and expenses incurred by the plaintiffs in connection with this property, in connection with the drill which was required for the purpose of keeping the thing going, and in regard to sending men like Mr. Watermeyer, Mr. Windley, and Mr. Le Sueur to the spot to protect the interests of the company, for the purposes of maintenance on the site of the drilling—very clearly such expenditure the plaintiff company is now, in my opinion, entitled to recover from the defendants. The account put in of £3,269 is not seriously criticised. It is said that some of these items were incurred after August, when it was known that the whole transaction would fall through. But it seems that up to the very last the plaintiff company was anxious, if possible, to



proceed with this transaction. It still hoped against hope that in the end the defendants would be able to give what they had contracted to give, and it was therefore, in my opinion, quite justified in going to this expense for the protection of their interests connected with their purchase, and it is right that this expense should now be refunded to the plaintiffs by the defendants, who had been the cause of the expenditure. If there had been a charge of fraud in the case, no doubt the measure of damages would have been very much greater, but there is no allegation of fraud, nor do I say that if fraud had been alleged it could have been proved. But it is clear, from the correspondence and from the evidence, that the two defendants at no time trusted each other. Ford seemed to distrust Mears, and Mears seemed to distrust Ford, and not only did he distrust Ford, but he made continual complaints against Ford to the plaintiff company, representing that Ford had been guilty of—well, I won't say fraudulent conduct, but conduct that was not straightforward, in pegging off claims for his own benefit upon the areas which, under their contract, they ought to have handed over to the plaintiff company, so that, although there is some evidence of dealings which the Court cannot approve of, at all events on the part of Ford, that has not been the basis of this action. The damages, therefore, must proceed upon the ordinary basis of the redhibitory action, where the expenses of the thing purchased are recoverable from the vendors, who have wholly failed in an important warranty. The judgment of the Court will, therefore, be for the plaintiffs for the sum of £3,269, with costs. The Court will order that the contract of sale be rescinded, and that the defendants pay to the plaintiffs, as damages for breach, the sum of £3,269, with costs, on condition that on payment of such amount, the plaintiff company deliver to the defendants the drill mentioned in the declaration.

Mr. Schreiner: That is, at Inhambane.

His Lordship: Oh, at Inhambane, of course.

[Plaintiff's Attorney: P. A. Cloete.  
Defendant's Attorneys: Herold and Gie.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. 1906.  
(May 10th.)

Mr. Van der Byl moved for the admission of Johannes N. de V. Stegman as an attorney.

Application granted, oaths to be taken before the R.M. of Aliwal North.

Mr. Lewis moved for the admission of Johannes A. D. Serfontein as an attorney.

Application granted, oaths to be taken before the Registrar of the High Court, Kimberley.

Mr. P. S. T. Jones moved for the admission of Walter Edwin Barron as an attorney.

Application granted, and oaths administered.

Mr. De Waal moved for the admission of Francis Wm. Reitz, as a translator in the Dutch and English languages. Applicant, it was stated, was too ill to appear to take the oath.

Application granted, oath to be taken before the R.M., or Assistant R.M. of Cape Town.

### PROVISIONAL ROLL.

#### ESTATE FRASER V. MARCUS.

Mr. Inchbold moved for a certain provisional order to be superseded.

Provisional order superseded.

#### COLE, LTD. V. BOLLA AND ANOTHER.

Mr. P. S. T. Jones moved for provisional sentence for £26 8s. 6d., on a confession of debt, and promise to pay, under which the defendants acknowledged their liability jointly and severally. The confession provided for the payment of the sum due by instalments, and in case of failure the whole of the balance became payable. The second instalment was unpaid, and the whole of the balance had become due.

[Buchanan, J.: Does the matter arise out of a purchase of land?]

Mr. Jones: It is another man's debt.

Mr. W. Porter Buchanan (for defendant): We say there has been no consideration. Counsel went on to read an affidavit by Bolla, who denied that he or Ganie owed anything to plaintiff, and said that the debt was owing by

one Sheik Mahomet, alias Shiek Mahomet Abdullah. Deponent had carried on business at Cecil-road, Salt River. He declared that a mistake had been made in advertising his goods for sale under an execution, that he was not liable for the debt of Abdullah, and that he had received no consideration for the instrument in question. He had instituted an action in the Resident Magistrate's Court for damages, but absolution from the instance was granted.

Mr. Jones read an answering affidavit by L. Berman, articled clerk in the employ of plaintiff's attorney, who said that Bolla offered himself as debtor in place of Mahomet, and that he refused this, but agreed to accept Bolla and Garni as joint debtors in place of Mahomet subject to their paying costs. Counsel read an affidavit by the second defendant in support of the statements made by Mr. Berman, and also an affidavit by a translator in Hindustani.

Mr. Buchanan submitted that defendant Boller was not liable, because there was no consideration given for the note, and the document was got for a wholly different purpose, viz., to stop the sale of Bolla's goods, which had been attached by the messenger of the Resident Magistrate's Court by mistake.

Mr. Jones said that the consideration given in this case was that Sheik Mahomet was released from the debt and that the goods of Bolla, which had been attached, were released. The result would be that if Bolla were found to be not liable on this note, the creditor would be deprived of his remedy against the original debtor, or the delegated debtor. Seeing that this was a case of delegation, he submitted that consideration would not be necessary.

Buchanan, J.: In this case Cole, Ltd., obtained judgment against one Sheik Mahomet. They could not get that judgment satisfied, and they attached goods in the shop of one Bolla, and also one Parker. Bolla and Parker thereupon filed interpleader actions, and these interpleader actions were brought before the Magistrate. In Bolla's case the Magistrate held that the goods in the shop of Bolla were not executable to the judgment, and gave judgment in his favour, with costs. That is not denied. In the case of Parker, the Magistrate held that the goods in Parker's shop were executable, and gave judgment for plaintiffs. The attorney for the plaintiffs made a mistake, and instead of executing the Magistrate's judgment against the goods in the shop of Parker, advertised the goods in the shop of Bolla for sale. Fortunately, Bolla came in and got him to stop the sale, otherwise he would have let himself in for an action for damages. What took place on this occasion is a matter for

dispute. As matters stand, it appears that Bolla was not in any way answerable for this debt. If the plaintiffs can succeed on the principal case, let them go into the principal case. At present provisional sentence will be refused, with costs, but the judgment as against Ganie will be made absolute with costs.

Mr. Buchanan urged that the document sued upon by plaintiffs should be impounded.

His Lordship granted an order accordingly.

#### ESTATE TURNBULL V. COWLEY.

Mr. Lewis moved for provisional sentence on a mortgage bond for £248, less £100 paid on account, with interest, and for the property specially hypothecated to be declared executable. Counsel explained that since the affidavits had been filed a further amount of £15 had been paid on the capital, and that interest had been paid to February, 1905. Judgment was therefore sought for £133 capital, and interest from the 8th February, 1905.

Mr. Roux (for defendant) read an affidavit by his client, in which she alleged that the matter was compromised in June of last year for £50. The amount had been tendered. Deponent said that she bought certain land from Mr. Van Reenen at Hout Bay with the intention of building thereon, but found that the land consisted partly of sand hills and partly of marsh. Counsel also read supporting affidavits by William Cowley (husband of defendant), and Mr. Bosman, attorney.

Mr. Lewis read an answering affidavit by Mr. A. W. Steer, attorney, who admitted that he agreed, on behalf of the original bond-holder, Mr. Van Reenen, to accept £50 in full discharge of the bond, but he added that that offer was subsequently withdrawn inasmuch as defendant did not pay the money at the time, and the negotiations broke down.

Mr. Roux submitted that this bond was novated by a judgment given by the Court in December, 1904, and that it could not legally have been ceded. The matter was clearly *res judicata*, seeing that the former judgment had not been satisfied or become superannuated. He contended that the bond was no longer in existence. The property had already been declared executable, and the plaintiff's remedy, instead of taking out a summons, was to issue a writ.

Buchanan, J.: The present holder of the bond now sued upon Van Reenen, obtained judgment thereon, and in consequence recovered about £130 of his debt of £240. In June, 1905, through his attorney, he intimated that he

would be prepared to accept £50 sterling in full settlement in this matter. This £50 was not paid. Afterwards, Van Reenen ceded the bond to plaintiff, who now sues upon it. It is alleged, in answer to this action, that the bond has been destroyed, and the previous judgment given upon it in 1904 takes its place. I cannot hold that that is a good contention. Payments were made on account of that judgment, and then it was allowed to drop. The second defence is that there has been a novation by the letters of the attorney, and that, as this novation took place before the cession of the bond, the present cessionary is bound by the agreement. Whether or not, it would be necessary to show that the present plaintiff knew of this agreement. On the question of the alleged novation I must hold that such an agreement has not been proved. According to the affidavit of the attorney, this offer to accept the £50 was made on condition that the amount was paid forthwith. The letter does not give any time, and the presumption would be that it was an offer to accept £50 forthwith in settlement of the outstanding amount. This was in June, 1905. The affidavits show that afterwards the attorney gave the defendant 14 days' grace, and again in September, 1905, when spoken to about the amount, defendant said he could not raise the amount, and the offer was then declared off. No payment was made, or any tender of the amount until after the summons was issued in this case. The defendant cannot now rely upon this offer made in June, 1905, and not then accepted. Provisional sentence must be given as prayed, for the amount of the bond, less the payments admittedly made, with interest and costs.

**STEGMAN V. OOSTHUISSEN AND OTHERS**

Mr. Sutton moved for provisional sentence on a promissory note for £207, payable at the Standard Bank, Willowmore, with interest and costs.  
Order granted.

**FLETCHER'S WHOLESALE V. PORTER.**

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

Mr. Bisset also moved for the appointment of Mr. E. W. McLachlan Thomas as provisional trustee in the insolvent estate, with power to carry on the business at Muizenberg.

Order granted, appointing Mr. Thomas as provisional trustee, with power to carry on the business.

**LANDSBERG V. WERNER.**

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**WILHELM V. MIDDLETON.**

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**KETS AND ANOTHER V. NORDEN.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest, the bond having become due by reason of the non-payment of interest, counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**ESTATE WEHR V. FIG.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £300, being balance due, with interest, and for £7 10s., insurance premium, the bond having become due and payable by reason of three months' notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**SWANEPOEL V. HAYWOOD.**

Mr. Toms moved for the final adjudication of defendant's estate as insolvent.

Order granted.

**HAZELL V. ESTATE BROWN.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £150, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**HOFFA V. GRONITSKI.**

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,100, with interest, less £22 paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**ISAAC V. MAHMOOD.**

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ESTATE MCGREGOR V. MINARDS AND ANOTHER.**

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £150, with interest, less £7 16s., paid on account, the bond having become due by reason of the non-payment of interest; counsel also applied for the property attached to be declared executable.

Order granted, subject to production of proof of citation having been published.

**ESTATE KAYSER AND OTHERS V. BIRD.**

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ILLIQUID ROLL.****BOARD OF EXECUTORS V. BOOYSEN.** { 1906.  
May 10th.

Mr. Van Zyl moved for judgment, under Rule 329d, for £178 10s., balance of interest due on a mortgage bond.

Order granted.

**DA COSTA, JACOBS AND CO. V. SECCOMBE.**

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £82 4s. 6d., balance of account for work and labour done, with interest *a tempore morae* and costs.

Order granted.

**ESTATE TURCK V. WALTER.**

Mr. M. Bisset moved for judgment, under Rule 319, in default of plea, for £25, less £1 5s. paid on account, money collected on behalf of plaintiff and not paid over.

Order granted.

**LIQUIDATORS, S.A. BRICKFIELDS, LTD. V. REILLY.**

Mr. Lourens moved for judgment under Rule 329d, for two sums of £50, in respect of calls due and unpaid upon shares in the plaintiff company.

Defendant said that the company had passed a resolution to exempt him from the claim. He had a counter-claim. He had volunteered a settlement, so that

the matter should not be brought into court. He asked that the matter should stand over.

In answer to the Court, defendant admitted that he had not entered appearance.

Judgment as prayed, defendant to take the regular proceedings if he had a claim.

**REHABILITATIONS.**

Mr. Van Zyl moved for the discharge from insolvency of Isidore Israelsohn.

Application granted.

**GENERAL MOTIONS.****CHISHOLM V. WRIGHT.** { 1906.  
May 10th.

Mr. P. S. T. Jones moved on the application of Elizabeth Chisholm eldest child of the late William Chisholm and his wife, for the removal of Thomas Wright from his office as executor testamentary in the estate of the late Margaret Ann Wright.

Respondent appeared in person.

Mr. Jones read an affidavit by petitioner, who said that the respondent was addicted to drink, and had failed to perform his duties as executor. There was property in the estate at Claremont. Counsel read affidavits by several persons at Claremont, to the effect that respondent was unfit for his position, on account of his intemperate habits, contracted since his wife's death. It was stated that the respondent had handed over the administration of the estate to one Mr. Leonard Tudge.

Respondent, a bricklayer, alleged that one of the step-children, L. Chisholm, had made false allegations against him, and he asked for an adjournment. His power of attorney, he said, was held by Attorney Walker, of Wynberg.

Respondent was removed from office as executor, the Master was authorised to call a meeting of next-of-kin to appoint an executor dative, and Mr. Attorney Walker appointed *curator bonis* of the estate, pending the appointment of an executor.

**Ex parte THE INSOLVENT ESTATE KOENIG.**

Mr. Bailey moved, on the petition of H. Gibson and G. W. Steytler, trustees in the insolvent estate of Julius Koenig, for the removal of Barry Heatlie Heatlie from office as one of the trustees, Heatlie having disappeared from Cape Town.

Heatlie was removed from the office as prayed, costs to come out of the estate.

*Ex parte* WINTERBACH.

Mr. Van Zyl moved for an order authorising the transfer of certain property at Ceres.

Ordered to stand over for further information.

Buchanan, J, suggested that the applicant should get fuller information, and proceed before a judge in chambers, under the Derelict Lands Act.

*In re* CROYDON BRICK CO., LTD.

Mr. Molteno moved, on the petition of Stephan Bros. and the Bank of Africa, for the rule *nisi* to be made absolute, and for the appointment of Mr. Harry Gibson as official liquidator. He stated that an application which had been made by certain shareholders and creditors for the appointment of Mr. Cook as official liquidator had been withdrawn. Counsel informed the Court that the value of the assets was below £20,000.

Rule made absolute, and Mr. Gibson appointed official liquidator, to provide security in the sum of £1,000, the liquidator to have all the powers under the 149th section of the Act.

Mr. Molteno also applied for costs of the postponement, occasioned by the application for the appointment of Mr. Cook instead of Mr. Gibson.

Buchanan, J, said that the costs of the application would come out of the estate, but costs of opposition must be paid by the other petitioners.

*Ex parte* JUST.

Mr. Russell moved, on behalf of petitioner, for leave to sue her husband, George Just, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce and division of the common property. Petitioner stated that her husband, who was believed to have lately been living in Johannesburg, had not contributed to her support for years past.

Leave to sue granted, citation to be returnable on the 30th June, personal service, failing which publication once in the "Government Gazette" and once in the "Star," Johannesburg.

NILAND V. NILAND.

Mr. Pohl moved for a certain award of an umpire to be made rule of Court. Order granted as prayed.

*Ex parte* SILBERMAN.

Mr. Lewis moved, on behalf of petitioner, for leave to sue her husband (Israel Silberman) by edictal citation *in forma pauperis* for restitution of

conjugal rights, failing which a decree of divorce. The parties, it was stated, were married in Russia. Respondent had been residing in Cape Town, but had now disappeared, and had not been heard of for some time.

The matter was referred to counsel for further information, especially in regard to the question of the Court's jurisdiction.

*In re* THE RECREATION SYNDICATE, LTD. (IN LIQUIDATION).

Mr. Gutsche presented the official liquidators' report, and applied for the usual order as to inspection and publication.

Usual order granted.

*Ex parte* HOWARD.

Mr. Sutton moved for the appointment of a *curator ad litem* to represent respondent in lunacy proceedings.

Mr. Swift was appointed *curator ad litem*, and the summons was made returnable for the 8th June.

*Ex parte* DUMBLETON.

Mr. Lewis moved, on behalf of the petitioner, for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Respondent was stated to be in New Zealand.

Leave to sue granted, citation to be returnable on the 1st August, personal service to be effected.

*Ex parte* THE ESTATE SCHUMANN.

Mr. W. Porter Buchanan moved, on the petition of the executrix testamentary, for leave to mortgage certain property in the village of Willowmore. Petitioner proposed to raise a sum of £350, so as to enable her to open a boarding-house at the coast. Minors were interested. The Master's report was favourable.

Order granted as prayed.

*Ex parte* SHAW.

Mr. M. Bisset moved for leave to dispose of and transfer certain property at Claremont.

Order granted, subject to the written consent of Frederick Reed, father of the children interested, being filed.

*Ex parte* BIRSE.

Mr. Burton moved, on behalf of petitioner, for an order allowing the



period of his indenture in Scotland—four years—to count as service of articles of clerkship. Petitioner had been employed as a clerk by Messrs. Van Zyl and Buissinne since May, 1903. Counsel added that the Law Society did not oppose the application.

Order granted as prayed, petitioner to serve an additional year in this colony before applying for admission.

THOMAS V. COTTS.

### Partnership—Interdict—Foreign jurisdiction.

This was an application upon notice to the respondent to show cause, if any, on behalf of himself or his firm of Cotts and Co., of Delagoa Bay, why an interdict should not be granted restraining R. P. Houston and Co., of St. George's-street, Cape Town, from paying over to him two sums of £512 11s. 1d. and £97 16s. 9d., pending decision of the matters at issue between the said Thomas and respondent. Mr. Burton was for applicant, and Mr. W. Porter Buchanan was for respondent.

Mr. Buchanan took the point at the outset that the applicant was a foreigner, resident at Delagoa Bay, and that, on the authority of *Brarley v. Faure, Van Eyk and Moore* (15, "Cape Times" Law Reports, 20), he must give security for costs. Counsel read the correspondence which had taken place between the attorneys of the parties in regard to the question of security being given by applicant.

Mr. Burton said that the applicant was about to bring an action against respondent, and this was an urgent application to stop certain funds from being paid over to respondent. Applicant was prepared to tender any security in reason which the Court might direct.

[Buchanan, J. (to Mr. Burton): Are you prepared to bind your attorneys for security?]

Mr. Burton said that his attorneys were not in court, and he could not, of course, bind them without instructions.

Buchanan, J.: The proceedings will be stayed to enable petitioner to deposit security for £25 to the satisfaction of the Registrar, with leave reserved, if fresh proceedings are taken, to respondents to apply to increase the amount of security. If applicant does not give security, respondents will be entitled to costs of this application; but if he does give security, costs to be costs in the cause. The application may be renewed on Monday.

Mr. Burton: I take it that the money lying at Houston's will not be paid to the respondents?

Mr. Buchanan: I will undertake that the attorneys for the respondents will hold it until this matter is settled, should the money be paid over by Houston's.

*Postea* (May 18th).

Affidavits having been read, and Mr. Burton having been heard in argument.

Buchanan, J.: Applicant and respondent carried on business in partnership at Lourenco Marques under the style of Cotts, Cotts and Co. It is stated in the affidavits that the capital for this partnership was found by the respondent Cotts. Under the deed of agreement, Cotts gave notice to terminate the partnership on the 12th April, as he was entitled to do by the contract. The partnership was terminated on the 12th April, but the applicant, Thomas, claimed that he had a right, as notice was given by Cotts to continue the firm of Cotts, Cotts and Co. for his own behoof. There is nothing in the deed of partnership which entitles him to do so. On the day after the partnership was terminated, Cotts entered into a new partnership with other people, and continued the business at Lourenco Marques under the name of Cotts and Co. As such firm Cotts and Co. drew upon Houstons for expenses of agency connected with the discharge of certain cargo a sum of £512 11s. 1d. Houstons' representative in Cape Town hesitated to accept this draft pending the decision of questions which had arisen between the partners. It now appears upon affidavit that this was money expended by Cotts and Co., and, as far as the affidavits show, it does not come into the accounts between the members of the late firm. The application now made in court is to restrain Houston and Co. from paying over this draft for the amount of disbursements made at Lourenco Marques. On the affidavits there is no ground for granting this interdict. But there is a further application to interdict Houston and Co. from paying £97, which is due admittedly to Cotts, Cotts and Co. Houstons have refused to accept this draft when drawn upon them by Cotts and Co., and the draft has been returned to Delagoa Bay, and there is no longer any chance of Houston and Co. paying over this amount to Cotts and Co. Therefore, the necessity for the interdict on the second part of the application has fallen away. The partnership was carried on at Delagoa Bay, the accounts are at Delagoa Bay, and the matter has been removed from the jurisdiction of this Court. The application must be refused with costs.

[Applicant's Attorneys: Van Zyl and Buissinné. Respondent's Attorneys: Findlay and Tait.]

*Ex parte* LOUW.

Mr. Burton moved for the appointment of a *curator ad litem* in proceed-

ings to inquire into the sanity of petitioner's husband, Nicolaas Gerhardus Louw, of Somerset Strand. It was stated that an action was pending against the respondent, and it would be necessary to appoint a *curator bonis*.

Mr. Advocate Roux was appointed *curator ad litem*, and the summons made returnable on Friday, 8th June.

#### LOUW V. TRUTER.

This was an application, upon notice to respondent, to show cause why a certain judgment for £54 0s. 1d., in the matter of *Truter v. Louw*, given on the 8th February last (16, C.T.R., 75), by reason of the defendant's default, should not be set aside, and why applicant should not be allowed to file plea. Mr. Burton was for applicant; Mr. Douglas Buchanan was for respondent. The parties belong to the Calvinia district.

Applicant in his affidavit said that there had been certain arbitration proceedings between respondent and himself, and that an award was made on all questions in dispute, except a counter claim, which deponent said that he had against plaintiff. The matter of his counter-claim was standing over, pending deponent putting in his counter-claim, and, to his astonishment, when he received the Cape Town papers on February 12 he found that judgment had been taken against him by respondent. As a matter of fact, respondent owed money to the applicant.

Mr. Buchanan read answering affidavits to the effect that proceedings were taken in the Supreme Court to protect the plaintiff's claim, inasmuch as no deed of submission had been entered into, and that on February 8, when the award of arbitrators was received, instructions were sent to Cape Town to stay proceedings in the Supreme Court, but was then too late. Respondent did not then know defendant had been barred. Respondent did not intend to enforce the judgment given by the Court on February 8 last, and all he intended to ask for was judgment for £15, and costs, in accordance with the arbitrators' award.

Mr. Burton submitted that the judgment of February 8 last should not be allowed to stand. Respondent must be confined to his award.

Mr. Buchanan submitted that it was largely in consequence of the applicant's acts that the judgment was taken. If defendant had not been in default nothing could have happened. Respondent was willing to have the judgment reduced to £15 and costs, and counsel submitted that that would be the reasonable course to be adopted under the circumstances. Applicant was not entitled to apply now for leave to plead.

Buchanan, J.: The Cape Town attorney, not having knowledge that the local attorney had agreed to refer this matter to arbitration, took, as he very naturally must have done, advantage of the defendant's default, and set down the case for judgment by default, and obtained judgment. I think this is a proceeding which the defendant had a right to expect would not be taken, after this agreement had been come to, to refer the matter to arbitration. Judgment was taken for the full amount of £54. I think it is a pity that the case was not set down for hearing, and judgment applied for in terms of the award, because costs would have been saved, inasmuch as the Court could have set aside the other judgment, and given judgment for £15, the amount of the award. The judgment of February last must, I think, be technically set aside, but the costs of this application will abide the result of further proceedings. As to the claim in reconvention, that would be no cause for setting aside the judgment already given. If the applicant succeeds in his subsequent proceedings, whatever form they may take, he will get his costs. He is not barred from taking an action against the respondent.

[Applicant's Attorneys: Mostert and Son. Respondent's Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1906.  
} May 14th.

Mr. Van Zyl moved for the admission of Tobias Johannes Louw as an attorney and notary.

Application granted and oaths administered.

#### PROVISIONAL ROLL.

#### MASTER V. ESTATE CRUMP.

Mr. Howel Jones moved for an order calling upon Kathrine M. Crump, to file an account in this estate.

Usual order granted.

## ALING V. BOSHOFF.

Mr. De Waal moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

## STEPHAN V. LOUBSER.

Mr. Van der Byl moved for provisional sentence on a mortgage bond for £2,550, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

FAIRBRIDGE, ARDERNE AND LAWTON  
V. HEROLD.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,330, with interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

## ASPELING V. FALALL.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VAN DER BYL AND CO. AND OTHERS. V.  
LAZARUS AND CO.

Mr. Struben moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

## WILHELM V. MIDDLETON.

Mr. Toms said that after a final order of sequestration had been obtained against respondent it transpired that a letter had been received from the latter. The terms of this letter had been brought to the notice of plaintiff's attorneys, who were prepared to consent to the final order of sequestration being suspended until certain affidavits could be received from Barkly East.

Order allowed to remain as it stands

ROSENBERG V. LUNTZ, TRADING AS  
LUNTZ BROS.

Provisional sentence.

*Provisional sentence refused  
where the defendant denied*

*that he was the person named  
in the summons.*

Mr. Benjamin moved for provisional sentence on a judgment of the Court of the First Special Judicial Commissioner at Johannesburg, for payment of £57 16s. on a promissory note. The judgment, counsel stated, was obtained on the 12th January, 1898, and the matter had previously been before this Court, when exception was taken that the judgment had become superannuated in the Transvaal, and that it could not be sued upon here until it had been revived in the Transvaal. The case was ordered to stand over for affidavits on the question of whether superannuation had taken place, but this point was not now persisted in by defendant. Affidavits had been sworn on behalf of plaintiffs, which counsel put in.

Mr. De Villiers (for defendant) said that the affidavits showed that a writ of execution was taken out within the period of superannuation. That was the reason why the judgment was not superannuated. Counsel went on to read an affidavit by Issy Luntz, trading as Luntz Bros., at Witmoos Station, division of Aberdeen, who said that he had been served with the summons. He denied that he had any knowledge of the alleged debt, promissory note, or judgment, or that he had resided in the Transvaal, and said that between 1897 and 1899 he carried on a produce business at Somerset East.

Mr. Benjamin read a replying affidavit by the plaintiff (Harris Rosenberg), who said that he had seen the defendant at Witmoos Station, and that Luntz at first denied that he knew deponent or was indebted to him. After some time, however, defendant admitted that he was the person referred to, and said that the transaction had quite slipped his memory, and he asked that the case be withdrawn, and promised that he would pay costs. Counsel also read a supporting affidavit by Alfred E. Gerwitz.

Mr. Benjamin: It is very extraordinary that the plaintiff should deny that he is the person in question. He says that he is not Israel Luntz, but Issy Luntz.

[Buchanan, J.: He denies that he was ever in the Transvaal.]

As to the question of costs. In the previous case he alleged Transvaal law. Now, after putting us to the expense of getting affidavits from the Transvaal, he takes up an entirely new position. We could not have proceeded under Rule 329 (d), *Fletcher and Co. v. Froneman* (4, C.T.R., 3). Under a liquid document a plaintiff must adopt the procedure which the law provides for liquid cases.

**Buchanan, J.:** A vital question of liability is raised upon the affidavits that cannot possibly be settled upon provisional proceedings. The parties must go into the principal case. Provisional sentence must be refused, and the parties must go into the principal case, all costs to abide the result.

**DEMPERS V. MELMAN.**

Mr. De Waal moved for provisional sentence on two mortgage bonds for £650 and £500 respectively, with interest, the bonds having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**OHLSSON'S, LTD. V. WARD.**

Mr. Struben moved for provisional sentence on a certain lease for arrear rents, amounting to £450.

Order granted.

**PAARL BOARD OF EXECUTORS V. GARB.**

Mr. Bailey moved for provisional sentence on certain mortgage bonds.

Order granted.

**MATTHEWS V. VAN DEN BERG.**

Mr. Toms moved for provisional sentence on a promissory note for £286 6s. 3d.

Order granted.

**ILLIQUID ROLL.**

**SYDNEY V. HARRIS.** { 1906.  
May 14th.

Dr. Greer moved for judgment, under Rule 319, in default of plea, for £57 2s., for professional services rendered and moneys disbursed.

Order granted.

**DOYLE V. SPENCE.**

Mr. Van Zyl moved for judgment, under Rule 329d, for £14, balance of account for money lent and advanced, and costs of suit.

Order granted.

**COLONIAL GOVERNMENT V. WOOLFE.**

Mr. Howel Jones moved for judgment, under Rule 319, upon a declaration that defendant, who resided in Johannes-

burg, was sued through his duly-authorised agent in this colony under general power of attorney, at the instance of the Colonial Customs; defendant had knowingly, wrongfully, and unlawfully imported, and removed certain tobacco of the value of £737 10s., without first paying the Customs and other duties; the tobacco was, after the said importation, in the possession of the Railway Department, and had been seized by and was in the custody of the defendant. Plaintiff claimed an order (1) declaring that the defendant had forfeited the said tobacco, and (2) requiring him to pay to the Government the sum of £2,212 10s., being treble the value of the said tobacco, by way of penalty.

Defendant said that he desired that his case should be heard, but he admitted that he was not prepared to find security for costs. He alleged that the Transvaal Customs authorities were aware of the transaction, and that the duty had been paid to the authorities in Johannesburg.

[Buchanan, J. (to defendant): I am afraid that if you cannot find £100 security for costs, the law is against you, and you cannot be allowed to defend the case.]

Defendant: They have no right to these goods at all. The tobacco has come in as importation under the Customs Union Act.

Mr. Jones said that the Government's case was that the duty had not been paid. That was the information that they had from the Transvaal.

[Buchanan, J. (to defendant): I am sorry. I cannot alter the law. You cannot defend this case unless you find security for costs. Judgment will be given for plaintiff by default.]

**ATTWELL V. VAN DER HEEVER.**

Mr. Burton moved for judgment, under Rule 319, in default of plea, for £30 4s. 4d., taxed costs of certain suit, defendant having brought and afterwards withdrawn an action against plaintiff.

Order granted.

**DOOUSS V. LEVITAN.**

Mr. Van der Byl moved for judgment, under Rule 329d, for £91 8s., balance due for work done, and costs.

Order granted.

**IMPERIAL COLD STORAGE V. NATHAN.**

Mr. Benjamin moved for judgment, under Rule 329d, for £146 1s. 3d., goods sold and delivered, with interest, and costs.

Order granted.

## ALLI V. ADAM.

Dr. Greer moved for judgment, under Rule 329d, for £118 18s. 6d., cash paid on behalf of defendant, and £8 10s., further cash paid for defendant, with interest *a tempore morae*, and costs.

Order granted.

## REHABILITATIONS.

Mr. Watermeyer applied on behalf of Petrus Jacobus Froneman for his discharge from insolvency.

Application granted.

Mr. Rowson applied on behalf of Lazaar Goldberg for his discharge from insolvency.

Application granted.

## GENERAL MOTIONS.

WEST V. WEST. } 1906.  
} May 14th.

Mr. Van Zyl moved for a decree of divorce by reason of defendant's non-compliance with an order of restitution of conjugal rights, with custody and maintenance of the child of the marriage.

Rule made absolute.

## STEVENS V. STEVENS.

Dr. Greer moved for a decree of divorce by reason of defendant's non-compliance with an order of restitution of conjugal rights, for payment of £50, value of half the joint estate, and custody and maintenance of the child of the marriage.

Rule made absolute, subject to affidavit of service.

*Ex parte* THE VRYBURG MUNICIPALITY.

Mr. Van der Byl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* THE DIVISIONAL COUNCIL, OUDTSHOORN.

Mr. Sutton moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* MACHAN.

Mr. Payne moved, on behalf of petitioner, for leave to sue his wife, Jane Ann Machan, by edictal citation, for

restitution of conjugal rights. Respondent was last heard of by petitioner at Stockton-on-Tees. Petitioner said that he had employed the Salvation Army with a view of tracing his wife, that he knew of no better agency for the purpose, but that their efforts had been unsuccessful.

Leave to sue by edictal citation granted, personal service if possible, failing which one publication in the "Government Gazette" and one publication in the "North-Eastern Daily Gazette," published at Middlesbrough, England, and circulating in Stockton-on-Tees; notice also to be given by registered letter addressed to respondent's mother, citation to be returnable on the 21st July.

*Ex parte* OLIVIER.

Mr. Pohl moved for leave to sell by public auction certain property in an estate in which minors are interested.

Order granted in terms of Master's report, sale to be subject to Master's approval.

*Ex parte* DE KLERK.

Dr. Greer moved, on the petition of Petronella Margaretha de Klerk, for leave to sue her husband, Julius Christiaan de Klerk, *in forma pauperis*, and by edictal citation, for restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage in community of property. Petitioner said that she was married to defendant at Humansdorp, where she still resided. Her husband deserted her in March, 1904, and she had no knowledge as to his present whereabouts. He was at Somerset East when she last heard of him.

The petition was referred to Dr. Greer for report and certificate.

## GOLD AND LEVENSON V. ARISTO CIGARETTE CO.

This was an application upon notice to respondents to show cause why a certain judgment granted by this Court, on the 17th April, by default, should not be set aside, and applicants be allowed to purge default, and enter appearance. Mr. Lewis was for applicants; Dr. Greer was for respondents.

Mr. Lewis read an affidavit by the applicant Gold, who stated that the business of the partnership had been taken over by the Continental Cigarette Company, and that the judgment was obtained during his absence. He also stated that before he went away he made arrangements for the debt to be paid, and that there was no liability upon him for the same.



Dr. Greer read an answering affidavit, in which it was set forth that the Aristo Company had no knowledge that Gold had no notice of the proceedings on his return. It was denied that there was a good defence to the action. Gold had stated that he was going to Europe, and that Levenson would settle, but Levenson said the respondents could whistle for the money. It was denied that the amount claimed in the summons was one of liabilities taken over by the Continental Cigarette Company.

Mr. Lewis put in a replying affidavit to the effect that the respondents well knew that the Continental Cigarette Company had taken over all the liabilities of the firm of Gold and Levenson.

Buchanan, J., said the judgment as against Gold must be set aside, with costs. Regarding Levenson, he was duly served with the summons, and the judgment would only be set aside in his case on payment of costs

#### *Ex parte* ESTATE TROLLIP.

Mr. Toms moved for leave to the petitioner, Susan Trollip, in her capacity as executrix, to raise a loan of £1,000 on mortgage in the estate of her late husband, Charles Trollip. There was a consent by three majors. The Master had no objection to the petition.

Application granted.

#### MASTER V. TRUSTEE, INSOLVENT ESTATE DURANDT.

Mr. Howel Jones was for the applicant, and Mr. W. P. Buchanan was for the respondent. The application was for an order of attachment for contempt of Court against the respondent, Henry Howard, sole trustee in the estate, for not filing an account, as previously ordered by the Court. The affidavit of the respondent set out that he was in a bad state of health, and could not attend to business during the time he should have filed the account. The account would shortly reach the agents in Cape Town.

An order of attachment was granted, with costs, execution stayed until June 1.

#### MASTER V. TRUSTEE, ESTATE DICKER AND MEIRING.

Mr. Howel Jones moved for an order of attachment against the trustee in the estate for not filing the account within the specified time. An account had now been forwarded, but the Master had not had time to see if correct.

Order of attachment granted, with costs, and execution stayed until June 1.

#### *Ex parte* ESTATE SULLIVAN.

Mr. Lourens moved for an order authorising the amendment of the petitioner's name and that of her late husband in a certain order of sequestration.

It was ordered that notice of intention to surrender be given in the "Government Gazette" in the correct name, and if no objection, the Master to correct the letters of administration in the usual way.

#### *Ex parte* INSOLVENT ESTATE SACKS.

Mr. Lourens moved for an order authorising the transfer of certain property in the estate of one of the trustees. There was an affidavit from the auctioneer of a fair sale and price.

Order granted, subject to the consent being filed by the other trustee.

#### *Ex parte* EDDIE.

Mr. Palmer moved for an order authorising the amendment of a certain entry in the Debt Registry. The matter had been before the Court, and now there was a report from the Registrar that was favourable.

Order granted.

#### *Ex parte* MCCARTY.

Mr. Swift moved to make absolute a rule *nisi* calling upon respondent to show cause why the petitioner should not be allowed to sue *in forma pauperis* for divorce.

Rule made absolute, Mr. Swift to take the reference as counsel, and Messrs. Syfret, Godlonton and Low to act as solicitors.

#### *Ex parte* MARAIS.

Mr. Van Zyl moved for an order authorising the Registrar of Deeds to issue a certified copy of a mortgage bond which had been lost.

The matter was ordered to stand over for a report from the Registrar of Deeds.

#### *Ex parte* JACKSON.

Mr. Palmer moved, on the petition of Henry Jackson, as guardian of his younger brothers and sister, children of the late Captain Hy. Jackson, of Wynberg, for an order authorising the Master to pay a sum not exceeding £336 9s. 4d., for the purpose of paying expenses incurred by petitioner for the support, maintenance, and tuition of the minors to the 31st December, 1906, and a further sum, not exceeding £100 per annum, for the maintenance, support, and tuition of two of the minors.

Buchanan, J, said that it seemed to be a very liberal allowance out of a very small inheritance that was asked for. The Court would authorise the repayment of the moneys already incurred, and further sums, not exceeding £60, £90, and £70, subject to the restrictions recommended by the Master, but no further payments would be allowed without further information being presented to the Court.

*Ex parte* ESTATE DE VILLIERS.

Mr. Searle, K.C., moved, on the petition of the executor testamentary in the estate of Moritz Jacobus de Villiers, for an order authorising the sale of certain landed property in the division of Beaufort West for £3,750, and the deposit of the balance of the purchase price with the Colonial Orphan Chamber and Trust Co. Minors were interested in the estate.

Order granted as prayed.

BUDRICKS V. CAPE TOWN TOWN COUNCIL.

Mr. Molteno (with him Mr. Roux) moved as a matter of urgency for a certain award of arbitrators to be made rule of Court. Respondent's attorneys consented.

Award made rule of Court in terms of consent filed.

MARAIS V. CAPE DIVISIONAL COUNCIL. 1906.  
(May 14th.)

Divisional Council — Rates —  
Transfer of immovable property — Tender — Receipt —  
Act 40 of 1889, Sec. 275.

*M. purchased certain immovable property within the Division of C. The Divisional Council rates for two years, which had been levied before the date of purchase, were unpaid. M. tendered the rates for the previous year, on condition of receiving a receipt for the same; the production of such receipt being a necessary condition under Act 40 of 1889, Sec. 275, to receiving transfer. The Council refused to receive one year's rates unless all arrears were also paid.*

*Held, that the Council was bound to accept and give a receipt for the last year's rates,*

*and might proceed against the vendor of the property for other arrears.*

Smuts v. Cathcart Divisional Council (6, C.T.R., 384), distinguished.

This was an application, upon notice, calling upon the Cape Divisional Council to show cause why they should not be ordered to accept from the applicant payment of £33 10s. 10d., being the rate last due upon certain property, and why they should not be ordered to issue such receipt or certificate for the rate as is required by the Registrar of Deeds in terms of Section 275, Act 40, 1899.

To the affidavit of Mr. Godlonton, of Messrs. Syfret, Godlonton and Louw, attorneys for applicant, was annexed a declaration of purchase and sale in regard to certain property between applicant and one Myer Pincus, at £7,500, on March 15, 1906. An account by the Divisional Council for a rate amounting to £33 10s. 10d. was also annexed. On March 21 last, deponent stated, payment was tendered of this sum to the respondent, such tender being made in the name of the applicant as purchaser of the property for the purpose of complying with the provisions of Act 40, 1899. This tender was refused by the Council on the ground that they could not accept payment, or issue a receipt for the rates last due, until all prior rates had been paid, although no liability for such prior rates fell upon the applicant. By reason of the Council's refusal to accept such rate and grant such receipt, the applicant would be unable to obtain transfer of the property purchased by him from Mr. Pincus, and he stood in considerable danger, owing to the fact that Pincus, the seller, was in financial difficulties.

The answering affidavit of Mr. Van der Westhuisen (secretary of the respondent Council), stated that the rates levied in 1904 and 1905 on this property were both unpaid, the amounts being, respectively, £37 11s. 1d. and £33 10s. 10. Interest was also due on the first sum from June 16, 1904, and on the second from September 14, 1905.

Mr. Upington for applicant. Mr. Benjamin for respondent.

Mr. Upington argued that on the authority of *Smuts v. Cathcart Divisional Council* (6 "Cape Times" Reports, 384) the obligation was clearly upon the respondents to accept the payment of the last rate due, and issue receipt upon tender of the amount. The Council would still have their recourse against Pincus for rates other than the last rate due. In the Cathcart case the Chief Justice stated that "there is no

lien or tacit hypothec created by law or by statute in favour of the Divisional Council or body of that kind for arrear rates." The main principle laid down in that case, counsel submitted, governed the present case.

Mr. Benjamin said that the Council did not wish to make applicant liable for these rates at all. That was the distinction between the present case and the case of *Smuts v. Cathcart Divisional Council*. Smuts was clearly liable to the Council for a certain rate as in occupation. Marais in this case tendered the rate really on behalf of Pincus, and, indeed, he could only tender the rate as agent of the seller. Pincus was trying to evade his liability for the arrear rates on the property. Counsel submitted that the Council had taken up a perfectly legal position. He also quoted a case against the Cape Town Council, in which a similar question was raised.

Buchanan, J.: In March last one Pincus, registered owner of certain landed property, sold the same to the present applicant, Marais. Marais, on attempting to get transfer, found that the Divisional Council rates levied during the last two years had not been paid. He therefore tendered to the Divisional Council payment of the rate which had been levied during the last year only upon the property. This tender the Divisional Council refused to accept, because the rates for the previous year had not been paid by Pincus. Prior to the passing of the Divisional Council Act, 40 of 1889, it was not necessary that the Divisional Council rates should be paid before transfer of any property was effected, but that Act, for the purpose no doubt of giving Divisional Councils some security, imposed the condition contained in section 275, which enacts that "before the passing transfer of any immovable property within any division every Registrar of Deeds shall require the production of a receipt or other voucher showing that the rates last due to the Council of such division upon such property have been paid." This section differs from that of the Cape Town Municipal Act. There are also several differences between this case and that of *Smuts v. Cathcart Divisional Council* (6, C.T.R., 384), which has been mainly relied on in argument for the appellant. In that case there was a sale in insolvency, and after that sale, but before transfer, a rate had been levied, and it was held that the purchaser of the property was not bound to pay anything more than the rates which had been incurred during his occupancy of the property. Here, however, the last rate has not been levied since the sale of the property, and *prima facie* the purchaser was not liable for any rates, but I do not see that this fact makes any conflict between the two cases.

Had this rate been levied after the sale of the property, it is admitted that the case of *Smuts* would apply, and there would be no ground for the Divisional Council to refuse to accept payment of the last year's rate from the applicant. But it is said that because the rate was due before the sale of the property, therefore the purchaser is not entitled to pay the last rate due by the previous owner without also paying the arrears due by such owner.

Great reliance has been placed upon a remark by His Lordship the Chief Justice, in the case of *Smuts*, that the Divisional Council would not be bound to accept from the owner of the property the last year's rates when such owner also owed the previous year's rates. That may be the case as between the previous owner and the Council, but the Council cannot on that account prevent the purchaser of the property from obtaining transfer. The Divisional Council does not say that a receipt for all rates due must be produced, but limits the receipt required to that for the rates last levied. It can only be read, therefore, as giving a security, or lien, or whatever you like to call it, for the rates last due. Mr. Marais has now purchased the property, and offers to pay those rates, which it is necessary should be paid before he is able to obtain transfer. His payment of the rates last levied does not release the seller from any liability to pay the rates previously levied. He is entitled to remove the objection created by this section, and to obtain transfer. I think there is no reason why the application should not be granted. It is said that a tender coupled with a condition for a receipt being given is not a good tender. However that may be, where a statute requires a receipt to be produced from a public body like the Divisional Council, I think it is the duty of such body to give such receipt upon the payment to them of the amount they are entitled to demand. The application will therefore be granted as prayed, with costs.

[Applicant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Moore and Son.]

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* NASH AND { 1906.  
ANOTHER. { May 15th.

Lien—Stoppage *in transitu*—Bills of lading.

Mr. Schreiner, K.C., moved, on the petition of Maynard Nash, as representative in Cape Town of John Deans Simmons (interim inspector of Reiners Von Laer and Co., of Port Elizabeth), and Cecil Govey, as manager of the Cape Town branch of Reiners Von Laer and Co., carrying on business under the style of Govey and Co. From the petition, it appeared that proceedings had already been taken on the 9th inst. by Mr. Simmons in the Eastern Districts Court for a temporary interdict, and that the Judge President granted a rule calling upon the Union-Castle Company, the Bucknall Steamship Company, the Ocean Line, the German-Australian Line, and the Port Elizabeth Harbour Board to show cause why they should not be interdicted from delivering to Ball and Co., or any other person or persons whomsoever for and on behalf of A. Ruffer and Sons, Schunck and Co., and the directors of the Direction der Disconto Gesellschaft, any goods already received by the said steamship companies, and the said Harbour Board, from delivering any goods which may yet come into their hands consigned to Reiners Von Laer and Co. by any steamers or vessels, and calling upon Ball and Co. to show cause why they should not be interdicted from parting with, alienating, or disposing of any such goods already received by them, or the proceeds of any goods that they may have sold, pending result of an action to be brought for and on behalf of the creditors of Reiners Von Laer and Co., to have it declared that such goods belong to the estate of Reiners Von Laer and Co. Rule to operate as a provisional interdict, and be returnable on the 17th inst. Mr. Simmons was appointed interim inspector of Reiners Von Laer and Co. at a meeting of the South African creditors held on the 20th April. Since his appointment, he said, negotiations had been proceeding in London (the largest creditors of the firm being banks and firms having their headquarters in Europe and America), for the general liquidation of the assets of the firm, either by a limited liability company, to be formed

for that purpose, or else under inspection, and the South African creditors had in meeting assembled agreed to the proposal submitted by the European creditors for liquidation by a company, subject to the acquiescence of the South African banks interested. These negotiations were still pending. On or about the 30th April information was received that certain English creditors, who were factors, but not vendors, had indemnified the local shipping companies set out in the petition, and requested them not to make delivery of certain goods, some of which had arrived at Port Elizabeth, and some of which were on their way thither, consigned to Reiners Von Laer and Co., in whose names the bills of lading were made out, their intention being to stop such goods against which the factors had made advances of money coming into the hands of Reiners Von Laer and Co., and to ensure their being held over for the factors' account by their agents in Port Elizabeth, and to thereby obtain undue advantage over the other creditors. Petitioner drew attention to certain correspondence between his solicitors and Messrs. Ball and Co., the agents in Port Elizabeth of certain of the factors. He was informed that the creditors in England who had given instructions as aforesaid to the shipping companies were Ruffer and Sons, Schunck and Co., and the Direction der Disconto Gesellschaft, none of whom were vendors of goods, but merely parties who had advanced moneys thereon. The petitioners in the present application (Messrs. Nash and Govey) annexed a list of vessels by which goods consigned to and intended for Govey and Co., or Reiners Von Laer and Co., had arrived or were expected at Cape Town, in regard to which the bills of lading were held either by petitioners or the Port Elizabeth House. Petitioners called the Court's attention to correspondence or negotiations which had taken place with Bucknall Bros. regarding goods consigned to Govey and Co. by the Bucrania, which had been stopped in the hands of the Table Bay Harbour Board, with Wm. Spilhaus and Co., of Cape Town, who were acting in conjunction with Ball and Co., of Port Elizabeth, agents of Schunck and Co., and also with the Union-Castle Company in regard to assignments per their line, which had been stopped upon cable instructions, and were detained by the Harbour Board. Petitioners went on to say that they had received cable advices that the negotiations in London were so satisfactory that it was expected that a new company would shortly be formed for the purpose of taking over the assets of Reiners, Von Laer and Co., and, meanwhile, it was eminently desirable that, in the interests of the creditors in general, attempts to stop goods in transit should be resisted

and frustrated. Petitioners were not able to place before the Court the grounds upon which the goods consigned to Govey and Co., or Reiners von Laer and Co., were being stopped in Cape Town, and they did not recognise any right to stop such goods in transit. Petitioners had received instructions from Port Elizabeth to apply for an interdict upon lines similar to the rule nisi obtained at Graham's Town. Petitioners prayed for an order interdicting the Union-Castle Co., Ltd., the Bucknall Steamship Line, Ltd., the German Australian Steamship Co., Ltd., the Deutsche Ost Afrika Linie, and the several agents of the said steamship lines at Cape Town, as also the Commissioners of the Table Bay Harbour Board, from delivering to any person whomsoever, other than the petitioners, any goods already received by them or their agents, or which may hereafter come into their, or their agents' hands, consigned to Reiners, Von Laer and Co., or to Govey and Co., by any steamers or vessels touching at Cape Town. Petitioners also prayed for an order interdicting Bucknall Bros. from handing over £56 16s. received by them as the proceeds of the goods covered by bill of lading, No. 76, ex Bucrania, pending further order of this court.

Mr. Schreiner went on to say that this case raised a very nice question of law, but he would not ask His Lordship to pre-judge it. All they wanted was that the *status quo* should be preserved until the whole matter could be argued before the Court. The firm was a very large one, with very large assets and very large liabilities. The idea was to float a limited liability company, which idea apparently was to be carried out. Everybody seemed to feel that, and it was likely that the business would be worked out on those lines, without an insolvency.

[De Villiers, C.J.: Surely the Harbour Board won't deliver the goods to anybody but those who hold the bills of lading.]

Mr. Schreiner: It appears that it has done so. It has been done in Port Elizabeth. The Harbour Board has no right to treat the thing upon the instructions of the ships, and hand over to anybody that has not the bills of lading. Counsel added that the matter was really urgent, because it would appear that under indemnity the companies and Harbour Board were disposed to deal with the goods in an irregular manner. The petitioners were prepared to show that there was no right in the persons who were seeking to stop the goods *in transitu*. They held the bills of lading, and all the shipping documents. The factors, or the persons who had lent the money in England, had now no lien on the goods. They should have retained all

the shipping documents in their hands until the money was paid. But they had handed over these documents to Reiners, Von Laer and Co., and they now seemed to seek some extraordinary remedy by way of stoppage *in transitu*.

[De Villiers, C.J.: What do you propose to do with the goods after they have arrived?]

Mr. Schreiner said that the goods might remain in the Harbour Board's hands. It was only a question of rent of the Board's stores, because he was sorry to say those stores were not over well filled.

De Villiers, C.J.: You may take an order, pending further order of court, interdicting the Union-Castle Company and the other steamship companies mentioned in the petition from handing over any of the goods mentioned in the petition to any other person or company than the Table Bay Harbour Board, interdicting the Harbour Board from handing over any of the said goods, and interdicting Bucknall Bros. from parting with the sum of £56 16s. mentioned in the petition, with leave to the Union-Castle Co., or any other person or company interested in the goods, to apply to this Court for a discharge of the order, question of costs to stand over. Leave will be granted to serve this order upon Ball and Co., of Port Elizabeth, by telegraph.

#### ADMISSION.

Mr. Alexander moved, as a matter for urgency, for the admission of Michiel Johannes Smuts as an attorney and notary public. Counsel said that applicant desired to proceed up-country. He added that two months of the articles were spent in studying for the examination, but there was authority in an *ex parte* application reported in 7, Jura, at p. 93, where the Court held that such time spent in study would be construed as a reasonable holiday.

Application granted and oath administered.

#### *In re* INSOLVENT ESTATE RUBENSTEIN.

Mr. Swift moved for the appointment of Mr. G. W. Steytler as provisional trustee in the insolvent estate of Ruben Rubenstein, the principal assets being the Lady Grey Bridge Hotel, near Paarl.

Order granted as prayed.



## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

HOOGENDOORN V. GOODALL. { 1906.  
May 15th.

This was an action brought by Johannes Stéphanus Hoogendoorn against Charles Albert Goodall, to recover £2,000 under a certain agreement.

The declaration set out that the plaintiff was an undertaker, carrying on business at Cape Town, Woodstock, and Wynberg, and the defendant, at present and for some time past, carried on business as an undertaker at Woodstock. In May, 1903, the plaintiff agreed to employ the defendant as manager of his business at Woodstock, the employment being terminable on one month's notice. It was an express condition of the agreement that the defendant should not within five years of the termination of the agreement enter into a similar business within the limits of the Cape Peninsula, and should he do so, the defendant was to pay to the plaintiff £2,000. In October, 1905, the employment was terminated by the defendant on a month's notice, and defendant then opened a business in opposition at Woodstock, to the detriment of the plaintiff's business, for which the plaintiff claimed £2,000 on the agreement.

In his plea, the defendant denied he entered into the employment under the conditions alleged by the plaintiff. The agreement was not a term or condition in the contract, and there was no consideration for it.

Mr. Upington was for the plaintiff, and Mr. Watermeyer for the defendant.

Johannes Hoogendoorn, plaintiff, stated that his business was the oldest in town. In 1903 he proposed to open a branch of his business at Woodstock, and an advertisement was put in the "Times" calling for applications. Amongst the applicants was the defendant, and the terms were discussed verbally that the defendant was to have a free house, £10 a month, and 2½ per cent. on all cash takings. On the 16th May witness wrote a letter to the defendant setting forth the conditions in the declaration. The following Monday the defendant came into the office, and agreed to the conditions. The defendant remained in the service of witness until October, 1905, and he acquired during his time an intimate knowledge of witness's business connection. The defendant gave plaintiff notice, and then opened a business in opposition to plaintiff. When the defendant gave notice, he told witness that he was going to England. Witness then wrote to the defendant claiming the £2,000. He had suffered

damages in consequence of this opposition.

Cross-examined by Mr. Watermeyer: The defendant's wife was present at the first interview. The defendant was not employed at the first interview. Witness thought he had in a way taught the defendant his business. The defendant's wife was present when the agreement was verbally agreed upon.

Mr. Watermeyer: Do you know any client of yours that has gone over to Mr. Goodall?

Mr. Upington: I don't suppose his clients come back again.

Mr. Watermeyer: Can you mention any families?

Witness: Oh, yes, several.

Edward Hutt, superintendent of the cemeteries at Maitland, put in a statement showing the applications for burial orders made by the defendant individually, and as manager of the United Funeral Furnishing Co.

Mr. Upington closed his case.

Charles Albert Goodall, defendant, stated that at the first interview he was engaged by the plaintiff, who had not decided the exact locality of the business. The salary was fixed, a free house and 2½ per cent. commission. There was no mention on that occasion of any agreement. Witness received the letter from the plaintiff, but took no notice of it, as he thought it was absurd. Other undertakers, although they had no branch at Woodstock, carried on business there. On the 6th February he sold the business to the United Funeral Furnishing Co., and merely gave a receipt for the cash he received—£40.

Cross-examined by Mr. Upington: Witness was continuing as manager to the company to whom he had sold. He was to get an increase on £10 a month if the business prospered.

You have been very energetic?—I can't kill people.

No, but you can get the funerals?—Yes.

As a matter of fact, you opened an office next door to the Registry of Deaths?—Yes.

Mrs. Goodall, wife of the defendant, corroborated her husband as to what took place at the interview with the plaintiff.

Mr. Watermeyer closed his case, and council having been heard in argument on the facts,

Buchanan, J.: The plaintiff in this case wished to start a branch of his own business at Woodstock, and he advertised for applicants. He interviewed some half dozen, and among them the defendant. The terms were discussed with the applicant, and two days later the plaintiff wrote the letter deciding to accept the applicant, and setting out the conditions of employment. The defendant admits receiving this letter, and that he wrote no reply to it. Both the defendant and

his wife state that the terms were distinctly settled at the first interview, and the plaintiff says that the terms were merely discussed at the first interview, and after seeing the other applicants he selected the defendant. Under the circumstances the defendant must be bound by the terms set forth in the letter. The only question is whether, although not prayed for, an interdict, which the plaintiff is willing to accept in lieu of damages, should not be granted, and counsel might consult his client as to whether he would agree to this order.

Mr. Watermeyer, after consultation, said that his client would rather submit to damages.

His Lordship then assessed damages at £75, for the plaintiff, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

INBAMBANE OIL AND MINERAL DEVELOPMENT SYNDICATE, LTD. V. MEARS AND FORD. { 1906.  
May 16th.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), moved as a matter of urgency for an order attaching a document conveying certain rights to the defendant in the case of the Inbambane Oil and Mineral Development Syndicate v. Mears and Ford.

De Villiers, C.J said he did not wish to decide the question of the saleability of the document, but it would be directed that the Registrar take custody of the document pending further order of Court.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1906.  
May 17th.

Mr. Alexander moved, as a matter of urgency, for the admission of Daniel Hendrik Viljoen, as an attorney and notary public. Counsel said that applicant had come down from Britstown for the examination, and he now desired to return.

Application granted and oaths administered.

### INDWE MUNICIPALITY V. COLONIAL GOVERNMENT.

#### Declaration—Exception.

*It is no ground of exception against a declaration which claims damages against the defendant for having collected water on his land and poured it on to the plaintiffs' land, that the declaration, while alleging that the defendant's predecessor in title had committed a similar injurg, does not claim damages for such predecessor's acts either from him or from the defendant.*

This was an argument on exceptions taken by the defendant, the Commissioner of Public Works, as representing the Colonial Government, to the plaintiffs' declaration.

The declaration, after formally stating the parties and the circumstances leading up to their present position, proceeded:

4. The said (Indwe) company wrongfully and unlawfully collected water, which otherwise would have flowed over a wide area, over the company's land, on to the Municipal land, and the said streets without injury to them, in certain channels, and poured the water so collected at these points, on to the said land and streets. The said inhabitants at first, through their Village Management Board, and after 1898 through their Municipality, objected and protested against the said wrongful and unlawful action.

5. In 1902 defendant bought the line of railway, together with a piece of land attached thereto, from the company, and defendant is now the legal holder thereof.

6. The defendant has since 1902, with knowledge of the aforesaid facts, wrongfully and unlawfully collected at certain points on his land, bought, as aforesaid, from the company the water, which would otherwise flow over a wide area from the defendant's land on to the Municipal land and streets without injury thereto, and has wrongfully and unlawfully poured water on the said property at these said points, and on to the said streets in great quantities and has, notwithstanding objection and protest by the said inhabitants through their duly-constituted Municipality, continued and continues so to pour the said water on to the said land and streets.

7. By reason of the aforesaid wrongful and unlawful conduct of the defendant, great damage has been done, and is being done to the said land and streets, and it is impossible for the plaintiffs to construct, keep, and maintain the said streets, as they lawfully should, and if the defendant continue so to pour the said water so collected, as he claims the right to do, the plaintiffs, as representing the inhabitants, will sustain further great and irreparable loss.

Plaintiffs claimed: (1) £1,500 as and for damages; (2) an interdict restraining the defendant from collecting water on his land and pouring it on to the said Municipal land and streets, so as to damage the same; (3) alternative relief; (4) costs of suit.

The exception to the declaration was in the following terms: "Before pleading to the declaration, the defendant excepts thereto on the ground that the same is vague and embarrassing and bad in law, and that it is impossible to plead to the same, and especially for the reasons following: (1) Paragraph 4 thereof is irrelevant, vague, embarrassing, and bad in law inasmuch as the company was not mentioned as a party to this suit and the land, streets, channels, and points therein referred to are neither specified nor indicated, nor is there any allegation contained in the declaration that the defendant is responsible for the alleged wrongful and unlawful action of the company. He prays that the said paragraph be expunged, or otherwise that the plaintiff be ordered to join the said company as defendant and to amend the said paragraph. (2) Paragraphs 6 and 7 are vague, embarrassing, and bad in law, inasmuch as neither land nor any of the points and streets therein referred to, are specified or indicated, and he prays that the plaintiff be ordered to amend said paragraphs. Wherefore he prays that the said declarations be set aside or amended with costs."

Mr. Searle, K.C. (with him Mr. H. Jones), for the exceptors (defendants); Sir H. Juta, K.C. (with him Mr. Van Zyl), for the respondents (plaintiffs).

Mr. Searle said that it was not stated in the declaration when the water was collected by the company. It must be alleged to have taken place before the Government bought the railway. Then it said that in 1902 the defendant bought the railway with a piece of land attached from the company. It was not stated what the piece of land was. As to the paragraph alleging that the company had collected water and poured it on the land and streets of the municipality, there was nothing in that paragraph to show upon what ground the Government were asked to be held liable for the wrongful and unlawful conduct of the company.

[De Villiers, C.J.: I do not understand that from the declaration. It is the Government's conduct that is complained of. The other is a recital. Plaintiffs say it was an unlawful act on the part of the company, and that the defendant continued it. You are only responsible for your own acts.]

Mr. Searle: Suppose we did nothing after this, except took the line over as we found it?

[De Villiers, C.J.: But then they say that, with knowledge of the aforesaid facts, the water was poured over certain points; that is all you are liable for.]

Mr. Searle: It is certainly alleged that we are liable for what took place before we bought the railway. I submit that there is no allegation in this declaration that the Government continued a collection of water that was wrongful and unlawful on the part of the company. Plaintiff says that they collected water at certain points on their land.

[De Villiers, C.J.: It must have been supposed that the Government, seeing that there had been a collection of water, thought it was legally collected water at a certain point.]

Mr. Searle: I do not see why paragraph 4 should be there at all.

[De Villiers, C.J.: I do not see why it is.]

Mr. Searle: It is embarrassing.

[De Villiers, C.J.: Well, I do not see where it is embarrassing.]

Sir H. Juta said that nobody ever dreamt of alleging that the Government were liable for the acts of the company prior to 1902. But since 1902 the defendant had done something, and for that wrongful act plaintiffs held him liable.

Mr. Searle submitted that the company ought to be joined in the action, or paragraph 4 should be struck out, so as to confine the action altogether to what the Government had done in this

action of tort. Then there was the point as to whether, as a fact, something should not be specified in regard to where it was alleged the tort was committed. It was stated "at points," but it was not stated whether those points were the same points or different points. The defendant would also like to know the particular streets that were affected.

Without calling upon Sir H. Juta, De Villiers, C.J.: I consider that the declaration would have been quite good if there had been no allegation whatever as to the conduct of the Indwe Coal Company before the year 1902. But the introduction of the paragraph as to what the Indwe Company had done before 1902 does not, in my opinion, invalidate the declaration. As I understand the matter, the statement puts the defendant's case in a more favourable light; it certainly does him no harm. It is alleged here that the water had been collected before 1902, and that in 1902, after the defendant became the owner of the railway, the defendant also wrongfully and unlawfully collected water at certain points on the land, but I cannot see anything in the declaration from which it may be inferred that the plaintiffs wish to hold the defendant liable for what the Indwe Company had done before 1902. I see nothing, either directly or by inference, to lead to that conclusion. If the allegation made in the 4th paragraph is true, a good case is made out against the defendant for damages. Then it is said that the defendant is asked for damages for what the previous company had done. The following clause does not show that: "By reason of the aforesaid wrongful and unlawful conduct of the defendant, great damage has been done to the said land and streets." So that it would be quite impossible for the plaintiffs to maintain that damage done before 1902 by the company can now be claimed, and I cannot see how the defendant is in any way embarrassed by this bald declaration. Then, as to the contention that the points at which the water was poured on to the plaintiffs' land should have been specified, it might, perhaps, have been more convenient if a plan had been annexed showing the exact points; but it is not usual in a declaration to go into all the minutiae. If the defendant is in any way prejudiced, he has only to ask for particulars. If particulars are refused, then there would be time to come into court, and I have no doubt that if application were made to the plaintiffs for a small sketch map showing the points at which water was poured on the plaintiffs' land, such a sketch plan would be given. I do not see why the declaration should go into all the minutiae. Probably both parties know what is meant. In my opinion,

there is really no ground for the exception. It must be overruled, with costs.

[Plaintiffs' Attorneys: Van der Byl and De Villiers. Defendants' Attorneys: Reid and Nephew.]

#### ESTATE SHAYLER V. DEVENISH.

This matter came on for argument upon an exception taken by defendant to plaintiff's declaration.

Plaintiff, in his declaration, said that he was executor-dative in the estate of the late John Leonard Shayler, of Prieska, and he sued in his capacity as such, and the defendant was a farmer residing at Omdraais Vlei, in the division of Prieska. The deceased died intestate on or about the 15th May, 1903, and plaintiff was appointed executor-dative by letters of administration granted on the 23rd October, 1903. Previous to the death of the deceased, he (Shayler) and the plaintiff carried on business in partnership as forwarding and general agents at De Aar and Prieska, under the style or firm of Shayler and Co., and at the date of the deceased's death the said firm was indebted to the defendant in the sum of £200, with interest thereon at 8 per cent. per annum, under a certain promissory note. The said firm continued to carry on the said business until shortly before the death of the deceased, when the said business was sold, and the said partnership dissolved. In or about the month of April, 1904, the plaintiff, as executor-dative of the deceased's estate, erroneously and improperly paid to the defendant out of the assets of the said estate the sum of £225 in settlement of the said promissory note, with interest thereon, the plaintiff, in doing so, acting in the bona-fide belief that the proceeds of the estate would be found sufficient to satisfy all the just and valid claims to which it was liable, and that it was in the best interests of the estate that the said debt should be paid in order to save further accumulation of interest thereon. Owing to the impossibility of realising several outstanding accounts due to the said firm, the proceeds of the estate had been found insufficient for the payment of all the just and valid claims to which it was liable, as would appear from the administration and distribution account annexed to the declaration. The plaintiff was liable to pay to the creditors specified in the said account the amounts which they respectively would have been entitled to receive in respect of their said claims if he had not paid the said sum of £225 to the defendant, and which said amounts the said creditors demand that the plaintiff should pay. The Master of the Supreme Court, acting in the interests of the creditors, had refused, and still refused, to accept

the administration and distribution account. Amongst the claims of creditors other than those referred to in the annexed statement, were some claims based upon accounts against the said partnership, but the estate of the plaintiff in his personal capacity was provisionally sequestrated as insolvent, on or about the 4th April, 1905, and the final adjudication thereof was ordered on or about the 27th April, 1905." "The plaintiff," the declaration proceeded, "was entitled, in his capacity as executor-dative in the estate of the deceased, to recover from the defendants the said sum of £225 so erroneously and improperly paid as aforesaid, in order that the same may be brought up in the assets of the said estate and distributed pro rata amongst the various creditors thereof, including the defendant, but the defendant refuses to pay the said sum or any part thereof." Plaintiff claimed repayment of the said sum of £225, with interest a tempore morae, and costs.

Before pleading to the claim, the defendant excepted to the declaration on the ground that it showed no good cause of action in law, and prayed that the same may be dismissed, with costs.

Defendant had also pleaded over in case the exception be overruled, the main purport of his plea being that he denied having received the payment in question from the plaintiff in his capacity as executor-dative in the estate of Shayler, but he said that he had received the payment from plaintiff as remaining partner in the firm of Shayler and Co.

Mr. Searle, K.C., was for excipient (John M. Devenish); Mr. Burton was for respondent (Edward J. Tannock).

Mr. Burton explained that the claim was brought by plaintiff under the 32nd section of the Insolvent Ordinance.

Counsel having been heard in argument,

De Villiers, C.J.: I think the section of the Insolvent Ordinance is wide enough to embrace a claim such as this, and that the exception should not be allowed. For the present there seems to me to be no reason why the case should not go to trial on the pleadings, but I cannot help saying that it is a pity that the section under which the claim is made was not mentioned in the declaration. The exception will be disallowed, but leave will be granted to the defendant to argue the point now raised at the trial, costs to be costs in the cause.

SPENCER AND OTHERS V. ( 1906.  
ESTATE HANSON. ) May. 17th.

*Fidei-commissum* — Bequest of property to be free from

control of husband—Security—Administrator—Trustee.

*The testator burthened the inheritances of certain female heirs with a fidei-commissum in favour of their children, and expressed his special will and desire that the inheritances should not in any way be subject to the control of the husbands of the heirs. The defendant was appointed executor, but no direction was given that he should also act as administrator. He claimed the right to administer the property so as to be able to keep it free from the control of the husbands.*

*Held, that as executor, he could only liquidate the estate, but that the desire of the testator to keep the property free from the control of the husbands should be carried out by making the payment of their inheritances to the fiduciary heirs conditional upon their giving security for the transmission of such inheritances to the fidei-commissary heirs.*

This was a special case stated for the judgment of the Court as to the construction of a certain will under which plaintiffs are appointed sole and universal heirs. Mr. W. Porter Buchanan was for plaintiffs; Mr. Benjamin was for defendant.

The plaintiffs were: Wilhelmina Johanna Cathrina Spencer (born Wiedemann), wife of Robert Spencer; Christina Johanna Dorothea Mathilda Bower (born Weidemann), wife of William Snowdon Bower; Antoinetta Isabella Aberneathe Harris (born Wiedemann), wife of George Harris; Florence Wilhelmina Mary Anne Cleenwerck (born Whitehead), wife of William Thomas Cleenwerck; Mabel Johanna Georgina Leonard (born Whitehead), wife of Frank Guy Leonard; Maud Margaret Maria Whitehead (a spinster of full age). The defendant was Daniel Maclaren Brown, in his capacity as executor-testamentary of the estate of the late Abraham Hanson.

The special case was set out in the following terms:

1. On December 11, 1895 Abraham Hanson, who in his lifetime resided and was domiciled at Port Elizabeth, in this Colony, duly made and executed his last will and testament, a copy of which is hereunto annexed marked



"A," and which the parties hereto pray may be considered as inserted herein. On the 9th March, 1899, the said Abraham Hanson duly made and executed a codicil to the aforesaid will, and the parties crave leave to have the copy thereof (hereto annexed marked "B") regarded as inserted herein.

2. The said Abraham Hanson thereafter died, leaving the aforesaid will and codicil of full legal force and effect, and the defendant was thereupon in due form of law recognised and appointed as executor testamentary of the estate of the said Abraham Hanson, in pursuance of the above-mentioned codicil, in which capacity he is sued herein. He resides at Port Elizabeth aforesaid.

3. The plaintiffs, who reside in the Cape Division, are the heirs designated and named in the aforesaid will, the first three being daughters of Maria Fitzspencer Weidemann (born Hanson), and the remainder being the daughters of Florence Sophia Whitehead (born Manuel). The five first-mentioned plaintiffs are married in community of property to and are duly assisted herein by their respective husbands. The sixth plaintiff is a spinster of more than twenty-one years of age.

4. The defendant, having partially liquidated the estate, is prepared to file a first liquidation and distribution account therein, but doubts having arisen as to the true construction and interpretation of the aforesaid will and codicil, is it desirable to have such doubts removed by the decision of this honourable Court.

5. The plaintiffs contend: (a) That according to the true construction and interpretation of the will and codicil, they are severally entitled duly to receive from the defendant their respective inheritances, as sole heirs, as their absolute property free from any *fidei-commissum* or other limitation in favour of their children or any other persons whatsoever. (b) alternatively, if the Court should decide that the will and codicil do create a *fidei-commissum* in favour of their children, that they (plaintiffs) are severally entitled duly to receive from defendant the capital sums of their respective inheritances, and to hold, manage and control the same, subject to the obligation that at their respective deaths their several shares shall pass over to their respective children.

6. The defendant contends: (1) That according to the true construction and interpretation of the will and the codicil the plaintiffs are only entitled to the benefit and enjoyment of their respective inheritances subject to a *fidei-commissum* in favour of their respective children, and failing such children or any one or more of plaintiffs, then in favour of the other or others of plaintiffs. (2) That the plaintiffs are entitled to receive from defendant only the annual interest or increment of their respective inheritances, and that defendant is entitled to hold, manage, and control the capital sums there-

of until the determination of the *fidei-commissum* imposed thereon respectively.

Wherefore the parties hereto severally pray for judgment in terms of their respective contentions and for an order that the costs of this suit be paid out of the funds of the estate.

The will was dated at Port Elizabeth December 11, 1895, and the material portions were as follows: "I hereby declare to nominate, institute, and appoint the daughters of Maria Fitzspencer Weidemann (born Hanson) and Florence Sophia Whitehead (born Manuel), both of Newlands, near Cape Town, that is to say Wilhelmina Johanna Cathrina Spencer (born Weidemann), Christina Johanna Dorothea Matilda Weidemann, Antoinetta Isabella Aberneathe Harris (born Weidemann), Florence Wilhelmina Mary Ann Whitehead, Mabel Johanna Georgina Whitehead, and Maud Margaret Maria Whitehead to be the sole and universal heirs in equal portions, share and share alike, of all my estate, goods, effects, stock, inheritances, chattels, credits, and things whatsoever and wheresoever the same may be, nothing excepted, whether movable or immovable, and whether the same be in possession, reversion, remainder, or expectancy, it being my special wish and desire that the said inheritance shall not in any way whatever be subject to the control of the present or any future husband of any of my said respective heirs, and that after the decease of the said heirs the said inheritance shall devolve upon their respective issue, the children of my said heirs abovenamed. And I further direct that if any of my said heirs shall die without leaving issue them surviving, then in such case his, her, or their respective share or shares shall devolve on the surviving heir or heirs. I hereby declare to nominate and appoint John Michael McCarthy, of Port Elizabeth, to be the executor of this, my will, and administrator of my estate and effects, hereby giving and granting to him all such power and authority as are required or allowed in law, and especially those of assumption. I hereby declare that it shall not be necessary for the executor of my will to file an inventory or a liquidation and distribution account of my estate with the Master of the Supreme Court of this Colony."

To this was a codicil dated at Port Elizabeth, March 9, 1899, in the following terms: "I hereby declare and nominate and appoint Daniel MacLaren Brown, of Port Elizabeth, to be the executor of my will instead of John Michael McCarthy mentioned therein, and granting to the said Daniel MacLaren Brown all such power and authority as allowed in law, and especially those of assumption."

Mr. Buchanan said that the plaintiffs were appointed "sole and universal heirs, in equal portions share and share alike." Those were very strong

words, and any limitation of them subsequently would have to be very strong. The clause "it being my special wish and desire that the said inheritance shall not, etc.," dealt only with the control and not with the vesting of the inheritance, so that that did not limit it. But it may be said that the next clause, "after the decease of the said heirs, etc.," created a *fidei-commissum* in favour of the children. But the word "decease" may also mean decease before the death of the testator, and so make it a case of direct substitution. The next clause, "And I further direct that if any of my said heirs, etc.," seemed to be a clause of direct substitution. If it were taken as a *fidei-commissary* substitution, then if five out of the six heirs died without children, the sixth heir would receive one-sixth, subject to a *fidei-commissum* and five-sixths as *fidei-commissary*, and the latter amount would be subject to the control of the husband. This showed that the "decease" spoken of must be death before the testator; at all events, the matter was so doubtful that in accordance with the ordinary rule of law a direct substitution should be taken to be meant. As to control of the inheritance, in any case the fiduciaries ought to have that. An administrator was appointed by will, but the codicil changed that, and only appointed an executor. In any case, counsel submitted, the mere appointment of administrator would not take the control from the fiduciary.

Mr. Benjamin said that the words used "after the decease of the said heirs, etc.," clearly showed a *fidei-commissum*, so as to give effect to the intention of the testator to keep the inheritance out of the control of the husbands of the heirs. The construction that was contended for by the plaintiffs would mean that further words would have to be read into the will, showing the testator to refer to the decease before his death. The next clause, "And I further direct that if any of my said heirs, etc.," was quite consistent with a *fidei-commissum*, and it was perfectly open for a testator to wish a portion of his estate to be subject to a *fidei commissum*, and a portion not to be. This clause, he submitted, did not qualify the other. With regard to the control of the estate, most frequently a parent, who was a fiduciary, was exempt from giving security to his children, as *fidei-commissaries*. The will clearly showed a desire to keep the custody out of the husbands, who would, otherwise, have it as being married in community of property. At any rate, security should be granted by the fiduciaries if control of the inheritance was given.

Mr. Buchanan having been heard in reply.

De Villiers, C.J.: I am clearly of opinion that the will creates a *fidei-commissum* in favour of the children. As to the

question of administration of the inheritance, the testator says: "It being my special wish and desire that the said inheritance shall not in any way whatever be subject to the control of the present or any future husband of any of the heirs," but unfortunately the testator has not named any trustee so as to keep the property free from the control of the husbands." The executor appointed by the will was also appointed administrator, but the executor appointed by the codicil is not directed to act as administrator. If such a direction had been given, there would have been some ground for holding that the defendant must administer the inheritances and thus keep them free from the control of the husbands. At the same time there ought to be some means of giving effect to the wish of the testator that the husbands should not have it in their power to diminish the amounts of the *fideicommissary* inheritances of the children of the heirs, and in my opinion this can be done by making it a condition of the payment of the inheritances to the plaintiffs that they should give security. The Court, therefore, finds in favour of defendant's contention No. 1. and directs that the respective shares of the heirs be paid to them respectively upon their giving security to the satisfaction of the Master, for the payment, at their respective deaths, of the amounts of the respective inheritances to those who shall thereto become duly entitled, costs of the case to come out of the estate.

[Plaintiffs' Attorneys: Fairbridge, Alder and Lawton. Defendants' Attorneys: Walker and Jacobsohn.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN]

W. AND E. J. SEARLE V. ( 1906.  
WARNER AND CO. ( May 17th.

This was an action for £75 damages alleged to have been sustained by the plaintiffs owing to defendants stacking coal in Plum-lane, off Francis-street, Cape Town, to the damage of adjoining stores, and to the detriment of users of that thoroughfare. Defendants admitted the act, and tendered £25 in full satisfaction.

Mr. Russell was for the plaintiffs; Mr. Upington was for the defendants.

William Searle said that in 1903 the stores in Plum-lane were leased to Collison, Ltd. After the coal had been stacked against the stores the latter began to leak, and the lessee sent plaintiffs an account for damage, which was

handed by them to their attorney. Correspondence ensued between the parties, and at one time arbitration was thought of, but at length the parties decided to go to law.

Cross-examined: The store was not built with slop brick, but clay mortar had been used in its construction. It was not an old store or a damp store, and forage had been kept in it. From McKenzie's brickfields the land sloped down, and in winter water flowed down, but was carried off by Searle and Osborne streets. Plum-lane and another lane. He had never found the Plum-lane wall of his stable to be damp. One store was 18 inches to 2 feet below the level of Plum-lane. It was not until the Deeds Registry was searched that the parties discovered Plum-lane to be a common one. Stacking the coal had caused the walls to be damp. Recently Mr. Warner had been denied access to the stores, owing to the attorney advising witness not to let Warner have the keys again. The store had been partially rebuilt, and new foundations put in. The bricks used were "red hards."

Robert Bryce put in a plan of the locality, and buildings concerned in the dispute. In his opinion, the damage was done through the water accumulating in Plum-lane.

Alexander Barron, who saw the work done to the store by a witness named Dunn, valued it at £56.

Mr. Russell closed his case.

Robert Chas. Warner, defendant, gave it as the reason for stacking the coal in the lane that a fire had taken place in his yard. At that time he had no knowledge that the lane was a common one.

Cross-examined by Mr. Russell: He gave instructions that the coal was not to be stacked against the wall.

Henry Stewart Milne, one time a bookkeeper, in the employ of one Sanders, who occupied the premises at one time, said that the walls were in a bad condition.

Cross-examined: He knew that there was a pool of water near one wall, because he had been thrown near there by a horse.

Johannes France, who had occupied a portion of the premises, said that an engineer, who slept in them, although there was a plank floor, took ill, and died: whilst witness had to shoot two of his horses, which were stabled on the premises.

Cross-examined: The horses he shot were suffering from mange.

John Stonner, an architect, who, at the request of the defendants examined the premises in September, 1904, stated that the end wall was slightly out of plumb. There were several old cracks in the wall. The bulging could be attributed to the foundations giving way. A sum of £10 would have put the lower wall in order.

Alfred Drake, builder and contractor, who inspected the premises, stated the bulge in the wall was not of recent date. There were no signs of new cracks in the wall. In his opinion the bulge was not due to the stacking of the coal.

Henry Edward Warner, manager of the defendant's business, stated that when he placed the coal in the lane after the fire he did not know that the lane belonged to anyone. A fence was placed across the lane to prevent people stealing the coal.

The evidence of Quartermaster-Sergeant Ashford, Army Service Corps, taken on commission, set out that a certain store in Francis-street was damp in winter. He was in charge of the building in 1897 and 1898.

Mr. Upington closed his case, and counsel having been heard in argument on the facts,

Buchanan, J.: The plaintiff, on receiving notice from his tenant as to the flooding of the store, wrote a letter to the defendant, and the defendant admitted that he placed the coal there, and he expressed his willingness to pay any damages which resulted. Seeing the reasonableness that was shown on both sides, it was a pity that the matter was not inexpensively and expeditiously settled. The plaintiff had the wall repaired and paid £53, and he was also liable to his tenant for damages. The question is, is £25 a sufficient tender? After hearing the evidence, I come to the conclusion that the justice of the case will be met if judgment is entered for the plaintiff in £50, with costs.

[Plaintiffs' Attorneys: Moore and Son. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]  
Arderne and Lawton.]

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

1906.  
} Mary 18th.

Mr. Douglas Buchanan moved for the admission of Guy Bernard Stent as an advocate. Counsel stated that Mr. Stent had come down from Pretoria, in the Transvaal, and desired to take the oath in this court, in accordance with the wish that had been expressed from the bench from time to time.

Application granted, and oath administered.

## STEYTLER AND CO. V. FLETCHER.

This was an action brought by J. and G. Steytler and Co., merchants, Cape Town, against Moses Fletcher, of Sea Point, to recover two sums of £33 14s. and £28 5s. 11d., respectively, for which he was alleged to be liable as guarantor, on behalf of his daughter, Mrs. Rachel Shur.

Plaintiffs, in their declaration, said that in April, 1904, defendant came to their premises with his daughter, Mrs. Shur, and it was agreed that she should open an account with them, the defendant undertaking to be a continuing guarantor for any indebtedness on her current account up to £30. Goods were supplied to Mrs. Shur from time to time. Subsequently, in December, 1904, an arrangement was made whereby the plaintiffs paid an account owing by Mrs. Shur to Messrs. B. Lawrence and Co., amounting to £33 14s., upon an undertaking by defendant that he would be surety for repayment of this sum, and also continuing guarantor for the current account. In October, 1905, Mrs. Shur's account was discontinued. She then owed plaintiffs £33 14s., in respect of the account paid by plaintiffs on her behalf to B. Lawrence and Co., and £28 5s. 11d., on her current account for goods supplied by plaintiffs. Mrs. Shur having left the Colony without paying the aforesaid sum of £61 19s. 11d., plaintiffs demanded the said sum from defendant, who refused to pay the same or any portion thereof. Plaintiffs prayed for judgment for the said sum of £61 19s. 11d., with interest *a tempore morae*, and costs of suit.

Defendant, in his plea, admitted having introduced Mrs. Rachel Shur to the plaintiffs, but he denied that he had in any way become party to an arrangement by which plaintiffs supplied the said Mrs. Shur with merchandise under his guarantee. He specially denied that he gave the plaintiffs a continuing or other guarantee, or that he had agreed to become surety for the debt alleged to have been owing by Mrs. Shur to B. Lawrence and Co. He admitted that he had refused to pay the said sum of £61 19s. 11d., but he said that he was in no way indebted to the plaintiffs, and he prayed that the claim be dismissed with costs.

Mr. W. Porter Buchanan was for plaintiffs; defendant appeared in person.

E. G. Steytler, of the plaintiff firm, said that the firm had had transactions with defendant for a number of years. He remembered defendant, who was accompanied by his daughter, calling to see the firm about April, 1904. Defendant guaranteed that the firm could allow her to buy goods from £20 to £30. They did not know Mrs. Shur before she was brought by defendant. On the 16th December, 1904, Mrs. Shur called to see plaintiffs about a debt

that she owed to B. Lawrence and Co. In consequence of the interview, they wrote to defendant at Bellwood Estate, Sea Point, proposing to pay the account, provided the defendant gave a guarantee in regard to the amount, as well as the ordinary goods account. Defendant called on the plaintiffs, and agreed to the idea that they should pay the account, so that Mrs. Shur should have no bother with B. Lawrence and Co. About July, 1905, plaintiffs began to cut off supplies to Mrs. Shur, because the account had become very unsatisfactory. She called and told plaintiffs that the best thing to be done was to close the account, as she was losing money. She desired the plaintiffs to realise the goods. Certain of the goods had been realised. He estimated the value of the goods remaining at about £2 or £3. Subsequently plaintiffs wrote to defendant, who, in reply, said that he simply recommended Mrs. Shur to them, but that he had not agreed to become security for her. He expressed his surprise at the letter, and said that this was the first intimation he had had that he was to be security. The plaintiffs had tried to get the amount of the debt from Mrs. Shur, but had not succeeded.

By the Court: The plaintiffs would not have given credit to Mrs. Shur without a surety.

[Buchanan, J.: Why didn't you get something in writing. In England you could not have sued in this case without a written document. It would be more satisfactory if you had had a written document?]

Witness: We quite see that now, my lord.

William Steyn, a letter-carrier, of Sea Point, said that he knew defendant, who lived at the Belwood Estate, Sea Point. He remembered taking a registered letter to defendant in December, 1904, the letter being delivered to defendant's son-in-law. Witness produced the receipt for the letter, signed by the son-in-law of defendant.

Defendant: I know nothing about it. He was living in Observatory.

William Aspinall Paisley, a clerk in plaintiffs' employ, gave evidence as to posting a letter to defendant on the 22nd April, 1904.

Defendant denied having received the earlier letters spoken to by witness in which it was proposed that he should become guarantor either for the current account for the debt due to B. Lawrence and Co. Defendant warmly protested that he had not undertaken to be surety, and said that he would not become security for his own mother. He said that his daughter had come from Johannesburg, and she wanted to open a shop. He took his daughter and recommended her to Mr. Steytler. Mr. Steytler said that they would give credit up to £30,



and he told Mrs. Shur to go to the book-keeper. Witness afterwards took her to Mr. Lawrence, and the latter said he would give credit to the extent of £30, but he asked witness to sign a guarantee for one-half if credit was given up to £60. Witness agreed to this. Mr. Steytler's traveller subsequently proposed to Mrs. Shur that she should open a shop at Observatory. She did so, but she went back in her business. Later on, Mrs. Shur removed to Bloemfontein.

Cross-examined: Witness had not received the registered letter from plaintiffs. He never led Mr. Steytler to believe that he would become guarantor for Mrs. Shur's account.

Buchanan, J.: The plaintiffs in this case, merchants in Cape Town, supplied one Mrs. Shur with goods. These goods, the plaintiffs allege, were supplied on a guarantee by the defendant in this case, Mrs. Shur's father. An interview took place, admittedly, between the plaintiff and defendant and Mrs. Shur, when defendant introduced Mrs. Shur to Steytler and Co. At this interview Mr. Steytler says that defendant distinctly undertook that if plaintiff would support Mrs. Shur, and supply her with goods from time to time, defendant would guarantee Mrs. Shur's account to the extent of £20 or £30. The defendant positively denies that he gave any such guarantee. We have not in this country a statute of frauds as they have in England; under that statute such a verbal guarantee could not be sued upon in England to found liability. In this colony, however, if an agreement is clearly proved, the agreement can be sued upon. It would always be safer in cases of this kind if guarantees were reduced to writing. Here the correspondence which passed between plaintiff and defendant supports the plaintiff's case. On the day after this guarantee was alleged to have been given, Steytler and Co. wrote to the defendant setting forth the conversation that had taken place between them. That letter said that defendant had introduced Mrs. Shur, and had guaranteed her account. Defendant said he never received this letter. Evidence has been given to show that the letter was duly posted to the defendant's address. Later on, in December of that year, Steytler and Co. wrote to the defendant that Mrs. Shur had been in difficulties with her account with Messrs. B. Lawrence and Co., and had consulted Steytlers as to what could be done, and the plaintiffs asked defendant if he were willing to guarantee the amount due to Lawrences, and saying that if he would so guarantee it they would pay it on Mrs. Shur's account, and as the matter was urgent, they asked him to give a prompt reply. The defendant, in answer to this, Mr. Steytler says, called and guaranteed the account. Here again it

is unfortunate that no writing was taken from the defendant, but from defendant's evidence it appears that he had given Lawrence and Co. a written guarantee for Mrs. Shur's account. On the 28th December, Steytler and Co. wrote referring to the conversation, and setting forth that they would pay the account to Lawrences on the strength of this guarantee. Defendant says that neither of these letters were received by him, but it was a registered letter, and it has been proved by the Post Office officials to have been delivered at the address of the defendant at Sea Point. None of these letters, which the defendant says he has never received, have been returned to Steytler and Co., through the dead letter office. This one at any rate has been proved to have been delivered at the defendant's house. It is true that the receipt is not signed by the defendant himself, but by his son-in-law, and that son-in-law is used by the defendant to write some of the letters which had passed between the parties. On the 30th December, 1904, Steytlers again wrote to the defendant, stating that in accordance with the guarantee they had paid Lawrence's account, and Mrs. Shur's account had been increased accordingly, and they asked whether he would make a note of this. Again the defendant says he never received the letter. This letter has been proved to have been posted in the usual way, and it has not been returned. After this the plaintiffs, Lawrence and Co., when Mrs. Shur's account got into an unsatisfactory state, Steytlers again wrote to the defendant, explaining Mrs. Shur's position and enclosing the account then due by Mrs. Shur, showing a debit balance of £62, "for which, under your guarantee to us, be good enough to pay cheque." This letter is sent to the same address as all the others, and this letter comes out of the possession of the defendant, so that he had received it. The defendant did not write repudiating the guarantee. He did not pay the account, and a month later the plaintiffs wrote asking for a settlement of account, and then for the first time defendant repudiates the guarantee. With all this correspondence before me, although there is no written agreement to the effect that the defendant did guarantee the account, but as all the correspondence thoroughly corroborates Mr. Steytler's evidence, I feel that the plaintiff's case has been proved, that the defendant did guarantee the account, and the plaintiffs are accordingly entitled to judgment. Judgment for plaintiffs as prayed, with costs.

[Plaintiffs' Attorneys: Findlay and Tait. Defendant's Attorneys: Mostert and Son.]



## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

SHEKEMA V. TYEKANA. ( 19 6.  
( May 21st.

Magistrate's jurisdiction—Goods  
sold and delivered—Act 43  
of 1885.

This was an appeal from a judgment of the R.M. of Komgha, in an action brought by respondent against the present appellant to recover £51, value of certain grain. Mr. Benjamin was for appellant (defendant in the Court below); Mr. M. Bisset was for respondent.

The original action in the Magistrate's Court was brought to recover a sum of 51, value of certain 36 bags of grain, which plaintiff said he gave to defendant at Umtata to sell for him. At the hearing in the Court below, exception was taken that the case was beyond the Magistrate's jurisdiction, inasmuch as it was for over £20, and not for goods sold and delivered. The Magistrate, however, overruled the exception. Defendant made a tender of £20, with costs, to date of tender, but he subsequently withdrew this. The Magistrate allowed plaintiff £32 8s. for the grain, but deducted £3 5s. for commission and £5 8s. for carriage, and gave judgment for plaintiff for £23 15s., with costs.

Mr. Benjamin (for appellant): I submit that the tender of £20 did not give the magistrate jurisdiction. The tender was subsequently withdrawn. The magistrate's extended jurisdiction is governed by Act 43 of 1885, Section 5. Act 20 of 1856, Section 8, limits the jurisdiction to £20. Here the action was not for goods, but for debt, and therefore falls under Section 8 of Act 20 of 1856. The magistrate says that "price" means "value," but that is not a legal definition. This is not a claim for damages, but for a debt. Act 43 of 1885 extends the jurisdiction in respect of the price of merchandise, but not in respect of debt. Here the appellant is a commission agent, and is entitled to deduct expenses. Wright, on Principal and Agent (p. 189), shows that an agent is not liable to his principal for the price of goods, but only for debt. Act 43 of 1885 only contemplates actions between vendor and purchaser. The cases cited by the magistrate do not apply.

Mr. Bisset was proceeding to argue that counsel for appellant had read certain words into Act 43 of 1885, when he was stopped by the Court.

Buchanan, J.: The Magistrate's Court Act, No. 20, 1856, limited the Magistrate's jurisdiction in civil cases to the following sums: On promissory notes or other written ac-

knowledgments of debt, £40; in cases of debt, which were not in writing, £20; in cases of damages, £20. The Act 43 of 1885 increased the Magistrate's jurisdiction in cases of written documents to £250; and in "all cases commonly called illiquid, for the recovery of the purchase price of any merchandise, goods or other movable property," to £100. It left the question of damages £20 as before. In this case the plaintiff gave to the defendant certain thirty bags of grain to be sold for him. He alleged that the defendant was to pay him a fixed price for the same, which fixed price, it is alleged, was agreed upon at the time of delivery. The defendant sold the grain, and never accounted for the purchase price, and he is sued for the purchase price. This is not an action for damages. It is certainly an illiquid claim, and I think comes within the definition of one "for the recovery of the purchase price of merchandise, goods, or other movable property." Exception was taken that the claim was beyond the magistrate's jurisdiction, which exception he overruled, and gave judgment for £23 15s. I think the magistrate was quite justified in considering the claim. I think he had jurisdiction in this case, under the extended powers given to him by Act 43, 1885. There is no cross appeal, or it might have been argued that more was due to the plaintiff than judgment has been given for. The only question before this Court is whether the case comes within the jurisdiction of the Magistrate, under the Act 43, 1885, and I hold that it was within the jurisdiction. The appeal will be dismissed, with costs.

HANSON V. HALFELE.

Sale and purchase—Hawker.

This was an appeal from a judgment of the A.R.M. of Umtata in an action brought by the appellant against the respondent to recover a sum of £31, alleged to be the purchase price of certain jewellery. Mr. McGregor was for appellant, a travelling jeweller belonging to Durban, Natal; Mr. Watermeyer was for respondent, Wm. Halfele, a contractor, of Umtata.

Plaintiff alleged that he sold to defendant, at Umtata, in June last, a diamond ring for £24, and a necklace for £7. The arrangement was that defendant should pay him a portion of the purchase price before he left for Idutywa, and the balance as found convenient. Defendant had not paid the purchase price or any part.

Defendant alleged that he did not purchase the goods. He was called by plaintiff into the Grosvenor Hotel, and asked to have a drink. Hanson gave him a pipe and a nail-clipper, and after-

wards pressed him to take the jewellery to show his wife. Witness did not buy the goods. Afterwards he was told by Hanson that he had bought the goods, and in consequence of an insinuation Hanson made, witness said that he would take the goods at a proper valuation. A local jeweller, called by defendant, valued the ring at £10, and the locket at £3 10s. The witness said that the profit made by jewellers was sometimes as high as 200 per cent.

The Magistrate, in his reasons for judgment, said that one side at least was guilty of flagrant perjury. It was for the plaintiff to prove his contract. He was called upon to produce his books. He produced a small book of a very primitive character. Under the circumstances, the Court considered that the most just way to settle the dispute was to order the return of the goods to plaintiff. Plaintiff might sue for his price under the offer made to him by the defendant, but in view of what had happened, it was not likely that he would. Both parties had been known to the Court for the last ten years, and this judgment, the Magistrate observed, was largely based upon such knowledge. Defendant would be ordered to return the goods, and judgment would be entered for defendant, with costs.

Mr. McGregor submitted that on the facts the Magistrate was mistaken, and that, even assuming he was correct on the facts, he was mistaken in the course that he had adopted. The Magistrate said that he could not decide on the value as between the assessors, and he thereupon ordered the return of the goods, so that his judgment was really a *non sequitur*. Counsel contended that a person who had bought goods could not, as defendant in this case had done, keep them for a considerable period and then return them. The Magistrate had misread the consequences that should flow from the facts as he had found them.

Without calling upon Mr. Watermeyer.

Buchanan, J.: This is an action brought in the Magistrate's Court for the purchase price of certain jewellery alleged to have been sold by plaintiff to defendant. The only question in dispute between the parties is whether there was a sale of this jewellery as alleged. The plaintiff said there was a sale; defendant denied this. The Magistrate had the parties before him, and he thoroughly believed the defendant, who detailed the circumstances under which the alleged transaction took place. The plaintiff was a travelling hawker, who, defendant says, induced the defendant to go to the hotel, where he gave defendant drinks and a few small things as a present, and he then induced defendant to look at certain jewellery. The defendant all

through said he had no money, and did not wish to buy. The plaintiff pressed him to take these things, and at last persuaded him to take them to show to his wife. He did take them home, but his wife at once refused to have them. Thereupon the day after he went to the hotel, but the plaintiff had left on his trading expedition. When next plaintiff came to Umtata, defendant saw him, and told him he would not keep the jewellery. Plaintiff again persuaded him to take back the jewellery, and told him to keep it for the present, and that he might like it, but, all through, there is no distinct contract of purchase and a sale come to. Afterwards the parties again met, and plaintiff demanded from defendant the price of the jewellery, and the latter then said, "Oh, I see your little game." Defendant, however, said that he would keep the things if they were appraised at the value stated. He had the jewellery valued, the ring at £10 and the locket at £3 10s., and the defendant offered to pay plaintiff £13 10s. for the jewellery. This offer plaintiff refused, so that here again there was no sale. The Magistrate had the witnesses before him, and he says, from his knowledge of the parties, as well as from the way in which they gave their evidence, he thoroughly believes the defendant's story. That being the case. There is no sufficient ground upon which this Court, as a Court of Appeal, can reverse the Magistrate's finding. The appeal will be dismissed, with costs.

SERONGWANE V. TEMPLE. { 1906.  
{ May 21st.

Retainer—Consideration—Attorney's fee.

This was an appeal from a judgment of the Resident Magistrate of Matatiele, in an action brought by H. M. Temple, attorney, against Serongwane, a native, to recover £5 on a promissory note, payable on demand.

From the record, it appeared that appellant had been threatened with an action by another native, and that he had consulted the respondent. The other case had not come on for hearing. Mr. Temple, however, said that he informed the defendant that he should want a retainer of £5 for his services, and that defendant signed a promissory note for £5 by making his mark. Defendant denied that he had agreed to give the promissory note, or that he had signed it by making his mark. The Magistrate found that defendant gave the promissory note to plaintiff as a retainer, and gave judgment for plaintiff, as prayed, with costs.

Mr. P. S. T. Jones was for appellant (defendant in the court below); Mr. Benjamin was for respondent.

Mr. Jones said that the Magistrate's judgment turned upon the question of whether the promissory note was given by way of retainer or by way of a deposit. It was a question whether the native understood what a retainer was. He submitted that this was not a retainer, because there could be no retainer, the native not understanding it. This was a deposit, and the plaintiff should have submitted to defendant a bill of costs, and claimed the amount from him on the note, giving him credit on the note for the balance. The native had received no consideration for this note. The practice of retainers should not, he submitted, be encouraged as between natives and attorneys. According to the plaintiff's own evidence, the utmost the amount could be for was a fee.

Mr. Benjamin said his learned friend, on the point of consideration, had failed to distinguish a case of failure of consideration, where the fault was due to the party himself, and due to some cause beyond his control. The case here was whether failure was beyond the control of the party. The plaintiff was perfectly prepared to render his services then or at any future time should the action come on, and that was ample and good consideration for the undertaking on the part of the defendant to pay this £5. The case was closely analogous to one where a brief was delivered to counsel, and the case did not come off.

Buchanan, J. The plaintiff in this case is an attorney practising at Matatiele. As such attorney he employs a native interpreter, and this interpreter brought the defendant to him one day, stating that the defendant was threatened with legal proceedings. According to the defendant, this interpreter of the plaintiff acted as a sort of tout. Defendant says this interpreter met him on the market square, and said he heard the defendant was about to be sued. The tout took the native to the attorney, and the attorney said: "My charges for defending you will be £5." Thereupon he obtained from the native a promissory note for £5, which is signed by the native with a cross, and demand £5 for value received." The is as follows: "I promise to pay on value received the plaintiff himself says, is this: It is for a retainer for defence and for all my charges in the Court. If the summons had been issued, I should not have made a further charge. No legal proceedings were ever taken against the defendant, and the plaintiff now sues me upon the note, the defence set up is no consideration. Now, the consideration seems to be to do certain work, which the plaintiff has not yet performed, and the promise on the part of the defendant

was to pay for such work. No action has been instituted against the defendant, and no work done by the plaintiff to earn this £5. As the case stands, there is a total failure of consideration. This happened two years ago, and no summons has yet been issued, and the threatened action has not been instituted against the defendant. If it had been a case in which the defendant, through his own act, had prevented the plaintiff from earning the £5, there might have been something said, but as the matter now stands there has been no consideration given for the note. This is simply a promise to pay for certain services and until these services are rendered the plaintiff is not entitled to pay. The magistrate was wrong in giving judgment for the plaintiff for the £5. The appeal will be allowed, with costs, the judgment entered in the Court below of absolution from the instance, with costs.

COUSINS AND PRESTON V. ( 1906.  
ASSIGNEE ESTATE PHILLIPS. } May 21st.

Magistrate's Court—Summons—  
Service—Assignee—Act 20  
of 1856.

*M., who resides in E. London, was summoned as assignee of the estate of P., who resides at Mount Fletcher, to appear before the Magistrate of that district. This summons was served upon P. Exception was taken in the Court below to this service, inasmuch as personal service was not effected on the defendant. The Magistrate upheld the exception.*

Held on appeal, that the exception was good.

Semle, such service of a summons issued out of any one of the superior Courts would have been good.

This was an appeal from a judgment of the Resident Magistrate of Mount Fletcher in reference to the question of whether the service of a summons was a good service or not.

The claim was for £50 on a contract, and the attorney, on behalf of the defendant, excepted on the ground that the service was bad, inasmuch as it was effected, not upon the assignee personally, but effected at the place of business on Phillips himself, who happened to be the possessor in the estate. The Magistrate upheld the exception, and gave judgment accordingly.

Mr. Gutsche was for applicant; Mr. Benjamin was for respondent.

Mr. Gutsche contended that where service could not be effected on the defendant the service might be effected at his usual or last known dwelling-house, or place of business. As Myers, the assignee in the estate, was absent in East London, the summons could not be served personally. It was served at the place of business on a responsible servant, who had also another capacity as assignor.

Mr. Benjamin submitted that the defendant in the action was Myers, as assignee, and that there should be personal service, because in the Magistrate's Court the summons took the place of the declaration, and the defendant must know what he was coming into court to answer. The service, he contended, could only have been effected on Myers at East London.

Buchanan, J.: A summons was taken out in the Magistrate's Court by the plaintiff against one Myers in his capacity as assignee in the estate of one Phillips at Mount Fletcher. This summons was served on Phillips at Mount Fletcher. When the case came before the Magistrate objection was taken that the service was bad. The attorney who took the exception said in his evidence before the Magistrate, that as he held Myers' power of attorney he would have accepted the service had it been served upon him as agent for Myers at his office at his place of business, but as not being so served he took objection. The objection raises a much wider question than that raised in the Magistrate's Court. The Magistrate's Court Act gives the Magistrate jurisdiction over persons residing in his district, and the Proclamation in the Transkei adopts the same words as the Act. Now, it is proved that Meyers does not reside in the district of the Magistrate's Court in which the summons was taken out. He resides in East London. It is true he is sued in his capacity as assignee of Phillips estate which is situated in the district of Mount Fletcher but he is defendant in the action, and, therefore, it is a question whether the summons ought not to have been taken out in the Court of the Resident Magistrate, having jurisdiction by virtue of his residence within that district. Had the summons been taken out in the Supreme Court or the Eastern Districts Court, the fact that Myers resides in a different district from Phillips, of whose estate he was assignee, could not have been raised, but as it was taken out in the Magistrate's Court, the question arises whether Myers ought not to have been sued in the district in which he resides, and not in the district in which the estate in which he is assignee carries on business. It is a matter of importance and one which, I think, de-

serves the consideration of the Legislature: whether the jurisdiction of the Magistrate should not be altered so that when persons carry on business within the district of the Resident Magistrate that Resident Magistrate should have jurisdiction over any action arising in connection with that district. As the Act showed, the defendant must be sued in the district of the Magistrate, which has jurisdiction over him by reason of his residence. The fact that he is assignee of an estate carrying on business in Mount Fletcher does not give the Magistrate jurisdiction over him. On this ground the exception of a bad service is well founded. The only question is whether, on the question of costs, as this is not the ground of the exception, costs ought to be given on the appeal. I must say, when an exception of bad service is taken, it is much more advantageous to the parties, instead of incurring costs by appeal, to simply take out a new summons. But instead there has been an appeal, and it has failed. The appeal will be dismissed with costs.

#### HASSEN V. LOUW.

This was an appeal from a judgment of the A.R.M. of Cape Town, in a interpleader arising out of an action in which the respondent had sued one Abraham Abdurahman for £39 15s., for goods sold and delivered, for which the Magistrate had given judgment, with costs.

From the record it appeared that certain goods were attached in execution of the judgment, and the appellant alleged that the goods belonged to him. He took out an interpleader summons against Louw, and the Magistrate found that the goods were executable, and gave as his reasons for judgment that the claimant's evidence was so suspicious and contradictory that he could not believe an atom of it. The Magistrate also stated that the agent for Hassen apparently recognised the futility of calling further evidence, and judgment was practically given with the agent's consent.

Dr. Greer was for the appellant; Mr. P. S. T. Jones was for respondent.

Dr. Greer submitted the Magistrate had no evidence whatever on which to found his decision. The only evidence was that of Hassen himself, and there were some extraordinary contradictions in the record before the Court. Hassen had contradicted himself by saying that the sheep belonged to Louw, but counsel submitted that that must have been a mistaken interpretation, and that the sheep really belonged to the appellant.

Without calling upon Mr. Jones.

Buchanan, J.: The respondent Louw obtained judgment against one Ab-



durahman. In execution of this judgment, he attached certain property at 27, Wale-street. The claimant, Mohammed Hassen, who produced a licence showing that he carried on business at 118, Church-street, claims the goods attached as his property. The only evidence given in support of this claim is that of the appellant himself, and the Magistrate says that his evidence was so contradictory and so at variance with the facts that he could not credit his evidence in any way. The goods are attached, and the onus is upon the person claiming them to prove that they were his property, and this is the only evidence given in support of the claim. The Magistrate said it was not evidence which was credible, and he held that the property attached was executable in satisfaction of the judgment of Louw. There have been several judgments before the Court in which these parties have figured, but, without going beyond the record before me now, I must say that the Magistrate's decision that the claimant has not substantiated his right to these goods must be sustained with costs. The appeal will be dismissed, with costs.

## SUPREME COURT

[Before the Hon Sir JOHN BUCHANAN.]

ADMISSIONS. } 1906.  
                              } May 22nd.

Mr. W. Porter Buchanan moved, as a matter of urgency, for the admission of Max Edward Thornton, as an attorney and notary.

Application granted, oaths to be taken before the A.R.M. of De Aar.

Mr. Burton moved, as a matter of urgency, for the admission of Daniel Jacobus Hugo de Wet as an attorney and notary.

Application granted, and oaths administered.

FEDERAL SUPPLY AND COLD STORAGE COMPANY, LTD. V. COLD STORAGE ASSOCIATION, LTD.

FEDERAL SUPPLY AND COLD STORAGE COMPANY V. SECRETARY, COLD STORAGE ASSOCIATION.

These motions came before the Court as matters of urgency.

The first application was upon notice to the Cold Storage Association, call-

ing upon them to show cause why the Federal Company should not appeal to arbitration against a decision of the committee of the respondent association at a meeting on April 20 last, and against a decision of the committee at a meeting on the 10th May last, and why they should not be ordered to do all such things and sign all such documents as may be necessary for the submission of such appeals.

The Court decided to hear the motions separately.

Buchanan, J., asked how the matters came within the jurisdiction of this Court.

Mr. Schreiner said that the head office of the association was in Cape Town.

The affidavit of Adolf Angehrn, managing director in South Africa, of the Federal Supply and Cold Storage Company, stated that on the 28th February, 1906, certain companies, to wit, the Imperial Cold Storage Company, Ltd., McArthur, Atkins, and Co., Ltd., Sparks and Young, Ltd., Pietermaritzburg Cold Storage Company, Ltd., Port Elizabeth Cold Storage Co., Ltd., and the Federal Supply and Cold Storage Co., Ltd., entered into an agreement to form an association called the Cold Storage Association, Ltd., *inter alia*, as expressed in the deed, to protect the interests of cold storage concerns in South Africa from undue competition, so as to ensure the earning of reasonable profits on behalf of the shareholders and proprietors thereby, and two documents were drawn up and signed, one entitled "heads of agreement" and the other "memorandum setting forth the constitution of the Cold Storage Association." The administration and control of the association was entrusted to a committee as set out in the said memorandum. It was provided by clause 4 "that any party fined a sum exceeding £10 may appeal to arbitration as hereinafter provided," and it was also provided by clause 8 that "if any question other than that provided for in clause 4 be determined by the majority of votes it shall be competent for the dissensionist or dissensionists to claim to have the matter at issue referred to arbitration as, hereinafter provided, provided that notice claiming such arbitration be served upon the secretary of the association in writing within 48 hours after the meeting, such notice to indicate the matter referred." In or about November complaint was made by the Standard Cold Storage Company, under which name McArthur, Atkins, and Co. trade, that the Federal Company were, in contravention of the terms of the memorandum, trading at certain mines at Johannesburg, and on the 15th March certain resolutions were passed by the committee. On the 20th April the committee passed the following req-



lution: "Standard Company's contract with Farrar Group, and six boarding-houses. The representative of the Standard Company having reported that the Federal Company had declined, and failed to carry out the agreement entered into between themselves, the Federal Company and the Standard Company. as per minute, dated 15th March, it was proposed by Mr. Martin and seconded by Mr. Morgan, that the Federal Company be fined £100. On being put to the vote the proposition was declared carried, all members present voting in favour of it, with the exception of Mr. Johnston." On the 21st April the Federal Company duly gave notice of intention to appeal to arbitration against the decision of the committee imposing the said fine. On the 20th April the Federal Company addressed a letter to the secretary of the Cold Storage Association, asking that the Benoni boarding-house question might be re-opened on the ground that material facts had since the resolution of the 15th March come to the knowledge of the Federal Company, but this letter was not considered by the committee of the Cold Storage Association until their meeting of the 2nd May, when they declined to re-open the question, and the committee further resolved that the Federal Company had no right of appeal against the fine of £100 imposed by the resolution of the 20th April. At a meeting of the committee on the 10th May, the following minute was passed: "Standard Company's contract with Farrar group and six boarding-houses. Mr. Atkins, having asked the committee (as recorded in minutes of last meeting) for redress in respect to the loss his company is sustaining by reason of the non-compliance by the Federal Company with resolution arrived at on the 15th March, was requested to submit a statement of his claim against the Federal Company. It was meanwhile resolved that the Federal Company be fined the sum of £100 for further non-compliance with the agreement above referred to, and that they be also fined the sum of £5 for not having made good the fine of £100 imposed on them on the 20th April, within eight days from that date." Thereafter an appeal for arbitration was duly notified in respect of this resolution. "Were my company," deponent went on to say, "to comply with the resolution of the 15th March, and break off all dealings with the boarding-houses and customers on the Farrar Group pending result of the appeal to arbitration, it would sustain injury which would be irreparable, as, even if the decision of the arbitrators were in its favour after taking such action, the customers would be entirely lost to the Federal Company. I am apprehensive that further fines will be inflicted upon my company for non-compliance with the resolutions passed by the committee of the association."

The answering affidavit of Walter McLachlan Martin, nominee of the Imperial Cold Storage Company, stated that he was acting chairman of the committee of the association at the meetings in question. Several members of the committee proceeded to Johannesburg, where the complaints by the Standard Company, amongst other things, were investigated. The parties concerned were invited to meet and come to some settlement. On the 14th March, the applicant company addressed a letter to the secretary of the association, setting forth the result of the negotiations which had passed with a view of a settlement. The committee accepted the proposition which the Federal Company had put forward. In regard to the subsequent action of the committee in imposing fines, he pointed out that the committee were merely giving effect to the agreement that had been made by the parties concerned after protracted negotiations, and that the committee were not at liberty, even if they had been disposed to do so, to re-open the matter. The claim of the Standard Company, or McArthur, Atkins, and Co., against the Federal Company, now amounted to about £5,000, the interest on which was a substantial item, and the fines imposed were, in the opinion of the committee, therefore, not excessive. If the Court were of opinion that the applicant was entitled to appeal against the imposition of the fines, he would point out that no serious opposition was raised by the committee to an appeal being proceeded with upon such terms and such conditions as the Court should prescribe. The letter addressed to the secretary of the association by the secretary of the Federal was as follows: "Provided McArthur, Atkins and Co. submit a copy of their contract (without stating the prices for supplies to the compounds) between themselves and the Farrar Group, to the committee, or the chairman of the committee, and it is thereafter decided by a majority vote of the committee that McArthur, Atkins and Co. are entitled to compensation under the articles of association, we hereby agree to abide by that decision, and to make no appeal therefrom. We further agree, in the event of its being decided that compensation is due to McArthur, Atkins and Co.: (1) to pay them 5 per cent. of our company's turnover, with the bona-fide white employees, on the Farrar Group, as and from the 15th February last, and to continue so long as the present association remains in existence; (2) also to pay McArthur, Atkins and Co. 10 per cent. of our company's turnover with the six boarding-houses now in dispute as and from the 1st June, and to continue so long as these are supplied directly, or indirectly, or during the existence of the present

association; and (3) to take from McArthur, Atkins and Co. the equivalent value for value of supplies to these six boarding-houses from the date or dates on which we commenced supplying them, according to the judgments given, and against which the Federal have appealed, unto and including the 28th February. This offer is made without prejudice to our rights and with the idea of arriving at an amicable settlement of the matter, and will remain open for acceptance or rejection until after the meeting called for to-morrow rises."

Sir H. Juta, K.C., for applicants; Mr. Schreiner, K.C., for respondents.

Sir H. Juta said that his learned friend had said that if the notice of appeal was upon certain things, then he had no objection. The matter was perfectly simple. There was an agreement which said that when a fine was imposed, they could appeal. It was provided that they must give notice within 48 hours. Applicants gave notice within 48 hours to the following effect: "We hereby give you notice of our intention to appeal to arbitration against the decision of your committee in imposing a fine of £100 in the matter of the Farrer Group and six boarding-houses." To this the respondents replied, "You can't appeal."

Mr. Schreiner said that the agreement contained in the letter addressed by the Federal Company to the Cold Storage Association was accepted by the committee. Then fines were imposed on the 20th April and the 10th May. Those fines were appealed against. His position was that, by these very appeals, the applicants were trying to bring into question the validity of an agreement which they had arrived at, and which was endorsed by the committee of the association. The respondents said that the applicants had no right to raise for arbitration any question coming into the original agreement. Counsel admitted that the construction which the respondents put on clause 9 was not correct. There being no appeal pending against the decision of the 15th March, then the clause did not apply so as to debar the applicants from appealing.

In answer to the Court, Mr. Schreiner said that the fines went to the funds of the association.

Buchanan, J.: The main application before the Court, viz., the right to go to arbitration is not now seriously contested by the respondent, and an order will be granted in terms of the notice of motion, which, in short, is that the respondents be ordered to go to arbitration on an appeal against resolutions passed on the 20th April and the 10th May. The only other question is the question of costs. It is clear that the applicants have the right to this appeal, and it is also clear that this right was

denied by the respondents before the matter came into Court, and, therefore, the applicants were forced to make this application. I quite admit the force of what Mr. Schreiner says, that as a rule when a person sets the law in motion the Court should wait to see the result of the proceedings before awarding the costs; but these are wasted costs. The costs of the applicants will be paid by respondents, all other costs of reference and award to be in the discretion of the arbitrator.

The second application was upon notice to the secretary of the Cold Storage Association, calling upon him to show cause why he should not be ordered to permit the representative of the Federal Company, or their solicitors, to make copies of all minutes of the meetings of the committee of the association from time to time, or to furnish the said company with copies of such minutes, and give the company, or their solicitors, an opportunity of inspecting the originals, in order to compare such copies therewith.

Affidavits having been read on both sides,

Sir H. Juta said that, under the agreement, they were permitted to inspect the minutes. The respondent now said that they might inspect the minutes, but they could not take a copy. That seemed to him (counsel) to be such an extraordinary attitude that he would leave it to his learned friend to show why they might inspect a thing, but they might not make a copy of it.

Without calling upon Mr. Schreiner,

Buchanan, J.: It seems to me that this application was altogether unnecessary. The matters in dispute, which have now arrived at the stage of legal proceedings, have reference only to certain resolutions passed on April 20 and May 10. The applicant applies to have inspection, and to take copies of minutes of the Committee of Management from the time of inception of the association. Copies of minutes since February 6 have been sent to the applicants, and respondent does not deny inspection of all previous minutes of the association. The right of inspection would certainly imply the right of taking copies of minutes, if necessary, for the purpose of the proceedings, but in this case all the minutes necessary for the action which is pending had been submitted to the parties. If there are any other minutes which applicant thinks are necessary, there is nothing whatever to prevent him from calling for them at the hearing before the arbitrator. Meanwhile he is not debarred from access to the minute book. This is in a way a sort of fishing application, because it has reference to matters not now before the Court, and matters not now *sub judice*. No order will be made.

The application will be refused, with costs.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton. Respondents' Attorneys: Not on the Record.]

WESTBROOKE V. MARTYN. { 1906.  
May 22nd.

This was an action brought by Charles Westbrooke, commission agent, Johannesburg, against John Hubert Martyn, accountant, Cape Town, to recover a sum of £37 10s., alleged to be due for services rendered in the leasing of Goodwood Park, Maitland, primarily used as a racecourse.

From the declaration it appeared that plaintiff claimed to be entitled to £50 from defendant for his services in procuring a lease of a certain piece of land known as Goodwood Park, near Maitland, having been requested by defendant to assist him as agent for the owners. Plaintiff did materially assist defendant in effecting the lease of the property by his services in Johannesburg, and he said that he was entitled to claim £50 in accordance with agreement in writing dated November 12th, 1904. Defendant had only paid £12 10s. on account, and he wrongfully and unlawfully refused to pay the balance.

Respondent had excepted to the declaration on the ground that it was vague and embarrassing, and disclosed no action in law.. He, however, did not persist with this exception, and pleaded that he agreed with plaintiff to pay him £50 if he assisted him in connection with the Kensington Estate, but he otherwise denied the allegations, and specially denied that Goodwood Park was situated within the Kensington Estate. He admitted having paid £12 10s. to plaintiff, but said that payment was made under a misapprehension, and that plaintiff was not legally entitled to the same. He prayed that the claim might be dismissed, with costs, and for a claim in reconvention he sought return of the sum of £12 10s., paid under a misapprehension that the property leased was on the Kensington Estate.

The replication was general.

Mr. Close was for plaintiff; defendant appeared in person.

Mr. Close said that he did not know what the defendant's position was exactly. When application was made to take the plaintiff's evidence on commission in Johannesburg, counsel appeared for defendant to oppose. A commission was granted, and when the evidence of plaintiff was taken defendant did not appear.

Defendant intimated that he desired to withdraw the claim in reconvention.

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Mr. Close proceeded to read the evidence of the plaintiff, taken on commission, from which it appeared that he was the promoter of a syndicate in Johannesburg to run pony and gallopway races in Cape Town. He advertised in the "Cape Times." Plaintiff said that he had done his share of the work in effecting the lease of the property by getting one Plunkett to sign the agreement.

Defendant said that he had evidence to show that the Goodwood Park racecourse was not on the Kensington Estate.

Mr. Close said that plaintiff in his replication admitted that the Goodwood racecourse was not on the Kensington Estate.

Defendant went into the box, and said that he entered into an agreement with plaintiff to pay him £50 if he assisted in effecting a lease of the Kensington Estate. No lease was effected on the Kensington Estate, as it was not considered suitable for a racecourse. Afterwards witness went over the Goodwood Park Estate, and a lease of that property was effected for ten years. He, however, decided to recognise plaintiff's services, and to pay him £50, provided that he (witness) first received his commission. Only one quarter's rent of the Goodwood Estate was paid by the syndicate, and at the end of three months the lease was cancelled.

By the Court: Witness received £50 as commission. He did not receive any further sum, but if the lease had continued he should have got a further £100. The lease, however, was cancelled.

[Buchanan, J.: You made yourself liable to plaintiff for £50?]

Witness: But that was for the Kensington Estate, which is a different estate altogether. On the 15th January I put in my letter a paragraph stating that the commission would be dependent on payment of the rent.

[Buchanan, J.: According to this agreement with plaintiff, you made an absolute promise. You promised him absolutely £50, and paid him £12 10s. I will stay execution for a month to enable you to make arrangements with the plaintiff if you can.]

Judgment was given for plaintiff as prayed, with costs, including costs of commission, execution to be stayed for one month.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* NASH AND ) 1906.  
ANOTHER. ( May 23rd.

Mr. Schreiner, K.C., moved for an amendment of an order granted by the Court, on the application of petitioners, interdicting the Union-Castle Company and other steamship lines from handing over certain goods mentioned in the petition. The matter originally arose out of the action of certain factors in stopping goods in transit consigned to Messrs. Reiners, Von Laer and Co., of Port Elizabeth, or their Cape Town business, which is carried on under the style of Govey and Co. Counsel explained that there were other goods coming down coast, and from elsewhere, to Reiners, Von Laer and Co., and Govey and Co., to which no stoppage in transit had been barred, and the respondents were taking up the attitude that the order operated upon these goods, and that they could not give delivery of these goods. He asked the Court to amend the order so as to make it clear that that was not the effect of the interdict. He supposed it was through an abundant desire on the part of the respondents to obey the order of the Court that they simply said that they would not part with goods that came to Govey and Co. and Reiners, Von Laer and Co. pending a further order of Court.

De Villiers, C.J., said that the order granted on the 15th May would be amended by adding after the word "petition" the following: "And in respect of which any other person or other company has given or may give notice to make claim to stop the said goods in transit," the amended order to be served on the respondents, with leave to them or any of them to object to such amendment.

Mr. Schreiner: That would mean that they would have to move the Court?

[De Villiers, C.J.: Yes, to apply to the Court for the purpose of opposing.]

### LOCHNER V. WOODHEAD.

This was an application upon notice to Lawrence Woodhead, of the firm of Woodhead, Plant and Co., of Cape Town, calling upon him to show cause why a certain interdict granted upon an *ex parte* application restraining the sale of certain property at Moorreesburg should not be set aside.

From applicant's affidavit it appeared that Mr. Woodhead claims that

Johannes Albertus Lochner is indebted to him in the sum of £1,132 for money lent and advanced, and that he commenced an action against Lochner for recovery of this sum. The defendant was barred from pleading, and the case was set down for judgment under Rule 319 on the 26th April last. Application was, however, made by Lochner's attorneys for removal of bar, and this was granted, and time in which to plead was extended until the 31st May. Subsequently an advertisement appeared of a sale of certain property at Moorreesburg by Mr. I. P. Marais, secretary of the African Mutual Trust and Assurance Company, Malmesbury, who is assignee in Lochner's estate, and Mr. Woodhead then moved the Court for an interdict restraining this sale pending the action. A temporary interdict was granted by Mr. Justice Maasdorp against the respondent and Mr. Marais. This interdict it was now sought to have set aside.

The answering affidavit of Jacobus Cillie, of Somerset West, defendant's local attorney, stated that defendant was at present away at Uppington, district of Gordonia. The cause of action arose about two and a half years ago. Plaintiff's claim was denied and disputed by defendant. Defendant had been in partnership in England with one Brodie, and the partnership estate had been declared insolvent early in 1904, and plaintiff had proved his claim in the insolvency proceedings in England. Thereafter, when defendant returned to this country, he called his South African creditors together, and the African Mutual Trust Company, of Malmesbury, were appointed assignees under a deed of assignment executed on the 25th May, 1904. The firm of Woodhead, Plant and Co., of which plaintiff was a partner, were a party to the said assignment. Several sales had been held, and the proceeds had been distributed, and the only assets remaining to be realised were certain erven at Somerset Strand and certain property at Moorreesburg. The remaining assets when realised would not cover the existing bonds thereon, and there would be nothing for concurrent creditors. Counsel also read an affidavit by I. P. Marais, secretary of the African Mutual Trust and Assurance Company, and the sole trustee in the assigned estate of the defendant, who confirmed the statement that the assets remaining to be realised would not cover the existing bonds.

The replying affidavit of Lawrence Woodhead stated that the claim filed in England was against Lochner and Brodie, and had nothing to do with the present claim. He denied any knowledge of the alleged assignment by defendant, until his return from England in 1905. He subsequently saw the defendant in Strand-street, Cape Town, when the latter told



him that he had made about £5,000 in connection with certain cattle transactions with the German Government, for German South-west Africa, and that he would repay his indebtedness to deponent. He (defendant) was anxious to regain his life policy, which he had deposited with deponent as partial security for the debt.

Mr. MacGregor for applicant. Mr. Burton for respondent.

Mr. McGregor submitted that the interdict should be set aside. The matter of an interdict was an extraordinary remedy in the discretion of the Court. Plaintiff must show that he had no other remedy. The defendant had been prejudiced by these proceedings on the part of the plaintiff.

[De Villiers, C.J. (to Mr. Burton): Is the plaintiff a preferent creditor?]

Mr. Burton: No. It is impossible at present to say what the estate will realise; it may realise more than the other side say. Counsel went on to say that the debt in question was incurred in London, and was really a private debt, of which the firm of Woodhead, Plant, and Co. knew nothing.

De Villiers, C.J., said that it might be of some advantage to counsel if he stated that his feeling was that it would be fair, under all the circumstances, to set aside the interdict, and in lieu thereof to make another order that the assignee of Lochner's estate be interdicted, pending a further order of Court, from parting with the proceeds of any sales effected, or to be effected, by such assignee after all preferent costs of the said Lochner have been paid, the question of costs to stand over.

Mr. Burton acquiesced in the suggested order.

Mr. McGregor said that he raised no objection, except that he submitted costs should be paid by the plaintiff.

De Villiers, C.J., made an order in the foregoing terms, and directed the question of costs to stand over.

*Ex parte SIMPSON.*

Dr. Greer moved, as a matter of urgency, on the petition of Isaac Simpson, tobaccoist, of Cape Town, for a discovery order upon certain banks, and upon the Union-Castle Company, and an interdict restraining them from parting with any moneys belonging to petitioner which may be in their hands. Petitioner said that he was married in England to one Betsy Goldberg. Previous to September, 1905, he resided with his wife and family at a farm in the district of Heilbron, Orange River Colony. He afterwards went to Johannesburg to start business as a tobaccoist, and left his wife and family and one Barney Levenson, who acted as his manager, at the farm. The farm and stock were

afterwards sold, and the proceeds placed in a bank at Heilbron. After the manager had been paid, a sum of £863 approximately would remain from the sale of the farm and about £400 from the sale of the stock. This money was deposited by his wife in the bank. Petitioner afterwards disposed of his business in Johannesburg, and he was proposing to enter into other arrangements. He proceeded to Heilbron to obtain money from his wife, arriving there about the 17th May, but he was told by the station-master and other persons that his wife had gone to Cape Town. He followed her to Cape Town, and then ascertained that his wife had left for England in the Carisbrook Castle on the 16th May. He was now completely ruined and without funds. He had applied to the banks for information as to whether his wife had taken a draft, and to the Union-Castle Company as to whether she had obtained a letter of credit, but they declined to give him any information. He desired to obtain an interdict restraining the said banks and the steamship company from paying over any money in their hands to his wife, pending an action to be instituted for recovery of the said amount, or an order of disclosure as to whether his wife had taken a draft or letter of credit.

[De Villiers, C.J. (to counsel): Have you any precedent for such an application?]

Dr. Greer: I may say that more facts came to my knowledge than are stated in this petition, and I had not seen the petition until I actually read it in Court now.

[De Villiers, C.J.: In the first place, the parties do not live here. All these proceedings took place elsewhere, in the O.R.C. and the Transvaal. This lady passes through here, and now you make a fishing application to compel the banks to disclose certain facts to you.]

Dr. Greer: Having become acquainted with the contents of the petition, I feel that I cannot ask your lordship for an order.

No order was made.

*Ex parte WARREN.*

Mr. Roux moved on the petition of Henry Warren, of Maclear, as sole trustee in the insolvent estate of William Henry Watson, late of Belgrave, Mount Fletcher, for leave to examine certain persons on commission. Petitioner stated that Watson's estate was sequestrated in October 1905. On the 31st of that month a sum of £335 14s. 10d. was paid by John Brown Shearer, of Queen's Town, as chief agent for the North-Eastern District of the Colony of the Sun Insurance Office, to Messrs. Daines and Seymour, of Mount Fletcher, the agents for that district of



the insurance company, for the purpose of paying over that sum to the said insolvent, whose attorneys Daines and Seymour were at that time. Daines and Seymour's office at Mount Fletcher was managed by one Wilfred Massingham Seymour. The insolvent had on October 31 last left the Colony, and had not returned. Petitioner believed that the money from his wife, arriving there Daines and Seymour partly in payment of monies due to the office by the insolvent, partly in payment of monies due to their clients, and partly in making a payment to Mrs. Watson, wife of the insolvent. The insolvent estate did not receive any portion of the said sum of £335 14s. 10d. Petitioner applied for the appointment of the Acting R.M. of Mount Fletcher and the R.M. of Queen's Town as commissioners to take the evidence of Mr. Seymour, Mr. Brown, and other witnesses whom petitioner might wish to have examined and for the production of books and other documents connected with the said payment.

Order granted as prayed.

N'DABA V. DEPUTY SHERIFF, 1906.  
MATATIELE. May 23rd.

Magistrate's jurisdiction—Deputy Sheriff—Wrongful seizure.

*The summons in a Resident Magistrate's Court alleged that the defendant, who is deputy sheriff in the district, wrongfully and unlawfully seized the plaintiff's cattle in execution of a writ of execution issued at the suit of A. against B. in a Supreme Court action and refused to return the cattle thus seized. The Magistrate upheld an exception to his jurisdiction on the ground that as the writ of execution had issued from the Supreme Court, the High Sheriff ought to have been sued.*

Held, reversing the Magistrate's decision, that he had jurisdiction to try an action for the defendant's wrongful act in seizing the plaintiff's cattle in the district and refusing to return them when thereto requested.

This was an appeal from a judgment of the Resident Magistrate of Matatiele in an action brought by the present appellant against the respondent, as deputy-Sheriff, and in his individual capa-

city, for restitution of a certain wagon, etc., wrongfully and unlawfully seized by defendant, which defendant refused to give up, although requested so to do, and for £10 damages, sustained by reason of the wrongful and unlawful seizure aforesaid.

In the Court below, exception was taken by defendant, firstly, of want of jurisdiction, inasmuch as the action should have been against the High Sheriff in the Supreme Court, and, secondly, that the judgment creditor had had no notice of this action.

The Magistrate, in his reasons for judgment, said: "The Court upheld the first exception on the ground that the writ was directed to the High Sheriff, and the Deputy was acting only as his agent, and, therefore, dismissed the case, with costs."

It appeared that the judgment debtors were one Breakfast and Willie N'Daba.

Mr. Benjamin was for appellant, Matthew N'Daba; Mr. Burton was for respondent, Henry Francis Temple.

Mr. Benjamin submitted that the Magistrate was wrong, because the property which, according to the summons, belonged to the plaintiff, was attached in an action against another person. That was a wrongful attachment, and if it were a wrongful attachment it did not matter whether it were carried out by the Sheriff or by his Deputy, any person who took part in the transaction would be liable in an action by the party, whose property was seized. This was clearly a case of tort, and plaintiff might have sued all the parties jointly or individually. As to the question of jurisdiction, counsel submitted that the Magistrate in this case had ample jurisdiction, seeing that the district was in the Territories, and that the Resident Magistrate's jurisdiction was co-extensive with that of the Superior Court.

Mr. Burton submitted that, under the circumstances, the exception was sound. The writ was a Supreme Court writ upon a Supreme Court judgment. He did not wish to lay stress upon that fact, but it certainly was an element in the Magistrate's decision. The important point was that any action brought by a person against the Sheriff or his Deputy for a tort committed in the course of the Deputy's duty, should be brought against the High Sheriff. This was an action instituted against the Deputy-Sheriff in his capacity as Deputy Sheriff and personally. According to the English authorities, there was no question whatever that the High Sheriff was the person who should be sued.

De Villiers, C.J., called the High Sheriff (Mr. Reynolds), and asked him whether in his practice there had been any cases in which a deputy-sheriff had been sued?

The High Sheriff: Yes, repeatedly, my lord. It is not the practice to sue the High Sheriff,

De Villiers, C.J. also pointed out that the High Sheriff had called his attention to the fact that Act 17, 1886 (section 8), recognised that the Deputy-Sheriff might be sued.

Mr. Burton: I admit that the Deputy-Sheriff may be sued under certain circumstances, where he has acted maliciously, but in this case he has, by virtue of his writ sent to him by the High Sheriff, attached certain property in the execution of his writ. I submit that, strictly speaking, defendant was right in saying: "I am not the proper person for you to sue, because I simply act in the course of my duty under the writ; if you have recourse against anybody you have only recourse against the person who directed me."

De Villiers, C.J.: The parties to this suit live in the district of Matatiele. The plaintiff sued the defendant, who was the Deputy-Sheriff in that district, for restitution of certain articles which he alleges were wrongfully and unlawfully seized by the Sheriff, and which the Sheriff (defendant) refuses to restore, although requested so to do. It is important to observe that the plaintiff was no party to the action in which the writ of execution was granted. He had nothing to do with that action. It may well be that if one of the parties to that action had been before the Court different considerations would have arisen, but here it is a third party who says: "My goods were wrongfully and unlawfully seized, and they were seized by the defendant." In my opinion, he was quite justified in suing the defendant in the Court at Matatiele for a wrongful act done in that district. The wrongful act consisted in seizing his property, and in refusing to restore that property after it had been claimed from him. The judgment ought to proceed in this case upon the assumption that the declaration states the facts. It may well be that when it comes to trial a different complexion will be put upon the matter. Exception was taken by the Deputy Sheriff that the action ought to have been brought against the High Sheriff, inasmuch as it was a Supreme Court action in which the writ of execution was granted. But the Supreme Court action did not authorise the Deputy Sheriff to seize the wrong person's goods, and if the Deputy Sheriff did a wrong of that kind, then the Deputy Sheriff must be answerable. I do not say that the High Sheriff will not be answerable—that is not the question—it may well be that both are answerable, but in my opinion the man who did wrong and who refuses to return the cattle seized is certainly liable. For this simple reason, I am of opinion that the Magistrate erred in holding that the Deputy Sheriff was not the

person to be sued. The appeal will be allowed, with costs of appeal, and the case remitted to the Magistrate to be tried on the merits.

[Appellant's Attorneys: Findlay and Tait. Respondent's Attorneys: Van Zyl and Buissinné.]

ZEEDEBERG AND DUNCAN ( 1906.  
V. HENRY. ( May 25rd.

Guarantee—Power of attorney—  
Manager of business—Authority.

*During the absence of the defendant from the Colony his brother H. and another person were appointed his general agents for the management of his business in Cape Town. The plaintiff alleged that H., as such general manager, gave a verbal guarantee to the plaintiff for the payment of a debt due by one O. to the plaintiffs. The evidence was not sufficient to prove that such guarantee had been given, but:*

*Held, that even if such guarantee had been given, H. had no authority from the defendant, on his behalf, to guarantee the debts of third persons.*

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action brought by appellants against respondent to recover a sum of £18 9s. 7d. upon a guarantee.

From the summons, it appeared that plaintiffs had had dealings with a firm called Ostrowsky and Ser. In 1901 Ser withdrew from the partnership business, and the business was continued by Ostrowsky. The plaintiffs said that they only consented to Ostrowsky continuing to trade without paying their account on condition that he provided a satisfactory security for payment of the amount owing. Defendant's brother H. Henry, who was managing defendant's business at the time, in November, 1901, acting for and on behalf of the defendant, interposed and verbally bound defendant as surety for the due payment of the said amount on demand being made from him by plaintiffs. There was a balance due of £18 9s. 7d., for goods supplied. Ostrowsky became insolvent, and his present whereabouts were unknown to plaintiffs. Defendant pleaded the general issue, and that his brother had no authority to bind him.

The record showed that in the Court below defendant's brother, H. Henry, gave evidence, and emphatically denied that he guaranteed the account to plaintiffs and bound his brother. He had never been interested in Ostrowsky and Ser's business, except in regard to a debt due to Henry.

The judgment of the Court below was for defendant, with costs.

Mr. W. P. Buchanan for appellants.  
Mr. Benjamin for respondent.

De Villiers, C.J., asked whether the defendant's brother, who was alleged to have acted under a power of attorney granted to him by defendant, who was out of the Colony, had authority to bind Nathaniel Henry as surety.

Mr. Buchanan: We say he was manager of the business. The debtor owed plaintiffs £28, and he owed Henry £158. He did this for the benefit of defendant's business. There was ample consideration for the security given. It was directly for the benefit of Henry that the business of Ostrowsky should not be sequestrated. Counsel went on to argue that it was clear from the evidence that the guarantee was given by defendant's brother. There was strong corroboration of plaintiffs' evidence by the fact of the letters written to defendant not having been returned. There was also a probability that the guarantee would be given by reason of the fact that Ostrowsky owed £158 to defendant at the time. The power of attorney held by defendant's brother was very general. Ostensibly he had the authority to bind the defendant.

[De Villiers, C.J.: Was anyone called in the Court below to swear that these letters were posted?]

Mr. Buchanan: No, but there is evidence that the letters were sent to the defendant.

Mr. Benjamin said that although the statute of frauds did not apply in this country, where a dispute existed as to whether a contract had or had not been entered into, the onus was upon plaintiff to prove conclusively to the satisfaction of the Court, that such contract had been entered into. There was no guarantee in writing in this case, and there was a dispute between the parties as to whether the alleged guarantee had been given. On a question of fact the Magistrate had found in favour of the defendant, and he submitted that there was ample evidence to support the Magistrate's decision.

De Villiers, C.J.: It appears to me that this is not a case in which the Court should interfere with the decision of the Court below. The plaintiffs sued on an alleged guarantee by the defendant of the debt of Ostrowski. The guarantee is not in writing, and the Magistrate was right in requiring clear proof of such guarantee. He had the witnesses before him, and he was not

satisfied that such guarantee had been given. Certain letters were put in which, if it had been proved that those letters had reached the defendant, I think would have gone far to prove the guarantee. I certainly attach more weight to those letters than the Magistrate did, but at the same time it is perfectly clear that there is not that proof which is always insisted upon in regard to letters which are relied upon to establish a contract, I say there is not such a clear proof of these letters having reached the person with whom the contract is sought to be established as to justify this Court now in reversing the decision of the Magistrate upon this question of fact. But there is this further difficulty, that assuming the guarantee is proved, I am not satisfied that Henry Henry had authority from Nathaniel Henry to enter into this contract on behalf of his brother. It is true that he was the manager of his business, and if it were a legitimate portion of that business to enter into transactions of this kind, it might fairly be said that the authority given to the brother would include the giving of the guarantee. Now, the only ground upon which it is stated in the present case that it was for the benefit of the defendant's business that the guarantee should be given is that Ostrowsky, the person whose debt was guaranteed, owed money to the firm of defendant, and that it was to his interest that the debt should be paid. But I am wholly unable to accept the proposition that a manager is entitled to enter into security for persons who owe that business any debts. It seems to be entirely outside the legitimate position of a manager to give a guarantee for the debts of third persons. There is a further difficulty in the present case, namely, that Henry Henry was not the sole manager of the defendant's business, but was joint manager with another under the power of attorney produced. Upon the question of fact, I am not satisfied that the Magistrate was wrong, and upon the question of law I am not satisfied that there is anything in the circumstances proved in the present case to show an implied authority to Henry Henry to enter into this contract on behalf of his brother Nathaniel Henry. Therefore, upon both grounds I shall not disturb the decision of the Magistrate, and the appeal must be dismissed with costs.

On the application of Mr. Buchanan, and with the acquiescence of Mr. Benjamin,

De Villiers, C.J., altered the judgment of the Court below to absolution from the instance.

[Appellants' Attorney: J. F. E. Bernard. Respondent's Attorneys: Not on the Record.]

# SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN  
and a Jury.]

SHERWOOD V. HOWARD AND ( 1906.  
SCOTT. ( May 30th.

Quantity surveyor—Commission.

This was an action to recover from the defendants £811 0s. 6d., for services rendered in connection with the building of the City Hall.

The plaintiff's declaration was as follows:

1. The plaintiff is an architect and quantity surveyor practising in Cape Town; the defendants, during the period in which the transactions now in question occurred, carried on business at Cape Town in co-partnership as builders and contractors, and were, *inter alia*, contractors to the Town Council for the erection of the City Hall at Cape Town.

2. (a) Towards the end of the year 1899 the defendants, with a view to submitting a tender for the erection by them as contractors of the proposed City Hall aforesaid, engaged the services of the plaintiff to assist them by furnishing information and supplying data for the purpose of and in connection with the framing of the said tender, and for his said services agreed to pay him a fee of £150. (b) Plaintiff duly discharged his duties in that behalf, and rendered the said services, and thereupon became and was and is now entitled to be paid the sum of £150.

3. (a) For a further count plaintiff says that the said tender was accepted by the said Council, and the defendants thereupon employed the plaintiff to assist them during the course of the construction of the said hall as their business manager, and to survey and measure up the work as it proceeded in connection with the original contract; and further in like manner to assist them in connection with other works the construction of which they might undertake contemporaneously with the building of the said Hall; and for the services to be so rendered they agreed to pay plaintiff one per centum on the contract price of the said works exclusive of the City Hall, and also one per centum on the total amount of the City Hall contract, including extras, and an additional remuneration of one and a half per centum on the amount of all the extras with respect to which plaintiff rendered any services, such extras constituting additions to and alterations in the specifications under the original contract for the said Hall (being in the result as regards the aforesaid extras two and one-half per centum on the amount thereof for remuneration). (b) as to the remuneration in respect of the said extras he says, al-

ternatively, that two and one-half per centum is a fair, reasonable, and customary remuneration for the rendering of such services as aforesaid in respect of such extras.

4. The total cost of the City Hall was approximately £159,000 inclusive of extras. The plaintiff duly carried out the terms of his said employment, and performed his duties thereunder; and for his said services, exclusive of the additional remuneration in respect of extras, his remuneration of one per centum on the said sum amounted to £1,590, and he thereupon became and was and is now entitled to receive payment of the same, besides the special further remuneration of one and one-half per centum in respect of extras as hereafter set out.

5. During the construction of the said hall the said Council decided to substitute two marble staircases in lieu of two teak staircases originally specified and defendants supplied the same for an accepted price, according to tender, of £4,000; it was agreed between them and plaintiff that in consideration of a remuneration of £200, being at the rate of five per centum on the cost of the said staircases, the plaintiff should execute a design, frame the requisite plans and specifications, take out quantities, and draw up estimates to assist defendants in framing their tender. Plaintiff duly performed the several aforesaid duties as agreed and thereupon the sum of £200 became due and payable to him on that head; the said sum of £4,000 is included in the aforesaid amount of £159,000, and one per centum thereon, to wit, £40, is included in the aforesaid sum of £1,590, leaving the balance of £160 as now further due and payable to plaintiff.

6. (a) In addition to the above items of indebtedness, defendants are further indebted to plaintiff in the said special remuneration for work done and services rendered in terms of his said employment on, and in connection with, the aforesaid extras, the amount of these being £58,643 4s. 5d., and the remuneration thereon at one and one-half per centum, amounting to £880 3s. 3d., plaintiff duly discharged his duties and performed his work as aforesaid in respect of, and in connection with, such extras, and the said sum of £880 3s. 3d. is now due and payable to him; (b) he annexes hereto an account, which he prays may be regarded as herein inserted; the said account shows the aforesaid amounts of £150, £1,590, and £160, and also particulars of the several items, making up the additional remuneration of £880 3s. 3d. in respect of the aforesaid extras.

7. The defendants are furthermore indebted to plaintiff in the sums of £1,360 11s. 2d. (being item for sundry accounts) and £66 (being for services rendered in taking out quantities in connection of a building known as Solomon's Building.



The said sums of £1,380 11s. 3d. and £66 represent the remuneration for work duly done and services duly rendered under the aforesaid employment for and on behalf of the defendants contemporaneously with, but exclusive of, the work in connection with the said hall. Plaintiff has duly done the said work, and rendered the said services, and the remuneration therefor, in all £1,446 11s. 3d., is now due and owing to him. Particulars of the said amounts have been rendered to defendants, and the item of £1,380 11s. 3d. figures in plaintiff's favour in an account rendered on behalf of defendant to plaintiff.

8. The aforesaid several services and works were duly rendered and done during a period commencing with January 1899, and ending with December, 1905.

9. The total amount of the above indebtedness to plaintiff is £4,226 4s. 6d. This said amount has been reduced by payments made and cash received from time to time and contra items going to plaintiff's debit in the account between the parties, amounting in all to £3,415 14s., leaving a balance in plaintiff's favour of £811 0s. 6d., and such sum is now due and payable to him; but though all things have happened, all times elapsed, and all conditions been fulfilled entitling plaintiff to receive payment of the said amount from the defendants, they, and each of them, refuse to pay any part thereof.

Wherefore the plaintiff claims against the defendants jointly and severally: (a) Payment of the sum of £811 0s. 6d.; (b) interest *a tempore morae*; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows:

1. The defendants admit paragraphs 1 and 2 of plaintiff's declaration.

2. As to paragraph 3 (a) thereof they say that the plaintiff was employed as their surveyor and not as their business manager, his ordinary duties being to measure up and survey the work as it proceeded, to see that extras and alterations were properly allowed for, to assist in preparing statements of account showing work done upon which instalments of the contract price might be obtained, and generally to protect the defendants' interests in regard to work done by them. They admit that they agreed to pay the plaintiff 1 per cent. on the price obtained by them for such work, that is, 1 per cent. on the contract price and all extras allowed less deductions made.

3. During the progress of the work in connection with the foundation of the said City Hall, the plaintiff represented to the defendants that the extra work ordered, being under the surface, entailed more work upon him than was adequately remunerated by the said 1 per cent., and the defendants thereupon agreed to pay the plaintiff an additional half per cent. on the price of the extra foundations.

4. It was further agreed between the parties that in cases when plaintiff was required to frame bills of quantities and prepare estimates for certain work in addition to his duties as aforesaid, he should receive  $1\frac{1}{2}$  per cent. upon the price of such work in addition to the 1 per cent. already stipulated for. The remuneration of the plaintiff was to be considered as due only upon the payment of each instalment of the contract price to the defendants.

5. The defendants deny that the plaintiff was entitled to an extra  $1\frac{1}{2}$  per cent. upon the price of all extra work for the said City Hall, and, save as aforesaid, they deny the said paragraph 3 (a), and also paragraph 3 (b).

6. As to paragraph 4 of the declaration, the defendants say that the price of the said City Hall was £158,200, which price includes £4,000, the price of the marble staircase hereinafter mentioned. The settled accounts of the said contract to date amount to £154,200, and the defendants admit that the plaintiff is entitled to 1 per cent. thereon, viz., £1,542, but deny that he is entitled to the special further remuneration claimed in respect of all extras.

7. As to paragraph 5, the defendants admit having agreed to pay the plaintiff 5 per cent. upon the price of the said marble staircase, but say that in addition to the duties the plaintiff admits having undertaken, it was also part of his duty to measure up and survey work as it proceeded, and prepare accounts to enable defendants to obtain the architect's certificate for payment. The said work is not yet completed, the architect has not granted any certificate of payment in respect thereof, and the defendants have not received payment of the purchase price or any part thereof. The plaintiff has not yet discharged his duties in respect of the said staircase, and until the happening of the aforesaid events he is not entitled to his remuneration. The defendants deny that the said balance of £200 is due, but they have always been and are still willing to allow the plaintiff the said five per cent. in his account with them upon the fulfilment of the aforesaid events.

8. In regard to paragraph 6 of the declaration, the defendants crave leave to refer to their above pleas and say that the special remuneration to which they admit the plaintiff is entitled as set forth in paragraphs 3 and 4 hereof, amounts to £47 17s. in respect of extra foundations and £173 19s. 1d. on other items as specified in the defendants' account hereinafter referred to. They do not admit the correctness of plaintiff's said account.

9. The defendants admit paragraph 7 of the declaration.

10. As to paragraph 8 thereof, the defendants admit the approximate correctness of the date of commencement of



the said work, but they deny that the plaintiff's services were completed in December, 1906, or are even yet completed.

11. As to paragraph 9, the defendants annex an account, which they pray may be considered as inserted herein, in which they show the amount they admit as due to plaintiff and the payments they have made to him. The said account shows the sum of £55 6s. 8d. as having been overpaid to the plaintiff up to date, but, as above set forth, the defendants are willing to allow the plaintiff a sum equal to five per cent. on the price of the said marble staircase upon the completion of the same and the payment to themselves of the price thereof, and to pay the plaintiff the said sum less the above sum of £55 6s. 8d. Subject to the above, they admit that they refuse to make any further payment to the plaintiff, and they deny that they are indebted to him in the sum claimed or any part thereof.

Wherefore, the defendants pray that the plaintiff's claim may be dismissed with costs.

Mr. McGregor (with him Mr. Lewis) for plaintiff. Mr. Burton (with him Dr. Greer) for defendants.

In the course of plaintiff's counsel's explanation to the jury,

Buchanan, J., remarked that this was one of the very worst cases to put before a jury.

Mr. Burton agreed with his lordship, and suggested that the matters in dispute should be referred to an expert, and referred to a concrete point as to whether plaintiff was entitled to  $\frac{1}{2}$  per cent. on extra foundations, or  $\frac{1}{2}$  per cent.

Mr. McGregor applied to amend the declaration on this matter by striking out "extra."

[Buchanan, J.: Strike out as much as you like. There is no objection to striking out.]

Edmund James Sherwood, plaintiff, stated that the defendants approached him with reference to assistance in connection with the building of the City Hall and other works they might give contracts for. He was to receive 1 per cent. on the amount of the contract, on the actual money drawn, and a further  $\frac{1}{2}$  per cent. on any extra work for which he rendered his services.

Mr. McGregor closed his case.

John Gibson Scott gave evidence for the defence, and in the course of his cross-examination stated that the plaintiff did nothing more than his ordinary duty when Mr. Howard was away. He was positive that the plaintiff did nothing extra. He did not know that £2,000 had been received in respect of the staircase. As regards the work done on the extra foundations by the plaintiff, he (plaintiff) stood on the top of the hall, someone gave him the

measurements, and he put them down in his book.

Thomas Masterton, accountant, at present engaged liquidating the firm of Howard and Scott, stated that at the interview, at which Messrs. Scott and Littlewood were present, he did not hear the former make any mention of the foundations.

Cross-examined by Mr. McGregor: The plaintiff did not seem to be a sort of "football" for the defendant partners. Every time the plaintiff gave an account he went on a different line. Witness advised the plaintiff to have his account agreed upon before Scott left for England. It was a common thing for the plaintiff to come up to witness's office for cheques, but witness could not remember any particular one.

Counsel having addressed the jury on the facts,

Buchanan, J., said that he knew of no case more unfitted to come before a jury than the one on which they were asked to adjudicate. The action was brought on an account of some forty items, thirty of which were disputed. Under the Arbitration Act, it was clearly laid down, where an action was one of account merely, the Court was at liberty to refer it to a referee. Fortunately, the parties, after some delay and difficulty, had agreed to refer the account, in the main, to a referee, with the exception of two items, on which the jury would have to decide. It would be for the jury to say whether payment was to be made now on the marble staircase, or whether the plaintiff should await a settlement of account between the defendants and the Town Council, whether on the foundations the plaintiff was entitled to a half per cent. or one and a half per cent. on the extra foundations, and whether the percentage was to be on the whole of the foundations, or the extra ones.

The jury found that the plaintiff was entitled now to his commission on £1,997, as agreed upon in the schedule, with reference to items 2 and 4. With regard to No. 6, they found that the plaintiff was entitled to claim one per cent. on the whole of the foundations, and a half per cent on the extra foundations.

Judgment was entered accordingly; the Court ordering that the accounts between the parties be referred to a special referee for determination, the decision to be reported to the Court. Mr. Ransome was appointed referee, with powers under Act 29 of 1896, the matter of costs to be discussed when the question again came before the Court.

[Plaintiff's Attorney: A. W. Steer.  
Defendant's Attorneys: Not on the Record.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1906.  
June 1st.

Mr. Roux moved for the admission of Sybrand Jacobus Mostert, as an attorney and notary.

Application granted, and oaths administered.

Mr. Inchbold moved for the admission of Lodewicus Johannes du Plessis as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate, Colesberg.

Mr. Van der Byl moved for the admission of Jan George van der Karet as a translator in Dutch.

Application granted and oath administered.

Mr. Alexander moved for the admission of Gabriel Pieter Steyn as an attorney and notary.

Application granted, and oaths administered.

### PROVISIONAL ROLL.

#### WITTON V. COLLIER.

Dr. Greer, for the plaintiff, moved for the confirmation of a writ of arrest against the defendant for debt.

Mr. P. S. T. Jones, for the defendant, said that his client was prepared to confess judgment in the matter.

Judgment was entered on the summons on consent, with costs.

#### HARRISON V. COLLIER.

Dr. Greer made a similar application in this matter.

Mr. P. S. T. Jones, for the defendant, said his client consented to judgment.

Judgment on the summons, on consent, with costs.

#### BOONZAIR V. COLLIER.

Mr. M. Bisset moved for the confirmation of a writ of arrest against the defendant for £30, rent due.

Mr. P. S. T. Jones, for the defendant, said the amount claimed from the defendant was for rent, and he was prepared to submit to judgment for £30, with the cancellation of the lease.

Judgment in terms of the summons.

#### BASSON V. LAMBRECHTS.

Mr. Douglas Buchanan, for the plaintiff, moved for provisional sentence on a promissory note for £400.

Mr. J. E. R. de Villiers, for the defendant, put in an affidavit in which the defendant denied that he owed the money. He stated that he signed the note to accommodate the plaintiff, who was in financial difficulties. He admitted he owed £71, which he tendered, with costs.

Order granted, with costs, execution to be stayed for six weeks to enable defendant to go into the principal case.

#### OOSTHUIZEN V. SAUNDERS.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £120, rent due, and £3 money lent, and for provisional sentence on two promissory notes for £17 10s. and £16, with interest and costs.

Order granted.

#### NATAL BANK, LTD. V. PICKARD.

Mr. M. Bisset moved for provisional sentence for £400 on a bill of exchange, with interest and costs.

Order granted.

#### STIGLING V. KOTZE.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £550, with interest and costs, and that the property be declared executable.

Order granted.

#### PEARLE V. MOOS.

Mr. Burton was for the plaintiff and Mr. Alexander was for the defendant.

Mr. Burton moved for provisional sentence on a mortgage bond for £5,000, less £3,211 12s. 3d. and £35, and to have the property declared executable. The application was by reason of non-payment of interest.

Mr. Alexander put in the affidavit of the defendant, which set out that the plaintiff well knew that the greater portion of the ground had been sold in lots subject to the conditions that the purchase price should be paid by instalments, the last of which was not due until December 31, 1906. It was the duty of the plaintiff to credit the defendant with interest on the lots, as against the interest on the bond.

A replying affidavit set out that many of the purchasers of the lots were hopelessly in arrear.

Provisional sentence as prayed, with a stay of execution for a fortnight.

**INSOLVENT ESTATE TODD AND CO. V. ADONIS.**

Mr. Benjamin moved for provisional sentence on a judgment of the Court of the R.M., Bedford, for £31 17s. 9d., together with provisional sentence on the taxed costs, and that the immovable property be declared executable.

Order granted.

**KOTZE V. PARTSIDGE.**

Mr. J. E. K. de Villiers moved for provisional sentence on a mortgage bond, and that the property be declared executable.

Order granted.

**MARAIS V. COLLINS.**

Mr. Douglas Buchanan moved for judgment on a mortgage bond for £3,000 with interest, and £10 10s. insurance paid, and that the property be declared executable.

Order granted.

**FARMER V. UYS.**

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £500, with interest and costs, and that the property be declared executable.

Order granted.

**S.A. BREWERIES V. HARRISON.**

Mr. Lewis moved for the final sequestration of the defendant's estate as insolvent.

Order granted.

**MILLS AND SONS V. BAPOO.**

Mr. Inchbold moved for the final sequestration of the defendant's estate, as insolvent.

Order granted.

**ESTATE VAN NOORDEN V. FAIRCHILD.**

Mr. Palmer moved for provisional sentence on a mortgage bond, and that the property be declared executable.

Order granted.

**RHENISH MISSION SOCIETY V. ESTATE MALAGAS.**

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £50, with interest and costs, and that the property be declared executable.

Order granted.

**ESTATE WATHES V. ADAMS.**

Mr. Toms moved for provisional sentence on a mortgage bond for £400, less £8 14s. paid on account, and that the property be declared executable.

Order granted.

**WALKER BROS. V. WANNENBERG AND ANOTHER.**

Mr. Sutton moved for the final adjudication of the partnership and private estates as insolvent.

Order granted.

**STEYTLER AND CO. V. BELL.**

Mr. W. P. Buchanan moved to have a provisional order of sequestration made final.

The defendant: I appear for myself. I deny I am insolvent. Here is a petition.

[De Villiers, C.J.: You published your schedule showing that you were insolvent.]

The defendant: The attorneys inserted the notice without my authority.

[De Villiers, C.J.: Will you pay your debts?]

Yes.

When?—On the bond I must have three months' notice.

[De Villiers, C.J.: You signed that you were insolvent?]

Yes; but Messrs. Steytler represented to me, if the schedules showed me not to be insolvent, the Master would not accept the petition.

De Villiers, C.J., ordered the matter to stand over to have a reply to the defendant's statements. The case would be postponed until next Thursday; the defendant ordered to make an affidavit.

*Postea* (June 7th).

Defendant was in default, and his estate was finally adjudicated insolvent.

**PHILLIP BROS. V. GRONITJOKI.**

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**HUDSON, VREEDE AND CO. V. ISSERMAN AND ANOTHER.**

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**MILLS AND SONS V. WALLACE.**

Mr. Rowson moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**STEVENS V. KASSIM.**

Mr. Louwrens moved for provisional sentence on two mortgage bonds for £375 and £25, and for the property to be declared executable.

Order granted.

**RUBIDGE V. BAAET AND ANOTHER.**

Mr. Pohl moved for provisional sentence on a mortgage bond for £180, less £5 paid on account, and to have the property declared executable.

Order granted.

**DUBING V. FLORIS.**

Mr. Gutsche moved for provisional sentence on a mortgage bond for £50, with interest and costs, and that the property be declared executable.

Order granted.

**ESTATE WRIGHTLEY V. WRIGHT.**

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**NATIONAL BANK V. GOLDSTEIN.**

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £300, less £5 paid on account, with interest and costs.

Order granted.

**ESTATE ARDERNE V. ESTATE HURST.**

Mr. Bailey moved for provisional sentence on two mortgage bonds for £375 and £200, less an amount paid on account, and that the property be declared executable.

Order granted.

**MACLEOD V. MULLER.**

Mr. Benjamin moved for judgment under a general covering bond for £575.

Order granted.

**ILLIQUID ROLL.****KREFT V. COTTELL.**

{ 1906.  
June 1st.

Mr. De Waal moved to have judgment signed against the plaintiff for not proceeding with his cause within the time fixed by the Rules of Court, and costs of the application.

Order granted.

**ESTATE JACKSON V. BOYCE.**

Mr. Russell moved for judgment, under Rule 329d, for £310, purchase price of certain property.

Order granted.

**BRADFORD V. LLOYD AND ANDERSON.**

Mr. Payne moved for judgment, under Rule 329d, for £35 19s. 6d., work and labour done.

Order granted.

**ROBERTSON AND CO. V. ASHERSON.**

Mr. M. Bisset moved for judgment, under Rule 329d, for £52 5s. 7d., for goods sold and delivered.

Order granted.

**PRETORIUS V. PRETORIUS.**

Mr. Benjamin moved, under Rule 329d, for an order against defendant, calling on him to transfer to the plaintiff certain property, with costs.

Order granted.

**WARD V. BOGGS.**

Mr. P. S. T. Jones moved, on notice of motion, calling on the respondent to show cause why judgment should not be signed against him for not proceeding with his action.

Order granted.

**ZEEDERBERG V. GIBSON.**

Mr. D. Buchanan moved, under Rule 329d, for the sum of £45, an amount of rent due, and payment of taxed costs, in an interdict application.

Order granted.

**MONARCH COLLIERIES V. ALBERTYN.**

Mr. Gutsche moved, under Rule 329d, for judgment for £100, due in respect of certain shares, less £3 paid on account since the issue of summons.

Order granted.

**QUAIL V. MONARCH COLLIERIES.**

Mr. Sutton moved, under Rule 329d, for judgment for £82 3s. 9d., less £50 for goods supplied, with interest and costs.

Order granted.

**DU TOIT V. ROYTOWSKI.**

Dr. Greer moved for judgment, under Rule 319, for £124 4s. 3d., for profes-

sional services rendered and disbursements made on behalf of the defendant.

The defendant was ordered to file a plea before next Thursday. otherwise judgment would be given against him.

### REHABILITATIONS.

Mr. W. P. Buchanan moved for the rehabilitation of George Henry Wm. May. A certificate of the Master set out that the only creditor who proved had consented.

Application granted.

Mr. Watermeyer moved for the rehabilitation of Samuel Gibson under the 117th section. The trustee reported that the books were kept in a very lax manner.

The application was refused with liberty to renew it in three months.

### GENERAL MOTIONS.

HEYDENBYCH V. MACKIE, { 1906.  
YOUNG AND CO. AND THE { June 1st.  
STANDARD BANK OF S.A.

Mr. Searle, K.C., moved for leave to appeal to the Privy Council. The petition was filed in due course. Mr. Burton, for the respondent, applied to have the money in the bank not drawing interest allocated to the special fund on fixed deposit bearing interest to abide the decision of the appeal.

Application granted, the money to be put on a fixed deposit.

### PHILLIPS V. MACDONALD.

Mr. Burton said that was return day of a service by edictal citation. The defendant, it appeared, went to German South-West Africa, and service had been effected on him by a German officer. A telegram to that effect had been received from the Deputy Sheriff of Kenhardt. Counsel said that the amount due was £119 for goods sold and delivered, but as the service had only been effected on the 25th May, he would apply for another fortnight's extension of the return day.

It was ordered that the further hearing of the case be postponed for a fortnight.

### VUSO V. VUSO.

Mr. Lewis, for the petitioner, said this was the return day of a rule nisi calling on the defendant to return to the plaintiff, or show cause why a decree of divorce should not be granted. Affidavit of non-return was put in.

Decree of divorce granted.

### Ex parte SCHUJA AND OTHERS.

Mr. Pymont moved to make absolute a rule nisi under the Derelict Lands Act.

Rule made absolute.

### Ex parte ESTATE ZIMMERMAN.

This was an application on a notice to the respondent to show cause why an order should not be granted appointing Francis Guthrie a provisional trustee in the estate of Carl Zimmerman. The Master had threatened unless a trustee was appointed he would discharge the insolvent. Attorney Krige had proved certain claims and contended that one on a bond held by Dr. Viljoen entitled him to two votes and he proposed his partner, Mr. J. J. Moore, as trustee. Counsel for the applicant contended that Dr. Viljoen was not allowed to vote in respect of his bond, and at the same time in respect of an unsecured debt. The Magistrate came to the conclusion that he could not appoint either Mr. Moore or the applicant without consent. The applicant proposed that he should be appointed trustee along with Mr. Moore. Counsel for the respondent had an application for the appointment of Mr. Moore, who represented creditors to the extent of £251, as against £97 proved by the petitioner. He had not the majority in number but the majority only in value.

Mr. Burton was for the petitioner and Mr. Molteno for the respondent.

De Villiers, C.J.: Clearly the parties are not likely to come to an agreement. The Court must now exercise its power of appointing a provisional trustee, with power to liquidate and finally administer the estate. The person who really in fairness ought to be appointed is the person who represents the majority in number and value. It is true that under the 38th section, creditors whose claim does not reach £30 are not allowed to vote in number, but only in value, and if it is counted in that way, there would not be a requisite majority in number. But when the Court is asked to exercise its power to appoint a provisional trustee, it is quite justified in looking into all the circumstances of the case. The Court will appoint Mr. Moore as provisional trustee, with power to liquidate and administer the estate. As to the costs, I think they might fairly come out of the estate, the costs not to include the costs of the previous application, which must be paid by the applicant.

### GUNTER V. LIQUIDATORS S.A. NITRATE SYNDICATE, LTD.

Mr. W. P. Buchanan applied to have a rule nisi calling on all concerned to



show cause why a certain notarial servitude should not be cancelled made absolute.

Rule made absolute.

*Ex parte KLEYNHAUS.*

Mr. Van Zyl moved to make absolute a rule nisi calling on the heirs in a certain estate to show cause why transfer of certain property should not be authorised.

Rule made absolute, the proceeds to be invested in the manner recommended by the Master.

*Ex parte DU TOIT.*

Mr. McGregor moved for an order, on notice of motion, calling on the respondent's attorneys to show cause why the applicant should not be released from tutelage of his guardian dative. The inheritance in the guardian's fund was no use to him in his farming operations. Although a minor, he was fully responsible for his actions, and he had experience of farming operations. There were affidavits to the effect that to delay investing the money now would be to the detriment of the young man.

The Master, in his report, said he could not recommend the granting of the application, on the ground that the capital was too small for the purpose required. The applicant was out of touch with his tutor dative, who was living in Hanover. The notice had been served on the tutor dative, and he did not oppose.

[De Villiers, C.J.: But he does not consent.]

Mr. McGregor: That is so.

[De Villiers, C.J.: Here we have the Master opposing it, and no consent on behalf of the tutor. I think the tutor should be approached to get his consent. I cannot agree with the Master that the sum is too small.]

Mr. McGregor pointed out that by his three years' absence in the Orange River Colony, the applicant was practically emancipated.

De Villiers, C.J., said there are special circumstances in this case which I think would justify the Court in coming to the petitioner's assistance. He no longer resides in this country, whereas the tutor resides here. The petitioner has been for some years a farmer in the Orange River Colony, and he now wishes to invest his money in that colony for the purpose of buying stock and hiring a farm upon which to keep the stock. I cannot agree with the view that the amount is not large enough for the purpose for which it is required. The amount is £497 10s., which would go a long way to buy sufficient stock for a young beginner. Under

all the circumstances therefore I think, as the petitioner has an elder brother living with him in the Orange River Colony who will assist him in his efforts to make a living, and as this application is recommended by certain reverend persons where the petitioner lives, the Court should grant the assistance. On the whole, it is a case in which the Court should come to the assistance of the minor. The inheritance mentioned in the petition will be paid to the petitioner's major brother, and to the petitioner for the purpose of being invested for the benefit of the petitioner.

*Ex parte MOCKE.*

Mr. Pohl moved for an order confirming the sale of certain property. The Master recommended the application, but advised that an account of the proceeds should be lodged before transfer was allowed to pass.

Order granted in terms of the Master's report.

*Ex parte PROVIDENT LAND TRUST.*

Mr. McGregor moved, on the petition of the directors of the Provident Land Trust, for leave to rectify a certain register and re-issue certain shares.

An order was granted in similar terms to that of the Contats case.

*Ex parte VAN RYNEVELD.*

Mr. P. S. T. Jones moved for an order authorising the Master to assume the death of W. H. de Villiers, who had disappeared on March 16, at Gordon's Bay. Search parties had gone out, but no trace of him could be found. De Villiers was last seen walking along a dangerous path. He was indebted to the petitioner in the sum of £220, and as security petitioner held a policy on De Villiers' life for £500.

A rule was granted, calling on all concerned to show cause by August 1 why an order should not be made as prayed, publication to be made twice in English and Dutch newspapers circulating in Somerset West.

*In re ESTATE GOLDBERG.*

Mr. Douglas Buchanan moved for the appointment of Mr. A. T. Hennessy as provisional trustee in the estate of Joseph Goldberg, of Caledon-street, Cape Town.

Order granted subject to the Registrar being satisfied that the applicant is insolvent.

# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

GRAAFF V. ROLLINCK. { 1906.  
June 2nd.

This was an application to make final a certain provisional order for the sequestration of the defendant's estate.

Applicant's affidavit stated that the provisional order was granted upon a petition, in which it was alleged that plaintiff had granted to defendant a mortgage bond for £5,000, hypothecating certain property. The bond had become due by reason of the non-payment of interest, judgment had been obtained on the bond, a writ of execution had been issued, and a return of *nulla bona* made, and the property had afterwards been sold to petitioner for £3,000. Petitioner said that the defendant's liabilities exceeded his assets, fairly valued, and that he was insolvent.

Respondent's answering affidavit denied that he owed the sum of £5,000 to plaintiff, or that he had committed an act of insolvency. He denied that his liabilities exceeded his assets, or that he was insolvent, and he put plaintiff to proof of his allegation that it would be for the benefit of his creditors that his estate should be sequestrated. The property had, he said, cost him £7,000, and it had been sold to plaintiff for £3,000. He claimed that in terms of an agreement entered into with plaintiff he was discharged from liability, and that under that arrangement the property was taken over by plaintiff for the amount of the debt, and sold by public auction.

The replying affidavit of J. A. C. Graaff denied that such an agreement as that referred to by defendant had been entered into with plaintiff.

Mr. Van Zyl was for plaintiff; Mr. W. Porter Buchanan was for defendant.

Mr. Buchanan submitted that the plaintiff had not given clear proof of the alleged insolvency as required by section 4 of the Ordinance. It was not alleged in the summons that the defendant's liabilities exceeded his assets—fairly valued. True, that was alleged in the petition, but the petition was not served upon defendant. Furthermore, one Max had signed as surety, and it had not been shown that Max would not be able to pay up the deficiency of £2,000, so as to satisfy the debt.

De Villiers, C.J.: The petition is made up of a statement of facts, all of which go to prove that the man is hopelessly insolvent. The summons also states that

the man was insolvent, but it does not enter into all the particulars of all the facts stated in the petition that the petitioner has referred to. I think there is clear *prima facie* evidence of insolvency, and the burden is upon defendant of disproving the statements made in the petition. That being so, the plaintiff is clearly entitled to sequestration of the defendant's estate. My only regret is that the defendant should set up a wholly hopeless defence of this kind, because practically he throws the expense of the defence upon the creditors. The final adjudication will be granted.

## GREYVONSTEIN V. THOMPSON.

Mr. J. E. R. de Villiers moved for leave to examine certain witnesses on commission in an action instituted by applicant, who lives at Barkly East, against respondent, for delivery of a certain erf and for £50 damages. The matter had, since the proceedings were commenced, been narrowed down to a question of damages, respondent having tendered delivery of the erf. Applicant said she was too poor to pay for her witnesses to come to Cape Town.

Mr. Roux (for respondent) read an affidavit by his client, who said that he was opposed to the application in the interests of justice, which would be best served by the witnesses appearing personally and giving their evidence before a Judge.

Having heard Mr. De Villiers in argument on the facts,

De Villiers, C.J., said that the application would be refused, costs to be costs in the cause. He added: My reason for making costs in the cause is that it may appear at the trial that this is a case of gross imposition on the part of defendant in defending the action, and that the plaintiff really had good reason for having her case tried in this way. I have not sufficient information before me to satisfy me as to the question of costs.

## INCORPORATED LAW SOCIETY V. RIVERA.

Contempt of Court—Letters of demand bearing Imperial Arms—Holding out as an attorney.

This was an application for an order of attachment against respondent, O. Rivera, for contempt of Court by reason of his having issued certain letters of demand bearing the Imperial Arms, purporting to be signed by an attorney of this Court, and intending the public to believe that it was a process issued

out of a Court of Justice. Mr. P. S. T. Jones was for the applicant society; respondent appeared in person.

Mr. Jones read an affidavit by Mr. R. B. Sanderson, secretary of the Law Society, who laid before the Court certain letters of demand and a post-card alleged to have been sent by respondent to certain employees of the Railway Department demanding payment of certain fees for tuition in the Spanish language. The documents purported to be signed by L. Matthews and Co. attorneys.

Respondent (in answer to the Court) said that the letters were sent out by one Matthews, who has since gone to Argentina. He obtained these letter forms from the "Cape Times" office. Respondent was a Spaniard, and had been in this country about four years. He had not heard of previous cases in which proceedings had been taken by the Law Society in regard to the use of such letter forms. Respondent bought the forms for Mr. Matthews. He first went to Townshend, Taylor, and Snashall's, and they said that they had none, and referred him to the "Cape Times," Limited, where he got a number of forms. He was a tutor in foreign languages and mathematics. He had not signed the letters.

De Villiers, C.J.: If the respondent in this case had not been a foreigner, I should have been inclined to deal somewhat severely with the case, by committing him for fraud, but as a foreigner he seems not to have been aware that the paper he was using was calculated to impose on others. He finds these documents for sale at the "Cape Times" office, and he naturally concludes that they are documents that he can utilise for the purpose of obtaining payment of what he considers a debt due to him. In similar cases before other Judges they held that the use of such a paper for the purpose of obtaining payment of debts is really a contempt of this Court, *Law Society v. Donner and Co.* (15 C.T.R., 213), but it is unnecessary for me to express an opinion on the point. In the present case the offence is aggravated by the fact that there is the signature of L. Matthews and Co., attorney, whereas such an attorney is not known in this country. I am prepared to accept the statement of the respondent that this Matthews has left the Colony. He shows from his books that he has had transactions with Matthews, and it is quite possible not only that Matthews might have signed the notes but that he might have said that he was an attorney. However, it is not clear to me that the handwriting is that of the respondent. Under these circumstances I shall not commit the respondent, but I think that the costs of this application should be borne by him, as he has necessitated the appli-

cation by his conduct. There will be no order except that the respondent pay the costs.

## GENERAL MOTIONS.

*In re* THE B.S.A. ASPHALTE } 1906.  
CO. (IN LIQUIDATION). { June 2nd.

Mr. Molteno presented the first report of the liquidators.

The usual order as to lying for inspection was granted.

### *Ex parte* ESTATE PEARCE.

Mr. Roux moved on the petition of Mrs. Pearce, on behalf of her minor daughter for an order declaring a certain debt to be preferent, and for the confirmation of the liquidation and distribution accounts, as framed by the trustee.

Order granted as prayed, His Lordship observing that there was no appearance for the creditors and any decision now given must not be regarded as authority in any future application.

### JORDAAN V. KRYNAUW.

Mr. W. Porter Buchanan moved for the attachment of respondent by reason of his contempt of Court in failing to obey an order of Court granted on the 12th January last directing him (Krynauw) to pass transfer of certain farm. It was stated that defendant had left the Colony some months ago for German South-west Africa.

There was no appearance for respondent.

Order granted as prayed.

### *Ex parte* REED.

Mr. Bailey moved for an order authorising the cancellation of two mortgage bonds on certain property at Port Elizabeth. Both the said bonds had, it was believed, been paid off, though no stops had been taken to have them cancelled. The bonds had been lost or mislaid.

Rule granted calling upon all persons concerned to show cause on June 21 why an order should not be granted as prayed, rule to be published once in two Port Elizabeth newspapers.

### *Ex parte* McDONALD.

Mr. Howes moved for an order authorising the transfer of certain property to the petitioner, which had erroneously been vested in her minor children.

Order granted as prayed.

*Ex parte* ESTATE OWEN.

Mr. P. S. T. Jones moved to make absolute a rule nisi calling on all concerned to show cause why a certain sale should not be cancelled.

Rule made absolute.

*Ex parte* INSOLVENT ESTATE COETZEE.

Mr. Toms moved for an order authorising the Registrar of Deeds to register transfer of certain property.

His Lordship said he required further information as to whether the petitioner's bond was first or second, and, further, independent evidence as to the true value of the property.

*Ex parte* LINDE.

Dr. Rainsford moved for an order authorising the Master to pay petitioner a certain inheritance of £625 to partly pay for a farm in the interests of certain minors, and authorising petitioner to pass a bond for the balance of the purchase price.

Order granted as prayed.

GREYLING V VAN DER WALT.

Mr. Douglas Buchanan moved for the confirmation of the curator's report, and for judgment against the defendant in the sum of £4,017.

Mr. Benjamin, for the respondent, consented in terms of the curator's report with certain alternative suggestions which had been agreed to by the applicant.

Judgment entered for the plaintiff for £4,017, with costs, execution to be stayed for thirty days.

MILLS V. MOWBRAY MUNICIPALITY.

Mr. Benjamin moved to make an award of arbitrators a rule of Court, with costs.

Order granted as prayed.

*Ex parte* BRINK.

Mr. Lewis moved for leave to the petitioner to sue *in forma pauperis* for divorce against her husband by reason of his desertion. He disappeared suddenly in the beginning of 1903, and had not been heard of since.

Leave granted to sue *in forma pauperis*. Mr. Lewis to act as counsel, and Mr. Tennant as attorney, the respondent to be served personally if possible, failing which one publication in a Dutch newspaper and one in an English news-

paper, circulating in Cape Town, with leave to serve the intendit and notice of trial, with citation.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

REX V. HENDRICKS. } 1906.  
June 5th.

Act 23 of 1879—Domestic servant—Illegal conviction.

Mr. Justice Buchanan said that among the cases which had come before him as Judge of the week was one against Jantje Hendricks, a coloured female, who was tried before the special J.P. of Vosburg, Victoria West Division, for contravening section 2, Act 23, of 1879 (the Vagrancy Act), in that she was found wandering abroad and having no visible lawful and sufficient means of support. She pleaded not guilty, but was convicted and sentenced to seven days' imprisonment. She was a domestic servant at the place where she had been in employment, but because a special J.P. wanted a servant she was arrested and sent to prison. Such a conviction could not possibly stand. Unfortunately, before the case came under review, this imprisonment had been served, but it was just as well to have the conviction quashed. The conviction would be quashed.

STEWART V. STEWART.

This was an action brought by Charles Langley Stewart, of Stellenbosch, against his wife, Mary Stewart, described as of the Alexandra Club, Cape Town, for restitution of conjugal rights, failing which a decree of divorce and forfeiture of the benefits of the marriage in community. Dr. Greer was for plaintiff; defendant was in default.

Wm. Thomas Birch, of the Colonial Office, produced a register containing entry of marriage.

Charles Langley Stewart, messenger of the R.M.'s Court at Stellenbosch, said he was married in community of property to defendant at the English Church, Stellenbosch, on October 8, 1903. His wife did not bring "a stitch" into the

community. In May, 1904, his wife left him, and had not returned to him. He had not since contributed towards her maintenance. He had not given her any cause to leave him. The sole trouble, as far as he knew, was in connection with the children by his first marriage. The letter (produced) was signed by his wife and contained these words: "I refuse absolutely to return to him."

[De Villiers, C.J.: I see your wife is described as of the Alexandra Club. What is she doing there?]

Witness said he did not know anything about that. He had had no communications with his wife since she deserted him. Witness added that he had no desire to press for costs of suit against his wife.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before July 1, failing which rule to issue calling upon defendant to show cause on July 14 why a decree of divorce should not be granted and defendant declared to have forfeited benefits of the marriage.

SMITH AND CO. V. S.A. NEWS- ( 1906.  
PAPER CO. ) June 5th.

Libel—*Animus injurandi* — Harbour Board—Fair report of debate — Malice — Public body.

*The bona fide publication in a newspaper of a fair and impartial report of a discussion at a meeting of the Table Bay Harbour Board upon a matter of public interest is not actionable even if it includes injurious statements regarding the conduct of an individual.*

This was an action brought by James Smith, trading as James Smith and Co., forwarding agents, Cape Town, against the South African Newspaper Co., Ltd., to recover £500 as damages for the publication of certain alleged false and defamatory words in the defendants' newspaper, the "South African News."

Plaintiff's declaration was in the following terms:—

1. The plaintiff has for several years carried on, and still carries on, business at Cape Town as a shipping and forwarding agent, under the style of Jas. Smith and Co. The defendant is a company duly registered in this colony with limited liability, and is the proprietor, printer, and publisher of the "South African News," a daily newspaper having an extensive circulation in the city of Cape Town and elsewhere in South Africa.

2. On or about the 10th March, 1906, the defendant company wrongfully, falsely, and maliciously printed and published, or printed and caused to be published, in and by their said newspaper of and concerning the plaintiff, and of and concerning him in the way of his said business, the following false and defamatory words, with headings and introductory statements calculated to draw special attention to the same:

#### FORWARDING AGENTS' CHARGES.

#### TWO FIRMS' LICENCES SUSPENDED.

#### PROTECTING THE PUBLIC.

The General Manager of the Cape Government Railways has written to the Harbour Board dealing with the cash-on-delivery system of forwarding goods, and in the course of his communication serious charges are made against certain local forwarding agents (meaning, amongst others, the plaintiff). The letter was read at yesterday's meeting of the Harbour Board, and was as follows:

"It has been brought to my notice that in certain instances the 'c.o.d.' (meaning the 'cash-on-delivery') system is being abused by private forwarding agents, who make use of it for the purpose of extorting excessive charges from passengers, and I subjoin particulars of two cases in point, which have been quoted to me as examples . . . (the first alleged example, relating to a firm other than the plaintiff, is here omitted).

"Consignment for Mr. S. Gordon, Johannesburg, forwarded by Messrs. Jas. Smith and Co., Cape Town (meaning the plaintiff) on April 1, 1906. The forwarding agents' (meaning the plaintiff's) charges amounted to £9 12s. 1d., although only £2 4s. 11d. of this amount would appear to refer to this consignment, the other two items of £1 12s. 8d. and £5 14s. 6d. apparently having no connection therewith. This consignment is still on hand at Johannesburg, the consignee (meaning the said Gordon) having refused to accept it. The goods will probably be sold by the C.S.A.R. (meaning the Central South African Railways) to meet expenses.

#### "WHY CAPE TOWN HAS A BAD NAME.

"It seems to me that cases such as the aforementioned (meaning such a case as *inter alia* that of plaintiff) constitute one of the reasons why Cape Town is acquiring a bad name as a landing port for the Transvaal, and I think it is desirable, in the interests of the port, that the forwarding of traffic be taken out of the hands of private forwarding agents altogether, and the whole of the work performed by the Board.

"I am aware that considerable opposition would be shown to such a course, but it seems to me that to give adequate protection to the travelling pub-



lic demands the abolition of the outside baggage agent."

Mr. L. Wiener, who presided, said one of the two firms was the same firm against whom there had been a complaint recently, when it was told them that if it occurred again their licence would be withdrawn. He suggested that the firm's licence should be suspended. He believed some of the firms had done their work well.

Mr. Hammerley-Heenan said that two or three firms had done their work very well indeed. He thought the best thing the Board could do would be to adopt the chairman's suggestion, and so weed out the bad ones.

Mr. Wiener said all the agents should be informed that if their charges exceeded those laid down by the Board, their licences would be suspended, and that meanwhile the licences of the two firms in question (meaning, among others, the plaintiff's) be suspended. It was a serious matter that the port should suffer for the alleged misdeeds of certain agents (meaning, among others, the plaintiff) who made their living out of it.

Mr. A. J. Robb said that certain agents purposely delayed the baggage until the passenger had gone away, and then sent it on under the "c.o.d." system, so that the owner could not obtain the baggage until the charges were paid.

It was tacitly agreed to adopt the chairman's suggestions.

3. The said words meant, and were intended to mean, that the plaintiff was a licensed outside baggage agent, and as such handled and dealt with the luggage and baggage of persons arriving at the Cape Town port, and that he had been entrusted with, or had undertaken, the business of clearing at and through the port of Cape Town, and thereafter forwarding to Johannesburg, the baggage or luggage of one S. Gordon; that plaintiff, on 1st April, 1905, delivered the said baggage or luggage to the officers of the Cape Government Railways, to be delivered to the said Gordon at Johannesburg, on the cash-on-delivery system (in vogue on the Cape Government Railways and Central South African Railways), i.e., with instructions to the said officers to demand on behalf of plaintiff and prior to delivery certain payments from the said Gordon, and that the demands of payment thereby made constituted extortionate and excessive charges as against the said Gordon, that the latter, refusing to pay such extortionate and excessive charges, failed accordingly to obtain delivery of the said luggage or baggage; that plaintiff's conduct in making such charges was extortionate, oppressive, improper, and disgraceful, and tended to bring Cape Town into disrepute as a landing port for the Transvaal; that such misconduct on the part of the plaintiff and others rendered it expedient, in the interests of

the said port, and for the protection of the travelling public, that the Harbour Board itself should undertake the clearing and forwarding of such traffic, to the exclusion of the baggage agent; and that, in the view of the chairman and the Board, the licences of the plaintiff and another firm as baggage agents should be suspended owing to their misdeeds; and that, generally, plaintiff had acted improperly, oppressively, and disgracefully in his said business.

4. By reason of the above false, malicious, and defamatory words, the plaintiff has been greatly prejudiced and injured in his character, credit, and reputation, and in the way of his said business, and has sustained damage in the sum of £500.

Wherefore, plaintiff claims: (a) Payment of the sum of £500 as and for damages; (b) alternative relief; (c) costs of suit.

Defendants, in their plea, denied that they were liable for any damages to the plaintiff in or about the publication of the said report, or that the plaintiff had sustained any damages. The comments made by members of the Harbour Board were published without malice, and as part of the proceedings of the Table Bay Harbour Board, the said meeting being of a public nature, and open to members of the public, and the said report was a correct account of what transpired at the said meeting on a matter of public interest. Defendants prayed that the claim might be dismissed with costs.

Mr. McGregor (with him Mr. J. E. R. De Villiers) for plaintiffs. Mr. Searle, K.C. (with him Mr. Van Zyl) for defendants.

James Smith (the plaintiff) said he carried on business as a shipping and forwarding agent in Cape Town under the style of James Smith and Co. He had been in business in Cape Town about nine years. On seeing the report in the "S.A. News," he immediately instructed his attorneys to make a demand on the defendant to withdraw the statement. On the following Monday, the 12th March, he wrote to the editor of the "News" denying statements in the report. The letter was not published, but on the 13th March a note was inserted in the paper in which it was stated that they had received a communication from Mr. James Smith, trading as James Smith and Co., in which he stated that the statements made concerning his firm by Mr. A. J. Robb at Friday's meeting of the Harbour Board were incorrect. He was afterwards informed that the matter would be considered at a meeting of the Board of Directors, but he had received no further notification from the defendant. The report had affected his business.

[De Villiers, C.J.: Did any other paper publish the proceedings?]

Mr. McGregor: Oh, yes, my lord.

[De Villiers, C.J.: The reason why I ask the question is that it may be difficult to identify damages accruing from one publication from damages accruing from another.]

Mr. McGregor: I shall also put in a copy of the "Cape Times" containing the report.

[De Villiers, C.J.: Have proceedings been taken against the other paper?]

Mr. McGregor: A summons has been taken out against the other paper.

Witness (continuing his evidence) said that he had his regular business, and what he called his casual business. His business with his regular clients had been as much as usual, in fact, he had done rather more business with them. He took steps to inform his regular clients of the real state of things after the report had appeared. His business with his casual clients had suffered considerably. He had prepared an abstract of his casual business. This showed that in March, 1905, the amount was £12 10s. In March of this year up to the 10th, the amount was £3 3s. Between the 12th and 31st March the amount was £1. In April the amount was £1 18s., and in May it was nil. The average for twelve months was £9 8s.

Cross-examined: Witness did not object merely to the letter of Mr. Robb; he also objected to the publication. He objected to the "News" not publishing the whole of his letter of the 12th March. He did not offer to indemnify the "News" in case Mr. Robb brought an action against the proprietors for libel in describing his statements he had made as false and reckless. Witness had issued summonses against Mr. Robb and the "Cape Times." The "Times" had published his letter in full. It was an exact copy of the letter he had sent to the "News." All the same, he had since summoned the "Times." He attributed the fact of his having no business in May to the publications in the "News" and "Times." He would not suggest that the defendant's paper had any malicious intention towards him.

Re-examined: The "Cape Times" left out the words "and reckless" from the letter which they published.

Cross-examination continued: Witness was formerly a baggage agent, but when the new system came into force about two years ago he did not take out a licence, because it would not pay him to make the deposit. His casual business was not in baggage, but in cargo. No licence was required for the business that he carried on.

By the Court: He sent a consignment to Mr. Gordon at Johannesburg. The goods were still lying at Johannesburg. Witness's charges were for storing and delivering the goods, the amount being £9 12s. 1d. The value of the goods sent was about £10. The goods had been in store for about two years. The charge for forwarding the

last consignment was 14s., plus £4 19s. 6d. for storing the goods for two years. The price was agreed upon with Mr. Gordon.

Frederick C. Donovan, sub-editor of the "South African News," and formerly a reporter of the "Cape Times," said that he attended the meeting of the Harbour Board on the 9th March, and took a report for the "Times." The report produced was a correct account of the proceedings. The "News" reporter was also present. No member of the public was present at the meeting.

By the Court: Witness did not know whether the meeting was open to the public. He had never seen a member of the public present at the meeting.

Cross-examined: The reporters always attended the meetings of the Board. The proceedings of the Board were reported in the three daily papers in Cape Town. The report of the "Times" was identical with that which appeared in the "News," the only difference being in the head-lines.

Mr. McGregor closed his case.

J. F. Sandeman, assistant secretary of the Harbour Board, said that he had been in the Board's employ eleven and a half years. Any member of the public would, he thought, be admitted if he wished to be admitted. He had never heard of anyone being excluded, but he had never heard of anybody asking to be admitted.

Arnold Buyskes, a reporter of the "News," said that he took the report in question on behalf of his paper. The report in the "News" was a correct account of the proceedings of the Board.

Mr. Searle closed his case.

Mr. McGregor said that this case brought into relief two important considerations. The first was the fact that newspapers fulfilled a useful and recognised public function, but the second consideration was that, on the other hand, conversely, a private individual had the right to come to the Court and say that the power of the press should not be exercised in a way to unduly press upon him as a private individual. The words in this case were clearly defamatory. It was alleged of a forwarding agent that he levied excessive and extortionate charges. That was a very serious allegation to make against a man in the plaintiff's position. The *injuria* was clear, and the onus was upon the defendants to justify the *injuria* which the plaintiff had suffered at their hands. This was not a case of whether it was a matter of fair comment on matters of public interest. The plaintiff did not allege malice against the defendants. The law had protected fair comment, and perhaps our leading case was that of *Upington v. Sarr Solomon* (Buch., 1879—276). That case, however, was not touched by the present case, because what was

complained of here was, in addition to wrongful allegations, mistaken allegation. He would at once draw their lordships' attention to the head-line. The head-line was unfortunate, because it said "Two Firms' Licences Suspended," thus giving a false impression, as plaintiff had no licence.

[De Villiers, C.J.: The real point for decision is whether a different principle should be applied to a report of a meeting of a public body like the Harbour Board from that which is applied to judicial proceedings.]

Mr. McGregor: Or Parliamentary proceedings.

[De Villiers, C.J.: Supposing what is said by Mr. Robb in this report had been said in a Court of Justice, would it have been actionable?]

Mr. McGregor said that he did not think so.

[De Villiers, C.J.: Any decision on this point would, I suppose, equally apply to Parliamentary proceedings? Papers publishing Parliamentary reports would be equally liable?]

Mr. McGregor: No, my lord.

[Buchanan, J.: Why not?]

Mr. McGregor: One is not for a moment prepared to say that a Court would in the least degree hamper anyone publishing Parliamentary proceedings. He added that, of course, he had not specially considered the point.

[Buchanan, J.: It is privileged for the Court to order witnesses out and prohibit publication until the case is finished.]

Mr. McGregor said that reporters were members of the public, and the point was whether, in a special case, they might not be asked to withdraw, or not to report the proceedings. Counsel cited the case of *Davis v. Duncan* (43 L.J.C.P., 185), in which Lord Chief Justice Campbell said that a fair report of what took place in a Court of Justice was privileged, but that privilege was not extended to a public meeting. Matters might be perfectly relevant, but injurious to the character of a man who had no opportunity of vindicating his character. The subject matter of a libel might be of public interest, and the report a fair one, without malice, yet the occasion may not be privileged. Counsel also cited the case of *Dunning v. the "Cape Times,"* where the defendants were held liable, as they took little trouble to ascertain whether the newspaper, "Owl," which they printed, contained libellous matter. There were many other cases to show that repetition did not save the person who published defamatory matter. On the question of damages, counsel would leave that matter in their lordships' hands.

Mr. Searle said the case raised a point of considerable importance, and counsel was unable to find any direct authority in Roman Dutch Law as to

whether a fair and impartial report of the proceedings of a public body, such as the Harbour Board, was protected or not, whether an action could be brought for anything which might appear in a fair and impartial report in the ordinary course of the proceedings of the Harbour Board. Counsel admitted that if any member attacked someone else and that appeared in a newspaper, possibly a different rule might obtain. The same principle which applied to a court of law must also apply to proceedings at a public body such as the Harbour Board or the Town Council. Very often the proceedings at public bodies such as counsel mentioned were of greater public interest than that which took place in a court of law. As long as the reporter gave a fair and impartial report in such matters counsel contended no action could be taken against the newspaper. The paper was simply performing an ordinary public duty. It was admitted that the proceedings were public, and that the Harbour Board was a public body.

Mr. McGregor having been heard in reply,

De Villiers, C.J.: This is an action against the proprietors and publishers of a newspaper for damages for an alleged libel published by that paper concerning the plaintiff. The defamatory words relate to certain charges made by the plaintiff as shipping and forwarding agent, and they are contained in a report published by the paper of the proceedings at a meeting of the Table Bay Harbour Board. The discussion at the meeting arose out of a letter addressed by the General Manager of Railways to the Harbour Board and complaining of the abuse by the plaintiff of the "cash-on-delivery" system of collecting charges. The letter led to a discussion on the part of the members of the Board, in the course of which the conduct of the plaintiff was condemned, and it was suggested by the Chairman that the plaintiff's licence as forwarding agent should be suspended. The suggestion was adopted at the meeting, but it now appears that, as a fact, the plaintiff never held a forwarding licence.

It is not seriously denied that the report is a fairly accurate statement of what took place at the meeting of the Board, and it is not suggested that the defendants were actuated by personal spite in reporting these proceedings. The report was published in the usual and ordinary course of a newspaper's business, and it does not differ in any material point from a report of the meeting as published in the "Cape Times." The Harbour Board is a body having important public duties to perform under Act 36 of 1896 in connection with the landing, warehousing and delivery of goods shipped to Table Bay. Three of the members are nominated

by the Governor and two are selected by persons who had in the previous twelve months paid £10 in customs duties; the Mayor of Cape Town is an *ex officio* member, and the Chamber of Commerce for Cape Town is entitled to nominate one member. There is no provision in the Act enacting that the meetings shall be open to the public, but in point of fact no impediment has ever been placed in the way of the public attending. Reporters for the newspapers have always attended the meetings, and the proceedings have been regularly reported in the newspapers. At the meeting now in question one of the subjects of discussion was the rate of charges made by agents for forwarding goods to Johannesburg. The matter was of considerable public interest and one which the newspapers would fairly be expected to report upon in due course. The question therefore arises whether a fair and impartial report of the proceedings is actionable by reason of its casting an aspersion on the conduct of the plaintiff. If, instead of at a meeting of the Harbour Board, the statements in question had been made by a witness in the course of a judicial proceeding there would have been no doubt as to the answer which should be given to the question. In the case of *Webb v. Sheffield* (3 E.D.C., 254) it was held by the Eastern Districts Court that the *bona fide* publication in a newspaper of a fair and impartial report of judicial proceedings which contained injurious statements is not actionable. In England a similar rule holds good, but, until the rule was extended by the Act of 1888 to the publication of the proceedings of vestries and such like public bodies, the plea that the alleged libel was a fair and impartial report of the proceedings of such a public body, was not held to be a good defence. In this Colony the question has never before been raised and the Court has now to fall back upon the general principles of the Dutch law for a solution of the question. One of those principles is that an injurious statement or publication is not actionable unless there is an *animus injurandi*, the existence of which must be gathered from the circumstances (see Voet, 47—10—20). If the circumstances attending the publication of an ordinary report of a judicial proceeding are sufficient to exonerate the publisher, I fail to see why a fair and impartial report of the proceedings at a meeting of a public body like the Harbour Board in regard to a matter of public interest should expose the publisher to an action for libel at the suit of a person whose conduct has been unjustly condemned at such meeting. If it is to be held libellous to publish such proceedings, why should it not be equally libellous to publish injurious statements made in the course of a debate in Par-

liament? Upon this point the Act (1 of 1854) to secure freedom of speech in Parliament and to give protection to persons employed in the publication of parliamentary papers does not offer much assistance. The statutory protection applies only to publications authorised by either House of Parliament, and if the *bona fide* but unauthorised publication of debates containing injurious statements is to be held not to be actionable, it can only be under our Common law relating to injuries. For myself I have always been anxious to uphold the right which every person has to protection against injurious attacks on his character or reputation: but the necessity for such protection is not so great as to be allowed to override the public good. If it is for the public good that the press should be unhampered in its publication of fair reports of parliamentary debates it would be impossible to hold that the *animus injurandi* exists in every case where a newspaper publishes a statement made in the course of such debates which is injurious to the character of an individual. On the contrary I consider that *prima facie* there exists no *animus injurandi* and that the burthen of proving the contrary lies on the person complaining of the publication. I am not prepared to say that the same principle would apply to the publication of speeches made at an ordinary public meeting. The question does not now arise and I express no opinion upon the point except to say that there may be a difference between a public meeting called by private individuals and addressed by irresponsible speakers and a meeting attended by the responsible members of a public body having important public duties to perform. The presumption of the absence of an *animus injurandi* might fairly be held to be stronger where the proceedings of such a public body are faithfully reported and commented upon. The object of the promoters of a public meeting might be to defame particular individuals and no public interest would be served by the publication of the speeches: but a body like the Harbour Board is not likely to attack the conduct of an individual except in the performance of the public duties intrusted to it. The publication, therefore, of speeches made at the Harbour Board upon matters of public interest appears to me to be one of those circumstances from which the absence of *animus injurandi* might fairly be inferred. If such publication is permissible, then, in my opinion, fair comment should also be permissible. I therefore do not attach much weight to the few lines of comment introducing the report of the proceedings now in question, or to the headline "two firms' licences suspended," upon which much reliance has been placed by the plaintiff's counsel.



I quite agree that sensational headlines should be avoided, and that their incorrectness may furnish proof of the existence of the *animus injurandi*; but in the present case the headline is justified by what was actually said at the meeting. In fact the plaintiff possessed no licence which could be suspended, but the members of the Board seem to have assumed that he held a licence, and they adopted the suggestion of the Chairman that such licence should be suspended. In the absence of any proof of express malice I am of opinion that the plaintiff is not entitled to succeed in this action, and that judgment must be for the defendant with costs.

Buchanan, J.: This is a case which is not governed by any previous decision in this Court, I wish also to express my opinion as to the deduction which I think the Court ought to draw from the general principles of law which prevail in this country. This is an action for damages for libel, arising out of a report published in a newspaper. The statements contained in the report are, no doubt, damaging to the plaintiff, and I would go so far as to say that a statement made in the report is not correct, and they were not justified in charging plaintiff with extorting excessive charges from passengers, so that the plaintiff's licence has been suspended. The question is, what duty was imposed upon the newspaper in this matter? I think a newspaper is justified and entitled to report judicial proceedings, Parliamentary proceedings, and those of all public bodies, such as the Harbour Board. In this case, the duty is imposed upon the reporter to make accurate reports, giving the whole of the material circumstances of the case. The reporter is not justified in adding any comments or notes of his own which may affect the report. As His Lordship the Chief Justice has pointed out, what has been added in this case by the reporter may or may not affect the result. In this case, I think, the headlines were justified by the facts which took place at the meeting, but it is desirable that the reports should be kept distinct from matters of comment. The report must be a record, a history, of the actual proceedings. I think the reporter should bear these things in mind. If a fair and accurate report is made of public proceedings, it is, *prima facie*, done without malice, which is the foundation of all these actions. It must also be borne in mind that reports must be for the public benefit and for information. They must not be maliciously done. You must not introduce into reports matters which are not of public benefit, and if this also is borne in mind, I think the principle would be a guide to the newspapers in reporting the proceedings of any public body. I wish to make these few remarks mainly because,

I say, in this case it is a declaration of a principle which has not previously been decided in the Court; but otherwise I agree fully with what the Chief Justice has said. Judgment will be given for defendant with costs in this case, not because the charges were true, but because the publication of this report shows no malice on the part of defendant. It must not be assumed that the charges are true, but that the publication was without malice.

[Plaintiff's Attorneys: Blaney and Merrington. Defendant's Attorneys: Sauer and Standen.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

	1906.
	June 6th.
METROPOLITAN TRAMWAYS COMPANY. LTD. V. CAPE TOWN TOWN COUNCIL AND CAPE TOWN GAS, LIGHT, AND COKE COMPANY, LTD.	" 7th.
	" 8th.
	" 11th.
	" 12th.
	" 13th.
	" 14th.
	" 15th.
	" 18th.

Town Council—Gas Company—  
Negligence—Costs.

This was an action brought by the Metropolitan Tramways Company, Limited, against the Town Council of the city of Cape Town and the Cape Town and District Gas, Light and Coke Company, Limited, to recover damages in three sums amounting to £3,777, sustained by an explosion in Adderley-street, alleged to have been occasioned by the defendants' negligence.

Plaintiffs, in their declaration, formally set out the parties in the first and second paragraphs. In paragraph 3 they said that for many years past, and prior to 1902, there existed a certain sewer, which was laid by the Council, from the top of Adderley-street and underneath the said street to the sea. The said sewer was always under the direct control and supervision of the Council, and it was the duty of the said Council at all times to take due and proper care that the same was in a proper state of repair. In paragraph 4 the plaintiffs said that the sewer had been used up to the year 1897 by the



Council for the discharge of sewage, but in or about that year the said user ceased, and the said sewer was used by the defendant Council for storm-water purposes, and was thereafter disused altogether. The sewer was blocked at certain points. The declaration proceeded: (5) In or about the year 1892 the defendant company, with the knowledge, consent, and approval of the defendant Council, laid across and underneath Adderley-street a high-pressure gas main or pipe for the conveyance of gas, and the said main intersected the said sewer at a point near the railway station; the said main was thereafter, with the defendant Council's knowledge and consent, used for the conveyance of coal gas and water gas from the defendant company's works at Woodstock to the said company's works in Long-street, whence the said gas was distributed to premises in Cape Town requiring the same, as part of the business of the said company; (6) the said gas main was laid in such a manner as to intersect the crown of the aforesaid sewer, and was at a certain point in or near Adderley-street in direct communication with the interior of the said sewer; (7) in or about the month of June, 1905, the said sewer was in a condition dangerous to the public and persons lawfully using Adderley-street; (8) the said dangerous condition arose from the acts, neglect, and default of the defendant Council in blocking up the said sewer at points opposite Darling-street and below the Railway Station, and leaving no proper ventilation therein, and in permitting and consenting to the laying of the gas main intersecting the said sewer, and having access thereto as aforementioned; and it also arose from the leaky condition of the defendant company's gas mains and pipes as hereinafter described; (9) it was the duty of the defendant company to keep the said gas mains and other gas mains or pipes laid and used by them in due and proper order, to prevent the escape of any gas therefrom by way of leakage from the mains or otherwise, and it was the duty of the defendant Council to take due and proper steps to inspect the said gas mains and pipes from time to time and to ascertain whether they were in proper order, and to insist upon the said company putting and keeping the same in proper order; (10) not regarding its duty in that behalf, the defendant company, prior to June 13, 1905, allowed its gas mains or pipes to become in a leaky condition, either in or near Adderley-street, at or near the point where the said high-pressure main intersected the said sewer or at some other portion of the defendant company's system of pipes, and in consequence of the above neglect, for some time prior to June 13, 1905, gas was allowed to escape from the defendant company's mains or pipes into the said

sewer, and the said Council, not regarding its duty in that behalf, failed and neglected to keep the said sewer free of gas and to prevent gas from the mains or pipes of the defendant company filling the sewer, and neglected to inspect the said mains and pipes to ascertain whether they were in proper order, and to insist that they should be kept in proper order; (11) on or about June 13, 1905, the gas that had escaped into the sewer ignited, from some cause unknown to the plaintiff company, and, in consequence of such ignition, an explosion occurred in Adderley-street, and the tram-lines of the plaintiff company were ripped up, broken, and destroyed, and the works of the plaintiff company in the said street injured for a considerable length; in paragraph 12 the plaintiffs said that by reason of the damage the street was closed to traffic for a considerable period, the line had to be relaid, and during that time they suffered loss through not earning the profits they otherwise would have earned, and incurred considerable expense in the management of business, costs of supervision of traffic, and legal expenses; in the final paragraph of their declaration plaintiffs said: "All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff company to recover from the defendants, jointly or one or other of them, the aforesaid sums of £1,044, £2,033, and £700, being damages sustained by reason of the defendants' negligence."

The plea of the defendant Council was as follows:

1. Paragraphs 1, 2, and 4 are admitted.

2. (a) The Council admits that for very many years past and prior to the year 1892 there existed a certain old sewer extending from the upper part of the town and thence from the top of Adderley-street down the said street to the sea. The said sewer was originally open, but was subsequently covered up. It had not been constructed by the Council, but was under its control. Prior to and since the year 1892 the Council had no knowledge of, and there was no reason to apprehend or contemplate danger from the sewer to persons lawfully using the streets of Cape Town. (b) Save as above, the allegations in paragraph 3 are denied. (c) Should this Honourable Court find that there was any duty on the Council such as is alleged in that paragraph, it says that it duly discharged its duty.

3. As to paragraphs 5 and 6, the Council admits that the defendant company had a main or pipe in the vicinity of Adderley-street, which was used for conveying gas; but it does not admit the remaining allegations in the said paragraph and specially denies that the said main was laid or used for the convey-

ance of gas with its knowledge, consent, or approval.

4. The allegations in paragraphs 7 and 8 are denied, save as to the allegation that in June, 1905, the gas main and the pipes of the defendant company were in a leaky condition, and that gas escaped therefrom.

5. As to paragraphs 9 and 10, the Council denies that it was under the duties therein alleged and submits that the declaration nowhere discloses in what manner such alleged duties arose, and it specially denies that it did not regard or failed or neglected to perform any duty in law resting upon it in that behalf.

6. (a) The Council admits that on the 13th June, 1905, there was an explosion in Adderley-street, that certain tramlines thereon belonging to the plaintiff company were damaged, and certain works belonging to it injured; and that the explosion was caused by the ignition of gas. (b) The gas was not ignited through any negligence on the part of the Council and the Council is not responsible for any escape of the gas which was ignited nor was it guilty of any negligence in that behalf. (c) The plaintiff company on that place, day, and occasion, and immediately before such explosion, by its servants fused a tram-rail joint, and for that purpose negligently applied an explosive mixture, without observing due precautions against danger arising from such application in the neighbourhood of escaping gas, though the said plaintiff company, by its servants, had knowledge or notice that there had been and was an escape of gas from the pipes of the defendant company at, or in close proximity to, the spot where such fusing took place. (d) The said negligence was the proximate cause of the said explosion, and the plaintiff company, by its negligence, directly caused the explosion, and any damage occasioned thereby or directly contributed to cause the same.

7. Save as above paragraph 11 is denied.

8. Paragraph 12 is denied, save as to a temporary closing of a part of Adderley-street for traffic and as to the appointment by Government of the Commission of Investigation. If the plaintiff company suffered damage as alleged in paragraph 12, the Council is not responsible therefor. It does not admit the materiality of the allegations in that paragraph, or the correctness or the materiality of the accounts annexed to the declaration; and it says that in any event the damage alleged in schedule A is excessive, and in B and C both excessive and remote.

9. Paragraph 13 is denied save as to the Council's refusal to pay.

Wherefore the defendant Council prays that plaintiff's claim be dismissed with costs.

For a claim in reconvention the defendant Council (now plaintiff) says:

10. It craves leave to refer to the matters hereinbefore pleaded.

11. By reason of the negligent action of the plaintiff (now defendant) company set forth in paragraph 6 of the plea, the Council sustained damage at the hands of the (now) defendant company in that the street wherein the said explosion occurred, being a street vested in the Council in its corporate capacity, was severely injured and the Council was in consequence thereof compelled to repair the same and to make up the surface thereof; and also to fill up the old sewer, the roof of which had been broken up, to lay water-pipes and to incur other expenses of a similar nature, and suffered loss in the sum of £712 3s. 9d.

12. By reason of the premises the Council is entitled to be paid the sum of £712 3s. 9d.

Wherefore the Council claims: (a) Judgment in the sum of £712 3s. 9d.; (b) Interest *a tempore moras*; (c) Alternative relief and costs of suit.

The plea of the defendant company was as follows:

1. They admit paragraphs 1 and 2 of the plaintiff's declaration.

2. They admit the allegations in paragraphs 3, 4, and 5 of the declaration, save that they say that they had no knowledge that the defendant Council had blocked the sewer, as alleged in paragraph 4, and save that the date in paragraph 5 should be 1894, and not 1892.

3. They deny the allegations in paragraph 6 of the declaration, and say that even if the gas main did intersect the crown of the sewer, and was at a certain point in or near Adderley-street in direct communication with the interior of the said sewer, the defendant company deny that it did or was so by their act or with their knowledge or consent.

4. They deny the allegations in paragraph 7, and of the declaration, but even if the sewer was in the condition alleged by reason of the causes alleged (which they do not admit), they say that in so far as it was so by reason of the blocking of the sewer, and absence of ventilation thereto, they crave leave to refer to their allegations in paragraph 5 hereof, and in so far as it was due to the leaky condition of the gas main they crave leave to refer to their allegations in the paragraph next succeeding.

5. They say that they exercised all due care and precaution in preventing escapes of gas, and in discovering and rectifying escapes, and if an escape occurred they deny that it was due to any act, neglect, or default for which they are liable, save in so far as is here stated, the defendant company deny the allegations in paragraphs 9 and 10 of the declaration.

6. They admit that on or about June 13, 1905, an explosion occurred in Adder-

ley-street, and that the tram lines and certain works in the said street were damaged, but they deny that the explosion was due to gas which had escaped from their mains or pipes into the sewer, and even if it were due to such escaped gas they were not legally liable for such escape, and they say further that the explosion was due to the act, negligence, and default of plaintiffs themselves, their agents, or servants in persisting in using a certain process known as the Thermit process, and liable to cause an explosion, notwithstanding that they knew, and had received warning, that an escape of gas was supposed to exist in the neighbourhood at the time, and that it would be dangerous to continue to use such process.

7. They admit the allegations in the first two lines of paragraph 12, and that in the last line of paragraph 13, but they deny each and every the other allegations in the said two paragraphs of the declaration, and say specially that even if plaintiffs have suffered the damages alleged, the defendant company denies that the plaintiffs are entitled to recover all or any portion thereof.

Wherefore the defendant company prays that the plaintiffs' claim may be dismissed, with costs.

Sir H. Juta, K.C. (with him Mr. Searle, K.C., and Mr. Struben), for plaintiffs. Mr. Schreiner, K.C. (with him Mr. McGregor), for the Town Council. Mr. Benjamin (with him Mr. Russell), for the Gas Company.

Alfred John Gregory (Medical Officer of Health for the Colony) said that in March, 1897, he made a thorough examination of the drainage of Cape Town, including the main sewer in Adderley-street. He made a report, which was annexed to his report for 1896, as medical officer for the Colony. There was no ventilation to the sewer; the sewer was of such a nature and construction that it was practically impossible to ventilate it. It was purely a sluit, but it had been altered from time to time, so that every short length of it was different from the other.

[Buchanan, J.: No doubt, it is an old canal of prehistoric or pre-municipal times.]

Witness (continuing his evidence) said that the sewer was really sieve-like. Witness recommended in his report that it should be filled in, because it was dangerous to public health. He had taken it for granted that the sewer would be filled in, and, in fact, from what he had seen, he had concluded that that was being done. There were old branch drains running into the sewer at various points. These, he considered, constituted an additional danger to the public. He considered that it was an improper thing to merely block up the ends of the sewer. The remedy would have been to properly ventilate the sewer or fill it in. After

the explosion had occurred, he went down in the afternoon. He detected a strong smell of gas opposite the Post Office.

A question arose as to the order of procedure, Mr. Schreiner submitting that the Gas Company should open the cross-examination.

Mr. Benjamin said that the Town Council were sued as the first defendants, and he submitted that the usual practice should be followed.

Mr. Schreiner said that they were much in this position, that one man supplied a gun, another supplied the ammunition, and a third pulled the trigger. Now the man who pulled the trigger was suing the others who had supplied the gun and the ammunition.

[Buchanan, J., said that the Cape Town Council should open the cross-examination, but this would not touch the question of whether the Council or the company should first open their case.]

Cross-examined by Mr. Schreiner: Witness considered that from a health point of view disused sewers in towns should be filled in. When he made the report, it was in his mind that the Adderley-street sewer should not be crossed by the Gas Company's mains. He could not, at this interval of time, tell how he knew that water and gas mains crossed that particular sewer. He was with Mr. Cairncross at the time, but he would not say that Mr. Cairncross gave him the information. He could not go and see where the sewer was crossed by the gas mains. He made a general statement in his report that gas and water mains did cross the sewer. He did not make any specific reference in his report to the Adderley-street sewer. He would not be prepared to swear that anybody gave him information that the sewer was intersected by the Gas Company's mains.

Mr. Schreiner: That is very important, because we say we did not know that the Gas Company's main intersected the sewer.

Further cross-examined: Witness noticed coal-gas when he went down to the scene of the explosion. He did not notice a smell of sewer gas.

Cross-examined by Mr. Benjamin: When he spoke of the "health point of view," he meant "health" in the broadest sense. He was not prepared to say that there would be more danger by reason of the sewer being blocked at both ends than if the ends had been left open. That was a matter one could not theorise upon, because the whole of the circumstances had to be considered.

Thomas Wm. Stanithorpe, A.M.I.C.E., Assistant Engineer of the Public Works Department, said he could not discover that there was any ventilation of the sewer before the explosion. Witness gave evidence bearing out the report

which he had made for his department. He attributed the leakage to the service pipes. He first looked at the joints on the high-pressure main, exposed to view, but could find no leakage. Across the triple sewers, at the junction of Strand-street and Adderley-street, there ran a high-pressure gas main, 9 inches in diameter. This gas main cut through the crown of three sewers. There had originally been 9 inches of brickwork. This had been cut through, and the main had been placed on the corner of the sewer. He noticed a smell of coal-gas at that point on the morning following the explosion. The smell seemed to be strongest at the sewer on the railway station side. He was shown where the Thermit joint was being run by the Tramways Company; it was within 10 feet of the high-pressure gas main. An examination was made of the joint of the gas pressure main on the centre of the middle arch on the 20th June. He noticed that the earth about this joint was soft, while the earth about the neighbouring joints was encrusted. The state of the joint over the middle arch gave him the impression that it had been very recently interfered with. The earth round this joint could be washed away, the earth round the neighbouring joints had to be chiselled away. Shortly before the explosion the Council built a head wall across the sewer at the junction of Darling-street and Adderley-street. He thought that the head wall was an important element in the explosion. He spoke to two of the Council's workmen on the day following the explosion; the men were working opposite the Standard Bank.

Sir H. Juta was about to question the witness in regard to a conversation that he had with the workmen, when

Mr. Schreiner objected that the evidence was inadmissible.

Sir H. Juta said that he only proposed to lead evidence in regard to what these workmen were doing.

[Buchanan, J.: We had better not have evidence which is doubtful.]

Witness (continuing) said that the workmen were named Rynould and Lindeboom. Witness had never previously heard of a gas main crossing a sewer in the way in which the one in question did. He considered that it was an absolutely wrong thing to do, especially with a high pressure main. The head wall tended to accelerate the accumulation of gas escaping from the high pressure main.

Sir H. Juta: What, in your opinion, was the cause of the explosion?

Witness said that he thought he could not do better than give the words used in the report he presented to the Commission.

[Buchanan, J.: Give it in your own words.]

Witness: The explosion was probably caused by the accumulation of gas in

the old disused sewer, and most probably ignition took place at the very moment the Thermit joint was being made by the Tramway Company's workpeople. Witness added that he considered the sewer was an elongated underground gasconter. He considered that it was dangerous to lay a gas main across a sewer in this way.

Cross-examined by Mr. Schreiner: Witness was a pupil, and afterwards assistant with the engineer of the county borough of Middlesborough. He left Middlesborough about 1878 to 1879. He then took an appointment at Lofthouse, in Cleveland. Subsequently, he took a position in an urban district, near Middlesborough. Witness had never professed to be a gas engineer.

Mr. Schreiner: Why does the danger arise from simply putting a pipe through the brickwork on the crown of the sewer?

Witness: The danger is from the liability of a joint of a gas main being sprung.

Cross-examination continued: Witness noticed puffs of gas coming from the three sewers on the morning following the accident. The smell was most noticeable at the sewer nearest the railway station. He would not say that the gas was still escaping at that time, or whether it was old gas that had not been used up. Witness did not observe any smell of gas at the telephone chamber, where the lady was killed. The only conclusion he could come to was that the gas had escaped from the joint over the middle arch. One of the Gas Company's workmen bared the joint in the presence of the members of the Commission on or about the 20th June. There was no leak when they saw the joint. His candid opinion at the time he saw the pipes was that the joint had recently been tampered with. Witness thought that the leakages from the iron branch pipes accounted for the flames seen on the previous day near the cable box. He did not consider, however, that the branch pipes materially contributed to the explosion.

Cross-examined by Mr. Benjamin. Witness's first impression was that the explosion was caused by the leakages from the branch pipes, but afterwards his attention was drawn to the lower part of the street. He should call the joint he had referred to an ordinary spicket and socket joint. It was not what he would call a bored and turned joint. He should be surprised to hear that this was a bored and turned joint. The joint of the pipe (produced) looked like an ordinary lead joint. It was dangerous to lay a high-pressure pipe across the crown of a sewer, because the pipe might be sprung or the pipe might rust. The reason why he came to the conclusion that the joint had recently been tampered with was, because where the



joint was made, the lead was bright, and where the chisel had come into contact with the top of the cast-iron, it was fairly bright. He knew that at the Commission Mr. Ladell, the Municipal Engineer at Wynberg, gave evidence that the pipe was not bright. He did not agree with Mr. Ladell's evidence; if Mr. Ladell had had more experience, he would speak differently. In such a street as Adderley-street, he thought a pipe should have 3 ft. 6 in. of cover.

By the Court: There was no appreciable explosion above the head wall at the corner of Darling-street. The Thermit process was being carried on near the bottom of Strand-street. The process was going on above the ground. He supposed the gas was escaping in the near proximity. It was a singular coincidence that, as soon as the molten material was opened, the explosion took place. The ground was somewhat disturbed about two feet from the place where rails were being fixed. It was possible that there might have been some ignition from the sparking of a car somewhere near. The fact remained, however, that no car was in the vicinity at the time.

Mr. Benjamin informed his lordship that he could produce the pipe, showing the joint that the witness Stainthorpe referred to.

Sir H. Juta said that he did not think the pipes would be of much service to the Court after they had been in the ground twelve months.

His Lordship said he did not think the pipes would help the Court, and he would prefer to take the evidence of witnesses. It might be interesting to have a demonstration of the making of joints.

Mr. Benjamin said that a demonstration could be given.

Edward George Clifford Jones, electrical engineer, Cape Town, said that soon after the explosion had occurred he went to the scene. He saw steam issuing from fissures opposite the Standard Bank; he observed a smell exactly like the exhaust of a gas engine. On the 14th June he made an investigation. Opposite Lennon's, Ltd., at the point where the high-pressure mains crossed the three sewers, he noticed a smell of coal gas. The smell was observable again on the two following days.

Mr. Searle (in answer to the Court) said that the Thermit joint was being made about 10 feet below where the high-pressure main crossed the three sewers.

Witness (continuing) said that he saw branch pipes opened up opposite the Standard Bar and Millar's. The pipes were full of holes. He should not say there was any direct communication between those pipes and the main sewer. Witness did not think there would be any possibility of a great

leakage of gas through the head wall. He considered that the explosion was caused by a leakage into the sewer from the high-pressure main becoming ignited by some means or other. Whether the ignition was due to the Thermit joint, he could not say. He did not think electrolysis had anything to do with the explosion. He did not consider that the explosion was due to sewer gas. The sewer seemed to be clean. He thought a low explosive mixture had been formed, and that there was really only one explosion.

Cross-examined by Mr. McGregor: Witness thought the ignition was probably caused by the Thermit joint. The fact, however, had to be remembered that the night before the cable-box was alight.

Cross-examined by Mr. Russell: The smell of gas became weaker each day after the accident, until on the Friday it was scarcely noticeable. The tramline on the Post Office side of Adderley-street ran over the disused sewer; the Thermit joint was over the sewer. Adderley-street had been watered with salt water; he thought that the salt water would have a good deal of effect on the wrought-iron pipes.

Thomas Govern, police constable, stated that at about 5.30 in the afternoon previous to the explosion he saw a blue flame coming from the edges of the cable box at the corner of Shortmarket-street and Adderley-street. The flame was about four inches in height. He reported the affair at the police station.

Mathias Munro, platelayer, in the employ of the Tramway Company, stated that he was in Darling-street the day before the explosion. In consequence of a message he received, he went to the corner of Strand-street and Adderley-street, where tramway men were working. There was an escape of gas outside of the tracks. The light, which was of a blue colour, was put out by the Gas Company's men. From the smell, it was ordinary coal gas, not sewer gas. The Gas Company's men excavated at the spot where the escape was noticed, and at another spot further towards the side of the street. While witness was working no pipes were disturbed. The gas main was about seven feet higher up the street than where the flame was.

Cross-examined by Mr. Schreiner: He did not see what the tramway workers did on the morning of the explosion.

Cross-examined by Mr. Benjamin: Did you speak to Mr. Humphreys on the day before the explosion?—Yes.

Can you point him out in court?—I can if he stands up.

Do you see him in court?—No; if I take a walk round I can find him out.

You say you had a conversation with him on Monday?—Yes.



George Manus, in the employ of the Tramway Company, who was in charge of a welding gang at the time of the explosion, stated that several joints had been welded in Adderley-street by the same process as they were working at the time of the explosion. Witness described the Thermit system of welding. At the time of the explosion he was waiting to give the word "go" to Higgins to release the pin in order to make the joint when he heard a rumbling noise.

Mr. Searle: What was it like?—It was like an earthquake trying to find its way out. Continuing, witness said there was no explosion on the surface at the exact spot where he was working, although the rails had been shaken. He was positive that nothing overflowed from the crucible; if that had happened, the joint would not be a good one. If anything did come out, it would simply go on to the surface of the ground. There were always sparks when the crucible was working. Before he ran from the spot there was an awful smell of coal gas. The first place where he noticed the explosion was about a couple of feet below the gas main. There was nothing unusual in the joint he made at the time of the explosion.

William Higgins, who was in the employ of the plaintiff company last June, stated he was working with Mann and King at the time of the explosion. There was a strong smell of gas previous to the explosion. Mr. Humphreys asked witness if he smelt gas, and witness replied in the affirmative. In reply to a further question, witness said that the Thermit would not interfere with the gas, as the claying process prevented that. In various parts of the town he had worked on joints effected by a similar process.

Cross-examined by Mr. Schreiner: The rumbling began where witness was standing, and extended up the street.

Cross-examined by Mr. Russell: If the Thermit escaped it could not reach the gas main. Gas was escaping just before the explosion. The crucible did not emit sparks like fireworks.

Wm. Craig, chief engineer of the Public Works Department, stated that in June last year he was supervising engineer, and was appointed as a member of the Commission to inquire into the cause of the explosion. He saw the high pressure main in Adderley-street, and examining the middle joint, which had a different appearance from the rest, and he came to the conclusion that the joint had been set up quite recently. By the appearance of the lead, he had no doubt of his conclusion. It was certainly dangerous to leave the old sewer open, as it would act as a reservoir for any escape of gas. If there had been an escape of gas from the middle joint it would

have got into the sewer and caused the explosion.

Cross-examined by Mr. Schreiner: It would be dangerous to proceed with the process the men were engaged upon in the vicinity of a smell of gas. It was quite possible to ventilate a disused sewer.

James Collier, contractor and plumber who examined certain joints of the high pressure gas main in Adderley-street, corroborated the last witness as to the recent setting up of the joint in the middle sewer.

Cross-examined by Mr. Benjamin: He had no experience of gas pipes, but he had of iron pipes. The experience of water pipes would practically hold good in the case of gas pipes.

Robert Caw, plumber, with fifty years experience, examined the joint in the gas-main where it crossed the sewer, and stated that he came to the conclusion on comparing it with others that it had recently been staved up. The other joints were very severely rusted, while the middle one was quite clean.

Robert Caw, Jun., who examined the middle joint with his father, the last witness, stated that it had all appearances of having recently been staved up.

John Dennann, electrical engineer, with large experience, who was also appointed as a member of the Commission, and visited the scene of the explosion, said he noticed a smell of burnt gas opposite the Post Office, of exploded gas opposite the Railway Station, and pure gas at the corner of Shortmarket and Adderley streets. Subsequently he saw the gas-main exposed. Many of the service pipes were in a very leaky condition. In examining the main on the day after the explosion he smelt intermittent puffs of gas coming from the sea end. The bottom of the pipe was the crown of the sewer for about two feet. After the Wednesday he did not smell the gas. The middle joint appeared to him to have been tampered with, as it was quite different from the others. As long as the Commission lasted he knew of no leak discovered by the Gas Company. The molten metal he had found could not pierce through the sand. An experiment was tried on sand and loose earth, and the molten iron would not penetrate. In his opinion the escape of gas from the high pressure main at the foot of Adderley-street was in all probability the cause of the explosion. There must have been a continuous flow of gas to the surface through an aperture. Witness did not see any traces of concrete, although Mr. Arnott, who supervised the laying of the pipes, had stated they were buried in concrete.

Cross-examined by Mr. Schreiner: He attributed the smell of gas to the leaky service pipes. His view was that the actual cause of ignition was the thermit

process. The explosion in the telephone box was contemporaneous with the other explosions. The box was visited about once a week or so.

Chas. Frederick Juritz, senior Government analyst for fifteen years, stated that a couple of hours after the explosion he visited the scene. The earth which was being taken out at the corner of Shortmarket-street and Adderley-street had a strong odour of coal-gas.

It would not be necessary to have an actual light applied to cause an explosion, the white heat of a mass of metal would be sufficient. Assuming the capacity of the sewer to be 30,000 cubic feet, then in order to fill the sewer with explosive mixture, taking it at eleven per cent. of coal gas, it would require 3,600 cubic feet of coal gas to fill what had been called a subterranean gasometer." An escape of a couple of ordinary burners would fill that place in about a fortnight. The explosion, he thought, was caused by a mixture of coal gas and air. Some light, he thought, must have been applied in this case. It was quite possible the gas was burning for some time before the explosion took place.

Cross-examined by Mr. Russell: He had seen showers of sparks omitted from the crucibles.

By His Lordship: It was probable that there was merely ignition directly underneath the crucible.

Andrew McLarity, in the employ of the Tramway Company last June when the explosion took place, stated he was guard on a tram going down Adderley-street on the left hand rail opposite the Post Office.

[Buchanan, J.: What is he called for?]

Sir H. Juta: To show there was a tram going down Adderley-street at the time.

[Buchanan, J.: Was the tram injured?]

Witness: No.

Alfred Giles, General Manager of the Tramway Company, stated that within about an hour of the explosion he examined the thermit joint and found it to be a properly-run one. If any metal came through it would run on the flat on the sand. Sand had the effect of cooling off the metal. In consequence of the explosion the line was blown up in several places, and it cost £1,044 to make the repairs. Before the explosion, when the rails were being re-laid, the company used one line in Adderley-street; after the explosion the service was dislocated, and from June 13 to July 11 the section between Darling-street and Strand-street could not be used. From April 19 to May 9, when the service was in order, the receipts, irrespective of the monthly ticket-holders, was £10,168; for the four weeks ending June 6, when they were only working one line in Adderley-street, the receipts were £8,653; from June 13 to July 11, when the Darling-street—

Strand-street section was stopped, the receipts were £5,074. Extra signalmen and despatchers were requisitioned to act at the temporary termini. At the same time there was a decrease in the mileage, and that was balanced against the increase in expenditure. The line had sunk in places from Darling-street to Strand-street, and it was also out of gauge. He attributed that to the sinking of the foundations, and that was after the lines had been properly re-laid. It would be necessary to make repairs soon which would cost £250.

Cross-examined by Mr. Schreiner: The company was relaying the line because it had got worn, and not because the Town Council had raised the level of Adderley-street. He did not remember making a request to the Council to work the single line after the explosion. He had no recollection of the fine weather in the August-May period and the wet weather in the period after the explosion. The line was up for a considerable distance at Sea Point, and that would also affect the falling off in traffic. It was probable that many monthly ticket-holders took smaller books during the reconstruction as they had not time to journey to Sea Point for their luncheons. He had not found on recent work that the gauges were out in other parts of the system.

Cross-examined by Mr. Benjamin: Of the £1,044 10s. 7d. claimed £850 odd had been expended. The traffic for the four weeks ending August 15 last year amounted to £8,283. The falling off, irrespective of the explosion, was going on while the line was up in other parts of the section.

Which is the principal paying portion of your line?—I am not bound to answer that question.

[Buchanan, J.: Can you answer it?—It varies at times.

Mr. Benjamin: Is the Sea Point the principal paying section?—No.

Which is the principal paying section?—I don't propose to answer that.

You must; answer it?—The sections vary at times.

Tell me how they vary?—

[Buchanan, J.: You are unable to give an answer?]

Mr. Benjamin: The witness did not say so, my lord.

[Buchanan, J.: He says so.]

Mr. Benjamin: How does the traffic vary?—It may vary in many ways, such as sports or other functions at any particular district.

Have you got the records week by week of the various sections of your line last year?—Yes.

Can you produce them?—Yes.

Will it take any considerable calculation?—Yes.

Well, you can prepare the figures for twelve months for the information of the Court later.

Sir H. Juta closed his case.

Mr. Schreiner mentioned the matter of procedure as to the examination of the witnesses of the defendants.

Buchanan, J., said he did not see any clear reason in this case to select one to be heard first more than the other. The Town Council was first on the list.

Mr. Schreiner pointed out that at the Commission he drew attention to the position of the witnesses of the co-defendant. A witness was called for the Gas Company, and counsel asked for a ruling as to whether he was at liberty to cross-examine, otherwise he would retire, because it was not evidence against the Council. The Commissioners allowed cross-examination, and counsel suggested to the Court that the case should be treated on the basis of each cross-examining each other's witnesses.

Buchanan, J., said the position of the Court was to ascertain from the evidence laid before it the true merits of the case. He thought therefore that any witness called by one defendant to give evidence which affected the other defendant should be cross-examined otherwise his statement might be prejudicial. A witness called by either defendant would be allowed to be cross-examined by the other defendant.

Mr. Schreiner: That will follow on the main cross-examination by the plaintiff?

[Buchanan, J.: Yes.]

Mr. Schreiner called

John Cook, City Engineer, who stated that May, 1905, was the first time he had anything to do with the old sewer. He had no idea until 24 June, when he returned from Johannesburg, that a gas main crossed the sewer. In May, 1904, the old sewer was closed at Darling-street. So far as he could trace there had never been any construction of a ventilation system for the old sewer.

Cross-examined by Sir H. Juta: He ascertained that if the Gas Company sent in a plan which did not clash with work it was passed. Witness did not know what powers the Gas Company had through Parliament. At the Commission he said that he was not aware of any municipal control over the Gas Company which he understood had no Act and had no right to interfere with the street or the sewers without the permission of the Town Council. The record of the various gas mains in Cape Town up to 1902 was very incomplete. Since 1902 witness had plans of all the mains laid. Witness could not say where all the gas mains were at present. After the explosion he found out that there was a water main under the gas main in Adderley-street. It would be wrong for the Drainage Engineer to say that he (witness) was responsible for the sewer six months before the explosion. If the sewer had been filled up there would have been no explosion. If he had known

the gas main was running as it did he would have said it was absolutely necessary to fill up the sewer and remove the gas main. He was not aware until recently that in several places in Cape Town gas mains ran through the sewers. He could not say why the sewer was not filled up. In the month of May witness contemplated filling up the sewer, but he had not the control of it until September.

Had you the power to fill it up?—I should have had to ask Mr. Rigby.

You, as City Engineer, would have to ask permission to fill up a sewer?—It is a different department.

Continuing under cross-examination, witness said the idea to use the sewer for the laying of cables was given up. He could not contradict Dr. Gregory that there was ventilation in the sewer when it was used as a sewage channel. He had no doubt that the joint in the middle sewer had recently been set up. In his opinion the coal gas escaped from the joint, mixed with the air and caused the explosion. As he saw the service pipes in the Public Works Department they were in a bad condition, but they might have been knocked into that condition.

Cross-examined by Mr. Benjamin: Since the explosion perforated covers had been put over the man-holes of the stormwater drains.

Re-examined by Mr. Schreiner: Except by forced ventilation the sewer in question could not be ventilated. About a month after the one in Cape Town there was an explosion in Leeds, caused by the explosion of gas which accumulated in a ventilated sewer. The Drainage Engineer's Department was quite distinct from his, the Drainage Engineer having the power to put down a sewer without witness's permission. Being unaware of the presence of the gas main, he thought the sewer quite safe.

William James Jeffreys, Assistant City Engineer, stated he had held that position in Cape Town for eleven years. During the absence of Mr. Cook, when the explosion took place, witness was acting as engineer. Ten minutes after the explosion took place, witness was in Adderley-street. Arrangements were made with the different departments to rope off the scene of the disaster. In conjunction with the Tramway Company, the work of reinstating the roadway was commenced, and next day witness proceeded to fill in the sewer. The first time witness was aware of the existence of the high pressure main across the sewer was when he saw the Gas Company's men working at it. The Gas Company's men broke the brick-work in order to get at the joint of the pipe. Two days after the explosion, witness examined the middle joint, and, although he was not an authority on the matter, he noticed that it was different from the other two. It was practically

impossible to ventilate a disused chamber like the one in question. In 1901 there was an explosion of gas in a ventilated sewer in St. George's-street. He had never heard that a disused sewer was dangerous from collecting gas. The new system of sewerage completely cut off any junction to the old sewer. He was unable to trace from the records of the Town Council where the gas main from Woodstock to Cape Town crossed the sewer. There were a few cases of gas pipes going through sewers, and they were removed between 1897 and 1903.

Cross-examined by Sir H. Juta: Mr. Cairncross was City Engineer when the gas main was laid down. In his opinion, although it was done, it was not necessary to fill up the sewer where there was no explosion. On the 30th May, when the road was being re-graded in Adderley-street, there was no smell of gas. He had no knowledge of an explosion in Wale-street, but he knew of one in Newmarket-street, where gas got into an ejector chamber.

Cross-examined by Mr. Benjamin: The fact that the joint was in brickwork and cement might have accounted for its brighter appearance than the other two.

Robt. O. Wynne Roberts, who came out in 1898 as City Engineer to the Cape Town Co-operation, and in 1902 became Water Engineer, which was a distinct department from that of the City Engineer, stated that when he was City Engineer he knew of the old sewer in Adderley-street, but witness never had any control of the sewer. Witness would not anticipate gas collecting in the sewer, which would not be filled in on that account, or would be filled in for sanitary reasons. The very explosive mixture which they might seek to avoid might be created by ventilation through reverse currents. Practically the sewer could not be ventilated. There was no reasonable anticipation of risk to the public in leaving the sewer open. Had he known of the gas main he thought he would have advised the Council to fill in the sewer. It was impossible to make a sewer absolutely gas tight.

Cross-examined by Sir H. Juta: More than once gas had got into sewers in Cape Town. Where it was possible, everything was done to ventilate the sewers.

You say it was impracticable to ventilate this sewer?—Yes.

Why, then, didn't you fill it up?—With the knowledge I have to-day, I would have ordered it to be filled up.

Thomas Wilson Cairncross, formerly engineer to the city of Cape Town from 1881 to 1898, stated that he did not see how the high-pressure main, which was laid in 1892, crossed the street. He had considerable trouble with the Gas Company laying mains without wit-

ness knowing anything of them, and then witness established the system of permits.

Witness then instituted a further system of submitting plans, but for this main no plan was submitted. There was constant trouble with the Gas Company in filling up the roads. Witness's instructions were that, where mains crossed sewers, the work had to be in concrete. He would not, as City Engineer, have approved of any such work if it was not enclosed in cement. It was not with his knowledge or approval that the gas main was laid in such a position. According to the rule of the office, the permit was taken away by the party applying for it, in order to show it to a policeman or a municipal official as authority to open up the street. There was no specific permission given to cross the part of Adderley-street where the high-pressure main was laid. Ventilation

was such an uncertain quantity, it would be a difficult thing to ventilate the old sewer. It might not be practicable to ventilate the sewer by means of shafts, because inlets were often outlets. Municipal county engineers in England had been trying experiments for twenty-five years, and as yet they had come to no thorough decision.

Cross-examined by Sir H. Juta: He would not have allowed the pipe to go through the sewer unless it was properly covered with masonry, more especially with a view of reinstating the sewer, and not from the point of view of any danger. When he went round with Dr. Gregory he did not open up the streets to see where the gas mains ran. When the sewer was blocked at the lower portion of Adderley-street, he would not consider it dangerous for the high pressure to remain where it was. Some part of the joint might have projected inside the crown, but he could not say for certain. There were fresh marks on the joint, and he had no doubt that it had quite recently been reset.

Cross-examined by Mr. Benjamin: It was several days after the explosion that he examined the joints. The one in question had evidently been laid in brickwork.

Mr. Schreiner closed his case.

Edward P. Reilly, engineer and general manager for the Gas Company, stated that after the explosion he immediately commenced opening up the street to find out if the gas mains had been damaged. He put in specimens of the ordinary lead joint and the "turned and caed" joint. Lead was not essential in a "turned and caed" joint. It was only put in as a support to prevent the pipe sagging. He had never known of any leakage from joints in Cape Town. None of the gas mains were disturbed at all by the explosion. The human nose was the best instrument for detecting gas leaks.



Bars were driven down in the street over the mains in order to let the gas up if there was any escape. He believed there was an aperture connecting the surface of the street with the sewer below the tram rail joint which was being welded. This joint in the gas main had not been recently reset. It was impossible to tell a joint which had been recently recaulked from an old one by the appearance of the lead, but it was possible to tell from the disturbance of the "barnacles" on the joint. It was impossible to caulk in a joint without disturbing the "barnacles." Thirty per cent. of the damage done to the pipes was done by the Town Council.

Cross-examined by Sir H. Juta: Before the explosion he had nothing to show the depth of the high pressure main in Adderley-street. He searched for a leak from the high pressure main after the explosion, but only found one leak in Adderley-street, opposite Logan's. A report was made to the office on Monday, 12th June, that there was an escape of gas somewhere. On Tuesday, about 4.30 p.m., the main had been opened up, the joint over the sewer was exposed, and he thought he smelt gas puffing out of the three sewers, but he was now sure that whatever it was coming out of the sewer it was not coal gas. A flame was burning near the tram rail joint after the explosion.

Cross-examined by Mr. Schreiner: The Gas Company's men were working near the gas main till about one o'clock in the morning. The tram rail joint was directly over the water main, about seven feet away from the gas main. The bit of metal was discovered at a depth of about two feet six below the surface of the street. The crown of the sewer was broken away underneath. There was a case where a gas main goes through the body of a sewer on the Parade. In the St. George's -street explosion the leak was not from a joint, but from a fractured pipe.

Re-examined by Mr. Benjamin: When the joint was first uncovered he smelt all round the joint and there was no escape of gas from it. A "turned caed" joint could not spring even if a traction engine passed over the top, and there was an excavation beneath. The pipe might fracture, but it would not spring.

Wm. A. Humphreys, assistant manager under Mr. Reilly, stated that he had had 27 years' experience of gas works in England and Cape Town. In 1891 he arrived here. On the evening of the day before the explosion he reported a leakage of gas in Adderley-street. About two feet away from where the thermit joint was working he smelt gas and ordered his foreman to open up the spot next morning. The foreman was already working on the

street. Next morning the workmen were filling up their excavation of the previous day and proceeded to open up the street near the high pressure main. Witness did not see Munro on the Monday, as Munro had stated. When the explosion occurred witness was in Mr. Reilly's office explaining what happened on Monday. Witness saw the street opened up after the explosion, and was almost constantly in Adderley street up to 11.30 that night. Witness saw the joint when it was exposed. There was no leak of gas coming from that joint. When the Commission examined the joint everyone that came to look at it had a rub at it. Certain indications were pointed out by witness that could not exist if the joint had recently been reset. In February this year on an examination of the main it was discovered that a nine-inch gas pipe opposite Logan's place was broken in two, and immediately underneath the broken main was a nine-inch earthenware drainage pipe running into the old triple sewer. The examination was made because the City Engineer was about to make alterations to the Dock-road. The breakage of the pipes was evidently caused by some shrinkage of the ground. The escape of gas was not very great from the pipe. On the morning of the explosion witness cautioned Higgins if there was any chance of the metal running over, not to run the joint until the leak was discovered. There was a tremendous number of sparks emitted from the crucible, and it was difficult for anyone to stand within eight or nine feet of it. Last Sunday there was an escape of gas in Rose-street. The gas leaked into the sewer although the gas main was ten feet away from the sewer, but there was no explosion.

Cross-examined by Sir H. Juta: He smelt gas coming out of the sewer near a high pressure main for several days after the explosion. Three men stayed on the spot all night. They were paid for staying all night. He never anticipated an explosion when he talked to Higgins, but he was afraid that the gas would be lighted by the "thermit," and then he would have the trouble to put it out.

Cross-examined by Mr. Schreiner: He did not find any concrete round the joint making good the crown of the sewer.

Hugh Ladell, engineer to the Wynberg Municipality, gave it as his opinion that the joint had not recently been recaulked.

Henry A. Mann, of the telephone department of the Post Office, who was called in to inspect the joint over the triple sewer on July 1, stated that in his opinion the joint had not recently been set up. Witness had long experience of setting up pipes.

Cross-examined by Sir H. Juta: He had said at the Commission that he



thought the joint had been set in a slipshod manner.

Cross-examined by Mr. Schreiner: He did not work with gas at all.

Frederick S. Sydney, in the employ of the Gas Company, who also examined the joint about eight or nine days after the explosion, gave it as his opinion that the joint had not been set up recently.

Cross-examined by Mr. Searle: He was asked to look at the joint a few days after he joined the Gas Company. He only saw the one joint.

Elias Lederman, in the employ of the Gas Company at the time of the explosion, stated that on the evening before the explosion he was sent to the corner of Shortmarket-street and Adderley-street. Mr. Humphreys told him to watch the box all night, and to see that no one struck a match in the vicinity. He did not see anyone resetting the joint over the high-pressure main.

Carl September, another employee of the Gas Company, said he was one of the boys who set up joints, and that the night before the explosion he came from Orange-street to Adderley-street, where the ground was opened up at the corner of Strand-street. Witness ran into a shop when the explosion occurred. The night of the explosion witness acted as watchman. Witness washed the joint for the commissioners who inspected it.

Cross-examined by Sir H. Juta: Mr. Humphreys went into the trench between nine and ten o'clock the evening of the explosion.

Jafta Sombaba, who was working for the Gas Company at the time of the explosion, said he was sent from Hatfield-street to Adderley-street the morning before the explosion, and worked opposite Lennon's for a leak, but failed to find one. Witness did not set up the joint, nor did he see anyone do it.

Cross-examined by Sir H. Juta: On the Tuesday night, when he left, he could not see the whole of the pipe, but he saw it the first thing on Wednesday morning.

John Hill, formerly a labourer in the employ of the Gas Company, said that the night before the explosion he extinguished the fire at the cable box. Witness was also watchman on the night of the explosion and carried out the instructions from Mr. Humphreys, "to let no one go down the hole." If there had been any recaulking of the joint he would have heard it.

The evidence of William Arnott, taken on commission, was then read.

Sir H. Juta, K.C., said the Gas Company had no statutory power to lay mains, that the sewers and streets were vested in the Town Council, and its permission had to be obtained by the Gas Company when a main was laid.

In these circumstances the doctrine of *Rylands v. Fletcher* would apply. The Gas Company had brought a dangerous thing (gas) into Adderley-street, and it had to keep it from escaping and doing damage, at its peril. Counsel quoted on this point: *Eastern South African Telegraph Company v. Cape Town Tramway Company* (App. Ca., 1902); *Batcheller v. Tonbridge Gas Company* (17 T.L.R., 577); and *Midwood v. Mayor of Manchester* (1905 2 K.B., p. 597).

The explosion was caused by gas escaping into the sewer. The Town Council was negligent in allowing the sewer to be there unventilated in spite of warnings, and the Gas Company in allowing the gas to escape and in laying the main as it did. It was not necessary to prove a joint act of negligence, in order to recover damages from the defendants. Counsel then quoted: *Newman v. East London Town Council* (12 J., 61); *Pollock on Torts*, 2nd Edn., p. 407; *Lynch v. Mudin* (1 Q.B., 29); *Sullivan v. Screed* (1904 Ann. Dig., 264); *Clark v. Chambers* (3 Q.B.D., 327). To show the Town Council's breaches of duty he quoted Sections 127, 133 of Act 26 of 1893; Section 20 of Act 23 of 1897; *O'Shea v. Port Elizabeth Town Council* (12 Juta, 146); and *Solomons v. Stepney Borough Council* (1905 Ann. Dig., 222).

If a joint act of negligence was necessary to fix liability on both defendants, then he said there was a joint negligence in laying the gas main through the crown of the sewer. The Town Council must have known how it was laid, because traffic must have been diverted to lay it; also permission was given to lay it from Woodstock to the Docks, and Arnott said the Clerk of the Works knew how it was laid. Cairncross, the late City Engineer, said he could not have known it, because he would never have allowed it, and yet gas mains were laid through the bodies of many other sewers. The Town Council knew also that it was dangerous to lay a main through a sewer, because it had had numerous other explosions, where gas leaked into sewers. There was no contributory negligence in using the "thermit" process. The damages claimed were £1,044 for repairs, £2,033 for loss of profits, £250 for damage to the rails since the explosion by subsidence of the soil.

Mr. Schreiner (for the Town Council): This is an action under the *Lex Aquilia*. It refers to an accident for which the Town Council was not responsible. There was no *culpa* on our part. If negligence be urged against us, we say that the accident was not due to our act or default, but to the act of the Tramway Company. Their act was the direct and immediate cause of the accident. If we did not know anything

about the conditions which produced the accident surely we are not the *causa causans*. The direct cause of the accident was the gas made by the Gas Company. The immediate cause was the ignition of this gas, and that was the fault of the Tramway Company. All that can be said against us is that we did not fill up the sewer. It is not contended that if the sewer had been in use that we should have been liable. That is not on the pleadings, nor does it appear on the evidence. Without legal *culpa* there can be no responsibility. Legal *culpa* must arise either positively or negatively. As to the former see *Clark v. Chambers* (3 Q.B.D., 330). As to the latter our authorities draw a distinction between what *may* be done and what *must* be done. There can be no *culpa* in case of a mere permission to do a thing. All *culpa* implies either an unlawful act or a failure of duty. No statutory obligation was cast upon us to fill up the sewer. As to authorities see *Jordaan v. Worcester Municipality* (3 C.T.R., 195), and the *Liesbeck Municipality v. Partridge* (4 Juta, 300). There no duty was cast upon the Municipality. Also *Catheart Divisional Council v. Hart* (9 Juta, 80). There a duty was cast upon the Divisional Council to keep roads in repair, but in one of the two cases the Council was held not liable because the accident did not arise from its act. Also *Kimberley Town Council v. Van Niekerk* (1 Ap., 101), *Reed v. De Beers' Mines* (9 Juta, 370), *E. and S.A. Telegraph Company v. Cape Tramways* (10 C.T.R., 72). It has been argued on the other side that these cases have been in a sense overruled by *Rylands v. Fletcher* (3 H.L., 330, and 86 L.T., 457 and 461), but in the case of *E. and S.A. Telegraph Company* it was shown from Voet (9-2-16), that injury must arise from an act or a default of the defendant; *Rylands' case* was discussed in *Parker v. Reed* (21 S.C.R., 496). A man is not responsible for any evil done to others by the use of his own property save in the case of *culpa*. If the doctrine that in the absence of *culpa* a man is an insurer for the results of his acts be English law, I say that it is not the law of this country, and that *Rylands v. Fletcher* is not in accordance with our law. See Voet (9-2-16), Grueber on the *Lex Aquilia* (p. 208, 209, where he discusses Chapters 1 and 3 of that law). I submit that our authorities and our case law show that if damage arise to another (1) it must be owing to the act of the defendant, and (2) the damage must be *incontinenti*, i.e., a direct result of the act. See *Harrison v. S. Pancras Vestry* (43 L.J., 137). This was a stronger case than ours, for there the overflow from their own sewer caused the damage. It has been argued that the duty of filling up this sewer

was cast upon us by Act 23 of 1897, but we had power under Sec. 133 of Act 26 of 1893 to construct new sewers, and surely were then entitled to discontinue the use of the old one. It is admitted that the disused sewer was in proper repair. See judgment of Alverston, L.J., in *Lambert v. Mayor of Lowestoff* (84 L.T., 237). This is quite a parallel case. Here it is contended that the Town Council is liable for a nuisance; but see *Midwood v. Manchester Municipality* (93 L.T., 525). There a duty was cast upon the Corporation to make compensation for nuisance; but that is not the present case, we did not commit the nuisance. We did not bring gas into our sewer. We are not gas undertakers. See Pollock on Torts (p. 474, 5th edition), citing *Smith v. Boston Gas Company* (129 Massch. Rep. 318), and *Parry v. Smith* (4 C.P., 325, for 1879). See also *Newman v. East London Municipality* (5 C.T.R., 41), cited on the other side. There it was held that the Municipality was liable for the acts of its contractor. Persons cannot be held liable, save for their own acts or those of their servants or agents. See also *Hill v. New River Company* (9 B. and S., 303, and 18 L.T., 55). This was a case similar to *Newman's* but here the Company alone was held responsible. In *Newman's* case possibly the contractor might have been held liable had he been sued. See also *Box v. Jubb and Another* (4 Ex. D., 76, and 48 L.J., Ex. 417), cited by Pollock with other cases (p. 464, 5th edition). As to joint tortfeasors, there must be separate actions for separate acts, *Clark v. Lindsay* (88 L.T., 198). In the judgment on exceptions (16 C.T.R., 247) it was held that if the allegations of paragraphs 5 and 6 of the declaration were proved the declaration was not open to exception; but they have not been proved. *Lynch v. Nurdin* (1 Q.B., 29, and 10 L.J.Q.B., 73) has been cited on the other side, but see Pollock (p. 41). There the cart and horse were the direct cause of the injury, but not so here. *Batchelor v. Fortescue* (11 Q.B.D., 474 and 84 L.T.), also cited for plaintiffs, is not in point; so also *Ballard v. Tomlinson* (29 Ch.D., 115, and 54 L.J., 454). We were under no obligation to fill in the sewer; then how could we be compelled to do so? *Picton Municipals v. Geldert* (69 L.T., 510) and cases there commented on. As to the remoteness of damage, damage must be capable of being foreseen.

[Buchanan, J.: This is not a question of foreseeing or of contemplation, but of the closeness of connexion between the tort and its result.]

But see the judgment in *Newman's* case. We did not want gas in our sewer. The whole case is founded on the supposition that the Council had something to do with the laying of these mains.

As to contributory negligence, see the "Bernina" (56 L.T., 258). On this case see Pollock (412 and 414, 3rd edit.). The Tramway Company was the direct and immediate cause of the explosion, and therefore cannot recover.

As to damages, that is chiefly a matter of fact and must depend on the view taken of the schedules submitted. Consequential damages, however, are not usually admitted, *Wesleyan Church v. Eayrs* (12 C.T.R., 147).

[Counsel proceeded to deal with the evidence as to the income of the Tramway Company and other matters of fact.]

Mr. Benjamin (for the Gas Company): I abandon the point raised as to joinder of parties. The points with which I have to deal are purely matters of fact turning on the questions: (1) How was the leak in the main caused? and (2) by what means was the gas exploded?

[Counsel proceeded to deal with the evidence bearing on these points.]

As to negligence, it is for the plaintiffs to prove their allegations. The case of *Rylands v. Fletcher* has no application to the case. Even in England it has been held that the principles enunciated in that case must be confined within the narrowest possible limits. In support of this view, see Pollock on Torts (p. 472, 6th edit.), Bevan on Negligence (473), Encyclopedia of the laws of England (Vol. 6, p. 57 and cases there cited), *Green v. Chelsea Water Works Company* (70 L.T., 547), where *Rylands v. Fletcher* is commented on and distinguished; *Batcheller v. Tunbridge Gas Company* (84 L.T., 765). There all that the Court held was that the defendants might not pollute the water supply. That was an application for an injunction, not an action for damages. See also *Solomons v. Stepney Borough Council* (Mews' Digest for 1905, p. 222).

[Buchanan, J.: There the County Court judge seems to have held the damage to be too remote.]

That case, which is years after Batcheller's case, throws an interesting light upon it. If a wide interpretation had been given to Batcheller's case, no question of negligence would have arisen, and the County Court Judge puts the whole case on the ground of negligence. Solomon's case was an action for damages, and applies here; Batcheller's case was a Chancery case (an application for an injunction), and does not apply in this country. In any case where statutory powers are given, the person who uses those powers cannot be held liable save for negligence. *Clark v. Chambers* (3 Q.B.D., 331) and *Scott v. Shepherd* (2 W. Bl., 892) do not apply to the case of a Corporation acting under statutory powers. As to statutory powers, see Act 26 of 1893, Section 108 and 130, and 44 of 1882, Section 51.

What evidence then is there of negligence? Simply this, that our main went through a sewer! But it could not have been carried across the street in any other way, if it was to be laid at a safe depth. As to what is a safe depth, see a case referred to in the "Journal of Gas Lighting" for June, 1903. At the time of the accident the main was 3½ feet below the surface of the road, a perfectly safe depth, but they would not have been at a safe depth had we laid it above the sewer.

[Buchanan, J.: Why could you not go under the sewer?]

That would have been yet more dangerous, as the gas, in the event of an escape, might have ascended into the sewer.

[Buchanan, J.: It amounts to this, that if you cannot do a thing without danger to the public you have no business to do it at all.]

We are acting under statutory authority. Various Acts to which I have already referred provide for the introduction of gas into Cape Town. Then, even supposing that there was negligence in taking a gas main through a sewer, whose negligence was it? We did not know that the sewer was unventilated, and we used the most perfect form of pipe joint known in carrying the main through the sewer. I submit that the leak did not take place at the spot where the main crossed the sewer, but elsewhere, probably at Logan's corner. If there as negligence, the Town Council are far more to blame than we are. As to joint liability, see *Newman v. East London Town Council* and *Hill v. New River Company* (9 R. and S., 303)—Pollock (451—6th Edition). The distinction has been pressed on behalf of the Council that a body acting under statutory powers is not liable for non-feasance, but only for misfeasance. But here the Council has been guilty of misfeasance. If they did not themselves construct the sewer, they too over and adopted a badly-constructed sewer, they converted it into an air-tight chamber, where the gas accumulated, and they sealed up all the connections with private drains and every other aperture which could afford ventilation. As to the claim for damages, I cannot contest the claim (a) (damage to the line), but the damages claimed for the falling off of the traffic are certainly excessive.

[Counsel proceeded to argue on the facts regarding damages, as disclosed by the schedules of accounts put in by plaintiffs.]

Mr. Schreiner (in reply to Mr. Benjamin) confined himself chiefly to the question of joint liability. The declaration claimed from the defendants "jointly or one or other of them." Hence the liability of the Gas Company does not involve that of the Town Council. At most we were only guilty of

non-feasance by not filling up our sewer, and I have not heard a single argument yet to show we were bound to do so.

Sir H. Juta (in reply): The main fallacy of the argument on behalf of the Town Council is that they had no control over the Gas Company. But they had, and Mr. Benjamin has clearly shown that the Council is the employer and the company the agent. The Council lights the streets through the company, and therefore many of the cases cited for the Council are not in point. The next point urged on behalf of the Council was that they were not guilty of misfeasance, but only (at most) of non-feasance; but many of the subtle distinctions drawn between misfeasance and non-feasance are neither law nor common-sense. O'Shea's case shows that by adopting this sewer, and failing to keep it in proper condition, the Council have rendered themselves liable. By statute they were bound to ventilate the sewer, and they not only fail to do so, but carefully close up all means of ventilation, and then bring gas into dangerous proximity to this closed sewer. The correspondence between the Council and the company in June, 1891, shows that the Council exercised control over the company, and were fully alive to the danger of gas getting into unventilated sewers.

[Counsel proceeded to discuss the case of *Rylands v. Fletcher* and many of the cases cited on the other side, and concluded by dealing with the question of damages.]

Buchanan, J: This case has lasted for a considerable time, and has been thoroughly thrashed out. The evidence has been fully given, and a number of authorities have been cited in argument, and I therefore do not think that it is necessary for me to take time to consider my judgment. It appears from the evidence that, in olden times, in Cape Town a so-called canal ran down the street now known as Adderley-street; and that from time to time this canal was covered over either by the old Municipal authorities or by the present Town Council. According to Dr. Gregory's evidence this seems to have been done in sections, thus converting the canal into a covered sewer. This sewer was extended to the sea as from time to time Adderley-street was lengthened out over reclaimed land. For many years this closed canal was used as a sewer. In 1897 the Health Officer of the Colony was requested to report on the state of the sewers of Cape Town, and after his report was received and adopted, the Town Council used this sewer only as a storm-water drain. Later on the Council constructed a new storm-water drain and sewer and in so constructing this new sewer they intercepted the old drain at

the upper end of Adderley-street, and also lower down they intercepted the triple sewers as they have been called, which formed the communication between the old sewer and the sea. By so doing they closed off the old sewer and made it an underground chamber. In 1891, while the sewer was still being used, the Gas Company laid a high pressure gas main across triple sewers, at the lower end of the main sewer and in so doing cut through the crown of these sewers with their pipe. After the new sewer had been completed, the Town Council officials built a wall at the upper end of the now unused sewer, near what is known as Cartwright's corner—a wall which completely shut off the lower part of the sewer from the upper part. This was done some three weeks or so before the explosion took place. This sewer so shut off had, it is true, some man-holes, but they were closed up and cemented. Unfortunately on the 13th June, 1905, an explosion took place in this sewer. I have no doubt, after hearing the evidence, that the explosion was not of sewer gas, or of any other gas except coal gas, and the question is, how did this coal gas get into the sewer? The weight of evidence, I think, points to the fact that the principal source from which this coal gas got into the sewer was from the high pressure main which crossed the crown of the triple sewers at the lower end of the street. The question we have to consider is: Who is answerable for this explosion? Was the explosion merely an accident, an uncontrollable accident, or was it due to negligence of either or both of the defendants? The defendants (the Town Council and the Gas Company) have been joined in this action. An exception was taken on the pleadings and argued before another branch of this Court before the trial as to whether this joinder of the two defendants was permissible or not under the circumstances disclosed in the declaration. The Court held that the joinder on the allegations of the pleadings was permissible, and this judgment was not appealed against, and must now be held to bind the parties to the suit. In actions for tort the complaint more frequently is, not that those who contributed to the wrong are joined, but that other tortfeasors are not joined in the action. It is true that the plaintiffs had the option of suing alone one or more of the alleged wrong-doers. It is quite possible if they had adopted this course and brought actions against the two defendants separately that the Court would have ordered the two actions to have been consolidated for the purpose of saving expense, or at any rate that the hearing of the two actions should be taken at the same time. In this case I do not



see how any injustice is done to either defendant in joining them in one action I am not going to re-open the question of misjoinder. It is true that the counsel have contended that the point upon which the Court went in dismissing the exception of nonjoinder, was that the allegations in the declaration alleged a joint act of negligence by both defendants as the cause of the explosion. I am going into the facts presently, and if there was such a joint action there can be no doubt that the defendants were properly joined. But on the authorities I am inclined to go a step further, and say that if two interconnected acts are done by two different defendants, and they together result in damage to the plaintiffs, though these two acts are done by each defendant independently of the other, still if they are so interconnected as to combine to cause injury, then there is no wrong in joining both defendants in one action. However, I am not now going to re-open the question of misjoinder, but shall leave that matter, if the parties are dissatisfied with my decisions, to be taken to a higher Court. The explosion having taken place, the first point to be considered is: Was the explosion the result of an accident, or was it the result of negligence? For I think that to found these cases there must be negligence on the part of the parties who are brought into Court. A point has been argued as to the application of the principle laid down in *Rylands v. Fletcher* to this case. The principle of *Rylands v. Fletcher*, as I understand it, is this, that a person who makes an unnatural use of his property and brings on to his property material that may be dangerous to others is answerable for the material so brought if it escapes and causes damage. *Rylands v. Fletcher* was discussed in what may be termed the leading case of this Colony, the case of the *Electric Cable Company*, which went on appeal. Though some misconception of the remarks of His Lordship the Chief Justice in his judgment in this Court as to full application of the doctrine laid down in *Rylands v. Fletcher* to our law, appears in the Privy Council decision, there does not seem to me to be any real disagreement in principle. If the ground of the decision in *Rylands v. Fletcher* be stated in its broadest terms, then on that ground alone there may be good reason to hold the defendant Gas Company liable, as the gas which caused the explosion was brought on to the spot by them. But I think there is clear evidence of *culpa* or negligence on the part of both defendants. The Gas Company had no statutory authority to bring the gas into the streets of Cape Town; but they cannot be said to have brought it there unlawfully. The streets

were under the control and management of the Municipal authorities, and I think, looking even at Mr. Cairncross's evidence, it is impossible to hold that the Gas Company brought the gas into Adderley-street and across Adderley-street otherwise than with the knowledge, consent and permission of the Town Council. I also, from Mr. Cairncross's own evidence, come to the conclusion that the gas main, when carried across Adderley-street, was placed through the crown of the triple sewers, with the knowledge, consent and permission of the Town Council. There was some dispute between the Gas Company and the Town council at the time, but Mr. Cairncross, in his evidence, would indicate that this laying of the mains through the crown was not objected to and was not against the wish of the Town Council. One thing that was remarkable is, that Mr. Cairncross says that he does not know who gave the consent, or superintended the work being done in this particular instance. He had other things to do, but he had a clerk of the works, and as we have seen, it was this clerk of the works who signed the written consent which was the only document which could be produced by the Town Council. Permits were constantly asked for, according to Mr. Arnott, whenever the streets were to be opened and were constantly given by some one or other Municipal official. It is shown that there was no record of such permits kept. The record should be kept, not by the plaintiffs in this case, but by the Council themselves, and I think on the facts that permits were given of which no record was made. Mr. Cairncross says that the general permit which was granted was signed by his assistant, who had just been appointed, and he goes on to say: "My instructions were that where gas pipes had to be taken through the masonry of sewers the mains were to be enclosed in concrete or cement." In the face of this, it is impossible to hold that the officials of the Town Council in 1891 did not know that the mains were being taken through the crown of the sewers, or that this was done against the wishes of the officials of the Municipality. "There were many places in Cape Town," Mr. Cairncross goes on to say, "where it was impossible for the sewers to have escaped being touched by the mains. The sewers were so near the surface that the pipes could not get cover without cutting into the masonry of the sewer." And he says further: "I saw no objection to that gas main coming through the brickwork of the arch of the sewer, taking everything into consideration, on the assumption that it was properly masoned at the sides and at the top." The utmost that can be said is this, that Mr. Cairncross wished when the mains



cut through the sewers they should be properly masoned at the sides and top, and I think it is quite possible that the Clerk of the Works saw what was done, and, according to what Mr. Arnott says, approved what was done, so that whatever was done was done with the permission and consent of the Town Council. Now, the high pressure main, which crossed at the lower end of Adderley-street, had, where it crossed the triple sewer, near the centre of the triple sewer, a joint between the pipes. Taking all the evidence—that of Mr. Cairncross, Mr. Craig, Mr. Stainthorpe, and even the present engineers for the Town Council, Mr. Cook, Mr. Jeffreys and Mr. Wynne Roberts—the engineers and experts, after having seen the main, after having seen the way in which it crossed the crown, after having seen the joint, are unanimous in holding that this was the place at which the escaping gas was fed into the sewer. The question is: Was this way of laying the main through the brickwork of the crown of the sewer, a proper way of laying the main or not? Here again the leading engineers both for the plaintiffs and the Town Council are of one opinion. Mr. Stainthorpe says that the laying of the main in this way was absolutely wrong. Mr. Craig agrees with him. Mr. Cook (the City Engineer) had no idea that the main cut through the sewer. Mr. Perkins is one of those who, when the new sewerage works were made, joined Mr. Rigby (the Town Drainage Engineer) in the "crusade," as he calls it, against removing the mains from the sewer. Why should this crusade take place if it was not an improper thing? He also goes on to say that they have taken care in the new works no gas mains cross or intersect any sewers at all. This was done before the explosion, and it points to the fact that the laying of the mains through the sewers was improper. The fact that these mains ran through the crowns of the sewers, or through the sewers, was known to the Municipality long before the explosion is, I think, clearly evidenced by Dr. Gregory's report, which he made to the Town Council, which they accepted, and to which no objection was taken. In this report he pointed out clearly to the Town Council that "a far more serious result than the bad state of the sewers is that water and gas mains have in places to pass directly through the body of the sewers." As to these sewers, it is not shown that they have passed through what is called the body of the sewers, but it is shown that being cut through the crown of the sewer they were connected with the body of the sewer, though they did not decrease the size of the sewer. "Such a thing is undesirable in case of gas mains, but with water mains it is a most improper proceeding, and for obvious reasons it should not be allowed to continue." Dr. Gregory, in

so reporting, was no doubt actuated solely from a health point of view, but the other engineers, when they knew of it, condemned it as an unsafe proceeding. Mr. Cook said if he had known of this he would have had the main up at once. I think his language is very strong on this: "Had I known that there had been a gas main running through the triple sewers, I would have had it got out long ago. I would also have had the sewer filled up. It was a very improper and dangerous state of affairs whoever was responsible." Now, here is a strong condemnation by the City Engineer. Of course, there is this excuse for the present city engineers, that the town has grown, the work has increased and has been divided between several different engineers, one having to look after the streets, another to look after the water, another the drains, but the fact that the present engineers, who have recently been appointed, did not know of the existence of what was done by the Council a number of years ago does not excuse the Council from any consequences resulting from their acts in the past. Here the Council have allowed this improper thing to go on and it has resulted in damage. When the main was placed across the sewer the sewer was in use. It was open at both ends. One of the witnesses says that in consequence of the use of this sewer there would necessarily be some ventilation through the sewer and the danger would be minimised. But the cutting off and closing of the drain made it, as Mr. Stainthorpe called it, an underground gasometer. It was not only closed at both ends, but all manholes were closed and cemented over, and absolutely no ventilation left. This clearly was a most dangerous and improper proceeding on the part of the Council. The act of the Gas Company was in bringing their gas to the sewer and the act of the Town Council was in allowing the gas to be so brought, and then in closing in the sewer and allowing the gas to collect therein without possibility of escape. The danger was certainly minimised as I have said, while the sewers were open, but it seems when once the sewers were closed the danger was rapidly increased, and led to the explosion which resulted in this action. I am, therefore, unable under such circumstances to find that the explosion which resulted was a pure accident, one which could not have been anticipated, and which arose from causes not under control. The Town Council had also, from other explosions which took place in other sewers in Cape Town, a warning before this accident that gas would collect in underground chambers, and when these chambers were not ventilated, and that there was considerable danger arising therefrom. Some of these explosions took place even in ventilated sewers, but in this sewer there was absolutely no ventila-

tion of any kind. Both defendants had further pleaded that even if there was negligence on their part there was contributory negligence on the part of the plaintiffs in this case in that the plaintiffs, in welding the tramway joints in the way they did, did that which was the immediate cause of the explosion. Now, I have gone carefully through the evidence and listened carefully to the arguments of counsel to ascertain whether I would be justified, as a juror, in saying that there has been contributory negligence on the part of the plaintiffs. I must say I cannot hold there was such contributory negligence. The plaintiffs did what they were perfectly entitled to do, and what they were allowed to do with reference to the joining of their rails. They had authority to lay their tram rails along the streets of Cape Town, and when those tram rails were laid they had joined the ends of the rails by what is called the "Thermit" process. This process was that by means of a mixture to melt iron filings, which molten metal was run into a mould in which was contained the ends of the two rails. The metal thus united the rails, so that they became right through the whole length and breadth equivalent to a continuous rail. The Tramway Company had been "running," as it is called, these joints all the way along their rails. They had done so for some months in all the joints in Adderley-street, and on the very morning of the explosion they had run a joint very near the spot, at the other end of the rail from the one which they were running at the time the explosion took place. This was done in the open air on the surface of the street, and an expert like Mr. Juritz, the Government Analyst, says that though this melting of the iron for the purpose of running the joint was of such a nature that it would cause gas in the immediate neighbourhood to ignite; still that gas on the surface of the ground would dissipate very rapidly, and it would not be anticipated that there would be any danger in running the joints on the surface of the road. It is only common sense to say that it is a very different thing to run joints on the roadway, in the open air, from a person taking a lighted candle into a room if he knew gas was escaping in the room, and thus causing an explosion. The only negligence which is alleged against the Tramway Company is the fact that there was a strong smell of gas at the place, but there was nothing to indicate to the Tramway people either that the smell came from any concealed gasometer under the earth. There was nothing to indicate the existence of any such gasometer, and all the experts say that the molten metal used for running the joints could not possibly run through

the ground so as to communicate with the sewer down below. One of the experts said that there must be an actual aperture, communicating with the gas down below before any ignition of the gas on the surface could be communicated to the gas in the sewer. If the gas was escaping through the earth or through the sand and was ignited on the surface, the flame would not go through the ground to where the gas came from, unless there was an aperture, a connection by air, allowing the ignited gas on the surface to run down into the collected gas in the sewer below. There is nothing to indicate to the Tramway Company the existence of any such open-air connection, or that any danger existed. That the explosion might have been caused by any other person is shown by the fact that, even before the running of this joint, the gas was seen at another part of the street actually burning on the surface. The Gas Company's servants had seen this, and they were working near the spot at the time, and one of them—Mr. Humphreys, I think it was—said this gas might have been lighted by a spark from the pick in opening the ground. The Gas people were working at the place at the time the explosion took place, they were working there before the explosion, and yet they did not consider the escape of gas was of any such importance as to induce them to warn or stop the Tramway people from running the joint. A piece of metal was shovelled up and has been shown in Court, but from what has been said and from the fact that the joint was properly run, I am not clear that this metal had anything to do with the running of this particular joint. But I am certain of this, that even if that metal had escaped from the mould around the joint and had penetrated the earth a depth of a foot or so, which I don't see how it could have done, it could not have ignited the gas in the sewer unless there had been a direct connection by means of an aperture between the sewer and the earth. The Tramway people were doing what they had done safely all along, there was no reason to expect any results at this particular spot; they were running this joint by the aid of skilled workmen, it was done in the usual way; the mould was made in the usual way, and I cannot lay hold of any fact upon which to find that there was such contributory negligence on their part as to justify me in refusing to give them compensation for the damage they have suffered. Summing up briefly, I think in this case it has been shown that there has been negligence on the part of the Town Council and of the Gas Company, that there has been no contributory negligence on the part of the Tramway Company, and consequently that they are entitled to

damages for loss they have suffered. The question is, what damage have they suffered? They claim under three different heads. The first is the sum of £1,044, which they allege it has cost them to replace the rails which have been blown up by the explosion. This amount is not seriously contested, and judgment will be entered on prayer (a) for the sum of £1,044. The second is for the sum of £2,033, which is arrived at in this way. They allege that in consequence of this explosion their communication was cut off along Adderley-street and they lost the profits which they would have earned by carrying passengers, and they also incurred other expenses in the supervision of traffic. The amount of £2,000 is arrived at by comparing the amount taken by the Tramway Company in the same period in the previous year with the amount which they took in this year. This I do not think is a basis upon which I can act in this case for several reasons. One is the traffic is likely to be disturbed by the state of the weather; another is all through the six months both before and after this particular month in which the accident took place the takings of the Tramway Company during 1905 were month by month considerably less than the takings of the Tramway Company in the same months of the previous year. Then again it is a question how far traffic might not have been reduced by dislocation of the service in other places besides Adderley-street. But I am forced to the conclusion that the Tramway Company had suffered some additional expenses of management of its business through this interruption and I am also of opinion that they did suffer some loss of traffic on this account. The month previous to the explosion the tramway traffic had been interrupted by the action of the Tramway Company themselves having to lay down fresh rails and this may have affected their takings and naturally would have affected their takings if there had been no explosion at all. Comparing the four weeks it took to repair the consequences of the explosion, with the four weeks immediately succeeding the explosion, there is no doubt an increase of money was taken by the Tramway Company in the succeeding four weeks when the line had been re-opened. The money taken by the Tramway Company after the explosion during the months of July and August was certainly less, considerably less, than the amount of money taken by the Tramway Company during the months of July and August in the previous year, but there is no doubt the Tramway Company must have lost something by the interruption of their line. They also incurred expenses in having extra guards, etc., and having to divert the traffic in other directions.

The onus is upon the Tramway Company clearly to satisfy the Court as to what damages they have suffered. But the amount is left in this indefinite way, and I can only assess an amount which as a juror, I take it they meant at least now lost. Sitting as a juror, I think I cannot award on the second claim more than the sum of £250 as damages. Then there is under the third head a claim for £700. Some of the items making up this amount have been abandoned but one claim of £250 is insisted upon as having been sustained by reason of the sinking of the new rails which were laid after the explosion owing to the settlement of the street after the filling up of the sewer had taken place. In this case I am not inclined to think that that is a claim which can be sustained, for this reason, that the new rails were laid with a knowledge that the sewer had just been filled up. The plaintiffs knew the nature of the ground they laid their rails on the loose ground, and they could have taken due precautions so as to prevent this settlement. Moreover I am not prepared to say that the settlement could not be expected in newly laid rails, and it is one of the contingencies which would happen to the company in laying rails along the street. I, therefore, do not think they are entitled to any damages upon this third item. There is one thing I forgot to mention as evidence of negligence on the part of the Town Council, and that is the fact that their Engineer, when he closed up this underground drain, intended at the time to have it filled up. It is clear that he thought it was an improper thing to leave it unfilled and he says he intended to fill it up, when he was reducing the level of Adderley-street later on, as he thought this disused sewer would be a convenient spot in which to tip the stuff taken off the surface of the street. He said the cost of filling up the sewer was only £150. It does seem extraordinary that when the filling up could be done at such a cost it was not done. The Town Council have wisely, I think, after this explosion has taken place, learnt the lesson which it has taught them, and which they ought to have learnt before, and have filled up unused drains in other streets in Cape Town. The authorities which have been cited have been useful not so much as laying down any particular principle of law, but as illustrations of what Courts have done in other cases in which there has been damage done through misconduct or negligence on the part of the defendants. I think that taking all the circumstances into consideration, I am doing justice to the parties in giving judgment for £1044 and £250 for the plaintiffs against both defendants with costs of suit.





plaintiff, £45 being portion of the balance still in their hands towards the payment of the interest due on the bond on December 31, 1905, and credited the plaintiff with the amount. The property had not been reinstated to the satisfaction of the defendants as holders of the policy. The plaintiff was not entitled to claim payment of any portion of the balance in hand, but defendants were prepared to allow and tendered to allow the sum to be expended in reinstating the property to their satisfaction or to be deducted from the capital of the bond.

In his replication the plaintiff admitted passing a mortgage bond in favour of defendants, and that the defendants insured the property, but he said they did so on his behalf, and that they held the policy of insurance as collateral security for the amount advanced under and by virtue of the mortgage bond. It was admitted that the half-yearly interest was not paid on December 31, 1905, but the matter was settled between the parties. A fire occurred and the defendant received the sum of £207 5s. 10d. on plaintiff's behalf from the Atlas Insurance Co. On January 4, 1906, plaintiff reported the fire to the first defendant, and it was agreed between the parties: (a) that the damage done would be reinstated by plaintiff, provided the Atlas Assurance Co. agreed thereto, and (2) that from any amount which should thereafter be paid by the said company to defendants the interest then due on the bond, £45, should be deducted by defendants. The company agreed that plaintiff should reinstate the property and plaintiff authorised one Henry Rowe Rowe to assess the damage caused by the fire. On January 23 plaintiff informed first defendant that plaintiff would personally attend to the reinstatement of the property and instructed first defendant to deduct the £45 due for interest from £207 5s. 10d. A certain portion of the work was carried out under instructions from the plaintiff by Messrs. Rowe and Co., who satisfactorily completed same, in accordance with their estimate for the sum of £32 10s. The remainder of the work was satisfactorily completed by plaintiff. The whole of the work was carried out in accordance with the municipal regulations and under the supervision of the municipal authorities, and to their entire satisfaction. The defendants applied for provisional sentence against the plaintiff on the mortgage bond, on the ground of non-payment of interest of £45, but their application was refused, with costs, on July 28, 1906.

Mr. Alexander (with him Mr. Long) for plaintiff. Mr. P. S. T. Jones for defendant.

Benzion Cohen, plaintiff, stated that on the 27th July, 1903, he got an advance of £1,500 on his property, and passed a mortgage bond. A policy in

the Sun Insurance Company was ceded to the first defendant. The insurance was subsequently transferred to the Atlas Company. On 3rd January this year a fire occurred, and witness saw Mr. Gibson, and told him that he would reinstate the building when he got the insurance money, and a sum of £45—overdue interest—was to be given out of the fund. Mr. Gibson agreed to this, and plaintiff reinstated the building as it was before the fire.

Henry Rowe Rowe, for the defence, said he had recently inspected the property, and it had not been reinstated in a manner he would have passed if it had been carried out under his supervision. From the outside the building had the appearance now as if there was a fire in it last week. The reinstatement of the building was not satisfactory.

Counsel having been heard in argument, on the facts.

*Cur. Adv. Vult.*

*Postea* (June 12th).

Hopley, J.: This is a case in which Benzion Cohen sues the executors of the estate Stanford for £141 odd, which he alleges is money of his received by the executors, or by Mr. Gibson, one of them, for his benefit, and held by Gibson for him and on his behalf. The facts are that the executors of estate Stanford advanced the sum of £1,500 to Cohen, for which they obtained a mortgage bond on certain property in Vinken-lane, off Long-street, Cape Town. As collateral security they took also a fire insurance policy that was on the buildings at the time for the amount of £1,500. Thereafter the insurance was transferred to the Atlas Company, and it was taken out at that time, not in the name of Benzion Cohen (the owner of the property), but in the name of Mr. Harry Gibson (one of the executors), who, of course, had an insurable interest in the building. Cohen, however, was charged with, and did pay, the premiums, and therefore there seems to be no doubt that the insurance, although taken out in Gibson's name, was eventually, and if anything should result out of it beyond the amount for which it was security for the estate, the balance, if any, should belong to Cohen himself. Now, the whole question in this case is whether the sum of money which did come from this insurance, at present in the hands of Mr. Gibson, is now claimable or not claimable by Cohen. On the 3rd January there was a fire, and Cohen himself called in an architect, who is also very frequently an assessor (Mr. Rowe Rowe), to look into this matter, and to assess the damage. Mr. Rowe undertook the position, and the Atlas Company was represented by Mr. Mouat. These two gentlemen went very



carefully into the matter, and I think they were assisted by a practical builder, and they came to the conclusion that the amount of £207 odd was the right amount to be awarded to the insurer for the purpose of reinstating the building. That amount was accordingly paid over to Mr. Gibson, who was the only person that the insurance company recognised in this matter. Now, as to the reinstatement and the way in which it was to be carried out, there is a considerable conflict of evidence. Benzion Cohen himself says that on the morning after the fire, or on the day of the fire, he went and had a personal interview with Mr. Gibson at his office, and that he then said to Mr. Gibson that he would himself reinstate the building, that Mr. Gibson might, out of the money to be awarded by the insurance company for the fire, pay an amount to himself of £45, which was interest on the bond overdue, and that he was to pay over any balance that there was afterwards, after all expenses had been deducted, to himself, Benzion Cohen. Now, it seems to me that that interview, which is entirely denied by Mr. Gibson, who says that he did hear that Cohen called the day after the fire, but that he (Mr. Gibson) was out—the terms of that interview, as stated by Cohen, are so wholly improbable that I cannot believe that the alleged interview ever took place, or that such terms were arranged between Gibson and Cohen. I accept Mr. Gibson's evidence in preference to Cohen's on this matter. Gibson says that he said nothing of the sort, that he knew nothing of the fire until a considerable time afterwards, when Mr. Rowe, who had been appointed assessor by Cohen, came and asked him for the fire policy, and Rowe (he says) was the first person who informed him that there had been a fire. However, the matter was finally assessed, and £207 odd was paid to Mr. Gibson. Mr. Gibson swears that Cohen came to him and said that he proposed to reinstate the building himself. Gibson said that he was firm from the very start on that point, and that he would not allow it. Here again, I believe Mr. Gibson in preference to Mr. Cohen. Mr. Gibson was (he says) protecting an estate in which there were minors concerned, and he might, in his capacity under the trust, be called upon at some time or other by the minors or their guardians to account for every penny of this fund, as it was held as collateral security, and he was bound to see that the building was left in as good repair and was as valuable as it was at the time he took the bond. It was extremely unlikely, to my mind—and Mr. Gibson said it was a thing he never contemplated—that he should hand over the reinstatement to Mr. Cohen, who would, in these circumstances, have every in-

ducement to "scamp" the work, for the purpose of being able to get hold of the balance of this fund, which he might, under the circumstances, look upon as a sort of windfall. Out of the fund received by Mr. Gibson, Cohen authorised him to pay two sums of £12 12s. and £8 11s. to the assessor. Mr. Gibson says that he afterwards accepted a tender of £165 from Rowe and Co. He accepted that tender, and told Rowe and Co. to proceed with the work of reinstating the building, under the supervision of Mr. Rowe Rowe. Gibson paid under the architect's certificate £50, and afterwards £12 9s., representing the total disbursements he has made of £83 2s. The people whom Gibson had put on to do the work, with the consent of Cohen, were turned off by Cohen. The only person whom Gibson could rely upon, the trustworthy person that he felt inclined to rely upon, was the architect, who advised him that the place had not been properly reinstated. I think, under such circumstances as these, where such a balance as claimed by Cohen, the onus of proving that the place has been properly reinstated, so that he can claim from Gibson, in his capacity, any balance of moneys he holds as part of his collateral security, rests entirely upon the plaintiff. I think he has failed in that matter in the present case, and it is impossible to say that the sum of £78 13s. 10d., which now remains in Mr. Gibson's hands, will not yet be required for the purpose of properly reinstating the building. I do not think the place has been properly reinstated, at any rate it has not been proved to my satisfaction, and there must be judgment of absolution from the instance, with costs.

[Plaintiff's Attorney: L. Alexander.  
Defendant's Attorneys: Reid and Nephew.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1906.  
June 7th.

Mr. Lewis moved for the admission of Johannes Jordaan de Wet as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Robertson.

Mr. W. Porter Buchanan moved for the admission of Antonie Kock as an attorney and notary.

Application granted and oaths administered.

Mr. Bailey moved for the admission of John Truter Stroebel as an attorney and notary.

Application granted and oaths administered.

Mr. Van Zyl moved for the admission of Daniel Petrus de Klerk as an attorney and notary.

Application granted and oaths administered.

### PROVISIONAL ROLL.

LINDHIRST V. NUTTEBI AND ) 1906.  
POMLA. ( June 7th.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £24 10s., with interest from the 25th August, 1904, and costs.

Order granted.

### HAZELL V. SCHMIDT.

Mr. W. Porter Buchanan moved for provisional sentence for £126 19s. 2d., balance of a certain mortgage bond for £160, the bond having been called up; counsel also applied for the property specially hypothecated to be declared executable. Counsel added that defendant had filed an affidavit, denying that he was indebted under the bond.

Defendant afterwards appeared, and presented a written statement to the effect that he was a German farmer residing on the Cape Downs, and, although a naturalised British subject, he could not speak English fluently. He was unable to engage counsel, as his resources had been crippled, because of protracted and needless litigation.

Mr. Buchanan read an affidavit by defendant, from which it appeared that there had been a certain lawsuit between John Scott, jun., and himself. Plaintiff had acted for deponent in the matter. Defendant repudiated liability for a number of the items, but admitted that he was indebted in certain sums, and he said that the account rendered by plaintiff must be debated. He denied that he was indebted under the bond. Counsel also read an answering affidavit by Mr. Hazell, who said that the bond was passed to him so as to cover existing debts, the costs of the action Schmidt v. Scott, and for future advances. He repeated that the balance of £126 19s. 2d. was due under the bond passed by defendant.

Defendant protested against being charged with interest on the bond.

Hopley, J: It seems to be a matter rather of account than of the bond.

Provisional sentence will be refused, costs to stand over and to be mentioned when the principal case is heard.

### LIND V. EXECUTORS ESTATE CAMPHER.

Mr. Howes moved for provisional sentence on a judgment of the Resident Magistrate's Court at Oudtshoorn for £8 3s. 7d. and taxed costs (£1 17s. 11d.), and costs of the present application, and also for certain landed property at Oudtshoorn to be declared executable. Counsel added that he was instructed to move as a matter of urgency, on the petition of the executors, for leave to sell the property, a minor being interested.

Hopley, J observed that it seemed that a good deal of unnecessary costs had been incurred to recover this small debt. Judgment would be given as prayed, subject to the production of certified appointment of executors. The property would be declared executable.

Mr. Howes then moved, on the petition of the executors, for leave to sell the property for £140, in accordance with an offer, or should the offer be withdrawn, to sell by public auction. The Master, in his report, complained that the information was insufficient.

Leave was granted to petitioners to sell the property for the purpose of liquidating the debts, and for the proper distribution of the balance according to the will.

### JEFFCOAT AND ANOTHER V. PETERSEN.

Mr. Swift moved for provisional sentence on a mortgage bond for £100, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### WARD V. DU PLESSIS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £56 15s., with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for judgment for £13 19s., being balance of a certain acknowledgment of debt, with interest, due by reason of non-payment of monthly instalments; counsel asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, property executable for the amount of mortgage.

### KING V. SWART.

Mr. De Waal moved for provisional sentence on a promissory note for £137 10s., with interest and costs.

Order granted.

## MOLEVELD V. VAN ROOYEN.

Mr. Bailey moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £317 9s. 3d., together with interest and costs amounting to £10 1s. 3d.

Defendant said that he was the holder of a promissory note from another party (Mr. De Jong), and he was gradually getting money from sales of erven in the Orange River Colony. He was prepared to offer 30s. a month until things got better. Property was not very saleable at present. He was willing to cede the promissory note from De Jong to the plaintiff. He was an auctioneer. Things were so bad that he could not increase the offer.

Mr. Bailey applied for an order of £10 a month, and pointed out that defendant admitted that he was an auctioneer.

Decree granted, with costs, operation to be suspended on payment of £1 10s. on the last day of this month and of each succeeding month, at the office of Mr. Home (Worcester), and on condition that defendant cede the power of attorney he holds from De Jong to plaintiff and all rights to any proceeds from the sale of the properties of the said De Jong in the Orange River Colony, or elsewhere, by the last day of this month, plaintiff to have leave to apply for increased monthly payments.

## VAN DER SPUY V. GERLOFF.

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £2,000, with interest, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and for the rents accruing from the property to be attached by the Sheriff.

Order granted.

## MARSH HOMES V. DU TOIT.

Mr. Toms moved for provisional sentence on a mortgage bond for £900, with interest, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

## PHILLIPS V. RHOODIE.

Mr. J. E. R. de Villiers (for plaintiff) moved for the discharge of the provisional order of sequestration against defendant.

Provisional order discharged.

## OHLSSON V. COHEN.

Mr. W. Porter Buchanan appeared for plaintiff; Dr. Greer was for defendant.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £5,000, together with interest at 6 per cent. per annum reckoned from July 1, 1905, the bond having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Affidavits were read, from which it appeared that defendant had had a bottle store in Long-street, and had had an interest in the Mechanics Hotel, Harrington-street. Defendant said that the bond was granted to him in January, 1903, for a period of five years, the consideration being that he bound himself to deal with Ohlsson's Cape Breweries exclusively for Colonial beers for 30 years. A complicated series of transactions in reference to the bottle store and the Mechanics' Hotel was set out in defendant's affidavit, the main point of which was that plaintiff had agreed to place interest due against a certain promissory note for £670, held by plaintiff, from one Clarke. This note had originally been given by the purchaser of defendant's share in the Mechanics' Hotel. Clarke was now the proprietor of the Mechanics' Hotel. Affidavits by plaintiff and others were read to the effect that the interest was overdue, and that no such arrangement had been entered into as that described by defendant. Plaintiff said that he advanced the money personally, and that the company had no interest whatever in the sum of £5,000, or the interest due thereon.

Dr. Greer having been heard in argument on the facts,

Hopley, J.: The only defence to the plaintiff's claim is that the interest is not in arrear, and, therefore, no breach of the conditions of the bond has been committed. The defendant to show that the interest is not in arrear, does not produce any evidence of money payments directly on behalf of himself or interest, but he brings in a promissory note which arises out of another portion of his business, a public house in which he had an interest. This promissory note was given by one Isaac Israel, when he purchased the defendant's interest in the house. That note has been lodged, not with Anders Ohlsson himself, but with the company, of which he is managing director, and presumably a large shareholder. The whole question seems to me to be whether that promissory note was ever taken by Anders Ohlsson in his individual capacity and held by him as security or in payment for any interest accruing out of this mortgage bond. There are voluminous affidavits and numerous contradictions. I have to consider in a case like this whether it looks, as far as the documents

before me at present go, where the probable success would be if this matter went to an action. Looking upon the documents as they at present stand and the affidavits as they are, and the value to be attached to them, I come to the conclusion that this is a case in which I ought to grant provisional sentence. One can only look upon this bond as a bond belonging to plaintiff's private estate, and made by him out of his private funds. Clearly the interest on this bond for £5,000 is in arrear; nothing has been done by the defendant to meet that interest, and therefore there has been a breach of the conditions of the bond and provisional sentence must be granted as prayed, with costs.

Mr. Buchanan then moved in the matter of Ohlsson's Cape Breweries v. Leopold Cohen for provisional sentence on two promissory notes for £300 and £200 respectively, less £70 paid on account, and for interest.

Dr. Greer applied for a postponement for a week to enable defendant to file affidavits.

Mr. Buchanan opposed the application on the ground that the case had already stood over for a week for that very purpose. At the very least, he contended, defendant must pay wasted costs occasioned by the postponement.

The case was ordered to stand over until next Thursday, defendant to pay wasted costs, and to file affidavits on or before Saturday next.

### ILLIQUID ROLL.

NATIONAL BANK V. BOOSE. { 1906.  
June 7th.

Mr. Sutton moved for judgment under Rule 329d for £40 10s., rent due, with interest *a tempore morae*, and costs of suit.

Order granted.

INSOLVENT ESTATE PRINCE V. AFRICAN METHODIST EPISCOPAL CHURCH.

Mr. J. E. R. de Villiers moved for judgment under Rule 329d for £667 8s., balance due under a certain building contract, with interest and costs.

Order granted.

HUGO AND ANOTHER V. OLIVIER.

Mr. P. S. T. Jones moved for an order declaring the respondent of unsound mind and incapable of managing her affairs and appointing a curator of her person and property. Counsel read affidavits by the respondent's medical attendants, and the *curator ad litem*. In answer to the Court, he said

that it was proposed later on to send respondent to a suitable home in Holland or France.

Hopley, J., said that he could not consent to the removal of the respondent away from her home in that way. An order would be granted declaring respondent of unsound mind, and appointing Jacobus P. Hugo (uncle of the respondent) and Andries Philippus Olivier (her brother) as curators of her person and property, with power to sell movables.

DU TOIT V. ROYTOWSKI.

Dr. Greer moved for judgment under Rule 319 in default of plea, in terms of declaration for two sums of £99 9s. 3d., and £24 15s. Defendant had been given leave to file a plea, but he had not taken advantage of the opportunity granted to him by the Court.

Order granted.

### GENERAL MOTIONS.

KILLINGSWORTH V. KILLINGSWORTH. { 1906.  
June 7th.

Dr. Rainsford moved for a decree of divorce in default of compliance by plaintiff's wife with an order of restitution of conjugal rights. Defendant was in England, and a passage ticket had been offered to her, but she had refused to accept the same, as she did not intend to make use of it.

Decree of divorce granted, as prayed.

*Ex parte* ROUX AND OTHERS.

Mr. Van Zyl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* ABRAHAMS.

Mr. Van Zyl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* ESTATE CAROLUS.

Mr. Lewis moved for a certain rule *nisi* to be made absolute, authorising cancellation of a lost mortgage bond.

Order granted.

*Ex parte* ESTATE KRUMMECK BROS.

This was an application by certain creditors of the insolvent estate of Krummeck Bros., calling upon A. N.

Foot, as *curator bonis* in the estate, to show cause why Abraham R. Truter and Edward William Rice should not be appointed joint trustees, or, in the alternative, A. R. Truter be appointed sole trustee. Mr. Lourens appeared for applicants; Mr. M. Bisset was for respondent.

It was stated that Mr. Foot was a member of the firm of E. R. Syfret and Co., of Cape Town, and the assets were at Beaufort West. The Cape Town creditors desired that Mr. Foot should be appointed to represent their interests. Mr. Truter was an attorney residing and practising at Beaufort West.

Having heard affidavits and counsel,

Hopley, J., appointed Messrs. Truter and Rice as joint trustees, and directed costs to come out of the estate.

#### *Ex parte* ESTATE STANTON.

Mr. Douglas Buchanan moved, as a matter of urgency, on the petition of Henry Richard Wood, M.L.A., of Graham's Town, and Pyott, Limited, of Port Elizabeth, for a certain final order of sequestration of the estate of Arthur John Stanton to be set aside. The final order had been granted by the Eastern Districts Court, and the reason of urgency in the present application was that an offer had been made of a composition of 5s. in the £ on behalf of Stanton, provided the final order was forthwith set aside.

Hopley, J., said that he did not feel disposed at present to grant the application. The application was altogether outside the Insolvent Ordinance, and it was sought to interfere with an order granted by another Court. He would, if counsel desired, consult his brother Judges in the matter, but he could not grant an order at present.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon Mr. Justice HOPLEY.]

*In re* INSOLVENT ESTATE { 1906.  
STANTON. { June 8th.

Mr. Douglas Buchanan mentioned this matter, which was an application, on the petition of H. R.

Wood, M.L.A., of Graham's Town, and Pyott Ltd., of Port Elizabeth, to have a final order of sequestration, granted by the Eastern Districts Court in the estate of Arthur John Stanton, set aside.

Hopley, J., declined to interfere, and advised counsel that the application should be directed to the Eastern Districts Court where the order was made. No order would be made on the application.

#### LOUW V. LOUW.

This was the return day of a summons calling upon Nicholaas Everhardus Louw, at the instance of his wife, to show cause why he should not be declared insane and incapable of taking care of his person and managing his affairs, and a curator appointed, with power to sell the movables for the maintenance of Louw and his wife, the present plaintiff, Classina Johanna Louw, of Somerset Strand; W. Roux appeared as *curator ad litem*.

Classina Johanna Louw, wife of the defendant, said that she had formerly resided with her husband in the Calvinia district, where he had carried on farming. In 1904 they removed to Somerset Strand, where her husband's condition had become worse. An action had been commenced against defendant by one Sampson. Witness would be able to look after him while he remained at home. She suggested that Mr. H. A. Fagan, of Somerset West, should be appointed curator of his property.

Dr. Waldron, of Somerset Strand, said that some time ago he attended the defendant and found him utterly unfit to manage his own affairs. Defendant was about 72 years of age. At present defendant was physically worse, and he was no better mentally.

Mr. Roux, as *curator ad litem*, said that he raised no objection to the application except that he suggested Mr. Fagan should be appointed curator of defendant's person and property. It had been decided in this Court that a lunatic's wife could not be appointed curator of his person.

Order granted, declaring defendant of unsound mind and appointing Mr. H. A. Fagan, of Somerset West, as curator of his person and goods, with power to sell movables (if any) as prayed.

#### HOWARD V. HOWARD.

This was a similar application, the plaintiff being Ellen Mabel Howard, of Durham-avenue, Salt River, and the defendant her husband, James Howard, at present a patient of the Valkenberg Asylum. Mr. Sutton was for plaintiff; Mr. Swift appeared as *curator ad litem*.



Ellen Mabel Howard, wife of the defendant, said that she was married in community of property to defendant at Johannesburg. Her husband was removed to the asylum about eighteen months ago. He has been very strange in his habits; he used to get up at all hours of the night. His memory was extremely defective. Witness desired to be appointed jointly with Mr. Wm. Arthur Currey as curator of defendant's person and property.

Dr. Dodds, medical superintendent of the Valkenberg Asylum, also gave evidence in support of the application.

Mr. Swift, as *curator ad litem*, said he was satisfied that defendant could not take care of himself or manage his own affairs.

Order granted, declaring defendant of unsound mind, and appointing Wm. Arthur Currey as curator of his person and W. A. Currey and defendant's wife as joint curators of the goods.

GIRDWOOD V. TODD. { 1906.  
June 8th.  
" 9th.  
" 10th.

This was an action brought by Wm. Girdwood, medical practitioner and District Surgeon, Kentani, against Wm. Todd, also of Kentani, to recover £1,000 damages for alleged defamatory libel.

Plaintiff's declaration was in the following terms:

1. The plaintiff is and was at all times material a physician and surgeon, duly licensed, practising at Kentani, in this Colony, and is and was at all time material the duly appointed district surgeon for Kentani. The defendant resides at Kentani aforesaid.

2. In or about the month of October, 1905, the defendant wrote, and on or about the 26th day of the said month published, or caused to be published in a certain newspaper known as the "Transkeian Gazette," and circulating in Kentani, and throughout South Africa, the following false, malicious, and defamatory words of and concerning the plaintiff and of and concerning him in his said profession of physician and surgeon and of and concerning him in his said office of district surgeon, to wit: "The Editor 'Transkeian Gazette.'

Sir,—Allow me through the medium of your columns to relate an incident which has caused great indignation here. On Friday last a few sportsmen were practising 'tilting the ring,' preparing for the coming sports in Butterworth, when one of them had a nasty fall. His horse, shying, threw him against the pole; the unfortunate fellow came down with a crash, bringing the pole with him. On examination it was found he had a deep cut along the top of his head, and a nasty bruise on his head.

H 1

Fortunately (at least, we thought so at the time) the doctor (meaning the plaintiff) was not far off, having just left the village a few minutes before. One of the young men galloped after him (meaning the plaintiff) and informed him of what had happened, and brought him back. On his arrival home the doctor (meaning the plaintiff) strolled leisurely over to the scene of the accident, and merely putting his hand on the unfortunate fellow's head, pronounced it a case of stunning. He (meaning the plaintiff) advised his friends to take him home, and it was not until he (meaning the plaintiff) was asked that he offered to lend his stretcher. Two young men accompanied him (meaning the plaintiff) over to his house, and on seeing that he had no intention of returning asked him about the dressing of the wounds. At this the doctor (meaning thereby the plaintiff) appeared surprised, evidently not even being aware of them. But even this did not have the effect of bringing him (meaning the plaintiff) to his sense of duty, he merely asking if they "thought" there was any carbolic at the hotel the injured man was staying at, and on being answered in the negative said he would send some down. When the doctor (meaning the plaintiff) was called back, he was on his way (I have since learned) to a musical entertainment at a friend's house about five miles distant, where he stayed overnight, and to this reason was in too great a hurry even to wait and attend the injuries of the young man. On the young men's return with the stretcher they informed their friends that the doctor (meaning the plaintiff) was not returning. Had a bomb-shell been thrown in their midst it could not have caused greater consternation, as by this time the unfortunate man had been lying unconscious for over half an hour. An old resident hurried over to the doctor (meaning the plaintiff) who was just leaving again, and succeeded in getting what dressing was required. An hour after the doctor's (meaning the plaintiff) departure they succeeded in bringing the injured man back to consciousness, but were greatly alarmed to find he was seized with cold shivers. However, with the help of hot water bottles, and all the aid inexperienced hands could do, they fixed him up comfortably for the night. On returning the following morning, the doctor (meaning the plaintiff) asked one who had been present the previous night, how long the man was unconscious after he (the doctor) left, and how his pulse was, showing that even he himself knew there was cause for anxiety. Surely such conduct on the part of a doctor is unprecedented, to leave a man lying unconscious, without examining him to ascertain the extent of his injuries? If

the man had died, as it was he had a narrow escape, would it not have been a case for a judge and jury? Apart from his profession, is it not every man's duty to do all he can for his fellow men in such a predicament? I question whether a poor heathen Kafir would have treated a dog as our District Surgeon (meaning the plaintiff) treated this case. Perhaps it would be a good idea to get another medical practitioner to take his place when he is "on pleasure bent." The residents of this district can hardly consider themselves safe in the hands of such a man (meaning the plaintiff).—An Eye-Witness.

3. The said false, malicious, and defamatory words meant and imputed to the plaintiff and were intended by the defendant to mean and impute to the plaintiff that he had been and was guilty of gross misconduct in his profession of physician and surgeon as aforesaid, that he had acted in his said profession and office negligently, improperly, and with great cruelty, and that the plaintiff was so negligent and incompetent and inhuman that he was unfit to carry on his said profession or to perform the duties of his said office, and that the plaintiff had rendered himself liable to a criminal prosecution.

4. In consequence of the premises the plaintiff has been and is greatly prejudiced and injured in his credit and reputation, and in his profession of physician and surgeon as aforesaid, and in his office of District Surgeon as aforesaid, and has sustained damage in the sum of £1,000 sterling.

Wherefore the plaintiff claims: (a) £1,000 damages; (b) alternative relief; (c) costs of suit.

Defendant, in his plea, admitted that he caused to be published in the "Transkeian Gazette" the words complained of, and that the plaintiff was the doctor referred to, but he denied that the words were false, malicious, and defamatory. He admitted that the "Gazette" circulated in Kentani, but he said he knew nothing of its circulation elsewhere in South Africa. He denied the innuendo, and said that the words, so far as they were allegations of fact, were true in substance and in fact, and, in so far as they were comments, they were fair comment on a matter of public interest, and were made in good faith and without malice. He said, further, that the publication of the said words was for the public benefit. He denied that any damages had been sustained.

Mr. Upington (with him Mr. Swift) for plaintiff; Mr. W. P. Buchanan (with him Mr. Van Zyl) for defendant.

Mr. Upington said that he did not propose to lead evidence of special damages, inasmuch as his client had come into court, not with a view of making money out of the case, but solely

with the object of clearing his character, which, he said, had been assailed in this letter. Under the circumstances, he submitted that the onus rested upon his learned friend of proving his plea of justification.

Mr. Buchanan said he could not admit that. If the plaintiff did not lead evidence he could get no damages.

Mr. Upington said that the point was important, and he desired to have a ruling of the Court. He must insist upon his right of leading rebutting evidence to any evidence in proof of the plea of justification.

His Lordship said that he saw no reason why the plaintiff should not proceed to prove his case. He ruled that plaintiff must begin the case in the ordinary way; he knew of no precedent to the contrary, and he was not going to create one in a libel matter.

Mr. Upington thereupon called

Wm. Girdwood (the plaintiff), who said that the "Transkeian Gazette" circulated in the Transkei and the district of Kentani. Witness had practised four or five years in Kentani, and he was the only doctor there. In reference to the incident in question, he had left the village, and had gone about a quarter of a mile, when defendant and a young boy came after him on horseback. He was informed that an accident had occurred, and was given particulars, and he drove back to his home. He walked about 30 or 40 yards, where the young man was lying. He walked over to the spot as quickly as he could; he did not "stroll leisurely over." He found one Curnick lying on the ground. He felt the man's pulse. He noticed that muscular rigidity was present, and that Curnick made a movement to elude his grasp. The pulse was regular and strong, but somewhat slow. He examined Curnick's eyes, and recognised that the reflexes were present. Witness (having explained, at the request of the Court, what he meant by "reflexes") went on to say that the eyes were not bloodshot. There was no discharge from the ear, but there was a slight discharge from a bruise on the nose. On the top of the head he found a shallow scalp wound, about an inch to an inch and a half long. He satisfied himself that there was no fracture at the base of the skull. He was satisfied that it was merely a case of stunning. The proper treatment for such a case was to put the patient to bed and keep him quiet. Witness offered to lend his stretcher, and showed defendant and another young man (James Macready) where it was. He told Curnick's friends to take him to the hotel and put him to bed. Witness went to his surgery and prepared some simple dressings and a sedative to lessen the nervous shock. He handed the dressings and sedative to an old resident named Macready, and gave

him instructions. Witness then proceeded on his journey, and stayed that night at a friend's house, about five miles from Kentani. He wished to be handy for a confinement that was expected, though it did not take place, as a matter of fact till three or four days afterwards. He saw Curnick next morning, and he then seemed to be himself again. Curnick, who was the postmaster and telegraphist, could have returned to his duties on the following Monday. The case was never regarded by witness as critical. He thought it was advisable that the man should have a week's rest, and he gave him a certificate. The publication of the letter had done witness great damage. The Traders' Association sent a copy of the letter to him.

By the Court: He considered that that action of the Traders' Association was a piece of officiousness—an impertinence.

Witness (in further evidence) said he treated the present case as he should have treated any other.

Cross-examined by Mr. Buchanan: Witness was the only doctor in Kentani, and there was no chemist there. The nearest doctor was about twenty miles away. On the night in question he was going to spend the evening at the Rev. Mr. Auld's.

Mr. Buchanan: I put it to you that the treatment you have described to-day is what you should have given, but what you did not do?

Witness said that he administered the treatment he had described.

Cross-examination continued: The wound was not covered with grass and dirt. Curnick was partially conscious when witness left him on the evening of the accident. He did not hand over the responsibility for the case to Mr. Macready, son. He admitted that he gave a certificate to Curnick recommending ten days' rest, his idea being that in a head injury it was well to guard against remote contingencies. The letter was also put into the "East London Dispatch" as proof of the report of the Traders' Association. He did not think the fact of bringing the action had done more harm than the original publication. He objected to the whole tone of the letter. Witness was still district surgeon, and the only physician at Kentani. He did not say that his practice had fallen off, but he thought the letter would damage him if he applied for an appointment elsewhere. He admitted having refused to attend Mr. Macready on February unless he gave him an assurance that he had not aided and abetted defendant throughout the proceedings. He denied having had a disagreement with Curnick.

Dr. E. B. Fuller, of Cape Town, and Dr. W. Darley Hartley, also of Cape Town, gave evidence to the effect that the diagnosis and treatment made and given by the plaintiff in this case were

correct, assuming that the injury were such as had been described by the plaintiff.

William McGill, trader, Kentani, said that he was on the scene soon after the accident. He saw the doctor examine the injured man; the doctor was on the spot between five and ten minutes. He did not regard the case as serious, or one to make a fuss about. The wound was on the crown of Curnick's head; it was about one and a half inches long, but was not deep. He did not notice any dirt or grass in the wound.

Cross-examined: Witness admitted that the evidence he now gave differed from a statement he had made to defendant's attorney. Witness did not think there was any consternation over the doctor's conduct.

Mr. Buchanan: Some of the "young bloods" there wanted to tar and feather the doctor?

Witness: I did hear about it.

In further cross-examination, witness denied that he had been a leader in the movement against the doctor. He heard the letter read in the hotel dining-room before it was sent to the "Gazette"; he did not raise any objection to it. He would not say that he approved of the letter. Todd had discussed the present case with witness, and had shown him some of the letters. He did not think he had been Todd's "bosom friend" until lately.

Re-examined: Curnick, young Macready, and others were present when the letter was read in the hotel dining-room.

This concluded the evidence for plaintiff.

William Brown Macready, trader, Kentani, said defendant was his nephew, and assisted witness in his business. He had known plaintiff, whose father was a missionary, ever since he (the doctor) was a child. Curnick was shot from his horse against a sharp-edged pole, and he fell like a dead man. When the doctor came he felt the man's pulse, and asked how long he had been hurt. He said it was a case of stunning, and the best thing to do was to take Curnick to bed. Plaintiff did not make any further examination at that time. Curnick was lying with his head in a pool of blood, and even his friends did not recognise him. The doctor afterwards told witness that he did not intend to wait and see Curnick later that night. Witness received medicine and a dressing for Curnick from plaintiff. The wound extended from the brow to the crown of the head. The bone was bared at the crown. There was a wound on Curnick's nose as if it had been penetrated by a nail. Witness described the steps he took that night to attend to Curnick's injuries. He thought the wound was serious. A few days later McGill

was at the hotel for the express purpose of keeping plaintiff out of Curnick's room. Curnick's hand was also cut by the accident, and he was still unable to use two of his fingers properly. Plaintiff had refused to attend witness unless he took a solemn oath that he had nothing to do with the letter. Witness had nothing to do with the letter, and he saw it for the first time when it appeared in the "Gazette."

William Brown Macready, of Kentani, cross-examined by Mr. Upington, said that plaintiff was not with the injured man Curnick for more than five minutes. Witness had often assisted plaintiff in dressing injuries. The doctor did not pass his hand over Curnick's head.

By the Court: Witness thought that the doctor should have come back to Curnick on the same night as the accident. He would not deny that plaintiff had reason to think the case would be properly attended to if left in his (witness's) hands. Dr. Girdwood was not very popular in Kentani. It was difficult to say why, but he had never been very popular in the district.

[Hopley, J.: Is there a feeling that you would like to get rid of him and get another district surgeon?]

Witness: As far as I am concerned, no.

As far as the feeling in general is concerned?—The feeling in the district is inclined that way. I think he is as clever a man as we could get in the town. His manner is just a little against him. He is rather short and abrupt, quick, and sensitive.

He has not got what they call the "bedside manner" to perfection?—Exactly; something of the kind.

This being the feeling against the doctor, do you think these young men thought it was a good chance of giving him a knock?—I don't think so; but I don't know. At 11 o'clock that night the witness McGill (called by plaintiff) said: "Let us tar and feather the b——; let us smash him up." I quietened the young men down. There is a bad feeling against the doctor for leaving Curnick as he did.

In further reply to the Court, witness said that he did not consider that the doctor's conduct was brutal, but he thought he had neglected the case.

William Todd (defendant), a young man, then gave evidence. He described the accident. As to the letter complained of, witness admitted that there was a "clerical error" in the statement that the doctor passed his hand over Curnick's head. By a "clerical error" he meant that he might have made a mistake in copying the original, which was in pencil. The letter sent to the "Gazette" was in ink. Everybody in Kentani was indignant over the doctor's conduct.

Cross-examined: Witness composed and wrote the letter; he was the sole author.

By the Court: Witness gathered the facts for the letter from eye-witnesses.

Further cross-examined: He admitted that it was only surmise on his part when he said the doctor wanted to go to a musical entertainment that evening. He did not now withdraw the statement nor did he adhere to it. Witness thought Curnick's condition was very serious when he was seized with cold shivers. That was what he meant when he said Curnick had a "narrow escape"; he always thought the end was near when the cold crept up a man.

Mr. Upington: Are there not a lot of you who want to get rid of Dr. Girdwood?

Witness: No; I have been quite satisfied with any treatment I have had from him. In answer to further questions, witness said that he still considered the letter to be fair criticism of a public man. Witness found fault with the doctor not for what he did, but for what he did not do.

By the Court: Witness sent the letter to the newspaper as a warning to the doctor. He thought when the doctor heard of it, he would be more careful in the future.

Wallace Whitfield, trader, Kentani, said he thought plaintiff was careless in his treatment of this case.

Norman Mills, salesman, Kentani, said that at the hotel on the night of the accident the young men were indignant because the doctor did not come back to see Curnick. McGill proposed to tar and feather the plaintiff, and give him a jolly good hiding. The Cricket Club had found some fault with plaintiff for not turning up at the matches, but they did not want him to neglect his patients.

This concluded the evidence.

Mr. Upington said that the questions at issue in this case were: (1) Were the allegations made in the letter false, malicious, and defamatory; and (2), if so, had the plaintiff sustained any damages. Now, publication was admitted, and it was admitted that the letter referred to plaintiff. Defendant had set up the plea of justification. There was no doubt that the letter was defamatory, if untrue. If the serious and grave imputations made against plaintiff were substantially true, he would be wholly unfit to hold the position of district surgeon in Kentani, or, indeed, to remain in the medical profession. Counsel commented on the discrepancy between the evidence for defendant and the alleged "clerical error" in the letter, to the effect that plaintiff passed his hand over the injured man's head. It was said that the plaintiff only stayed with the injured man a very little time, but they had the evidence of Dr. Fuller that an experienced medical man could diagnose such a case in



thirty seconds, and it was admitted that plaintiff, though he might be abrupt, was a clever doctor and a quick worker. Was there a shadow of proof even upon the evidence of defendant's witnesses that the plaintiff acted negligently or with gross inhumanity or brutality, because, after all, that was the inference to be drawn from the letter? He submitted not. The injury was merely a cut on the head requiring simple treatment and rest and quiet. Dr. Girdwood, he submitted, did everything in the case that could reasonably be expected of a medical practitioner under the circumstances. As to the question of damages, counsel contended that under our law damages would naturally flow from such an injuria, as it was clear plaintiff had sustained in this case. The matter was further aggravated by the fact that defendant had refused to apologise and withdraw the allegations, and to the very last he had persisted in his plea of justification.

Mr. Buchanan said he thought in the first place they must take out of the case the exaggerated innuendoes alleged in the plaintiff's declaration. The letter did not contain anything to warrant such innuendoes as were set out in the declaration. Plaintiff was not charged with cruelty or inhumanity or incompetence as a medical man. The gist of the letter was that the plaintiff was guilty of negligence, not perhaps even a high degree of negligence, but guilty of some negligence, as the only medical man on the spot, in his diagnosis and immediate following-up of the case. The question of whether there were a few slight inaccuracies in the letter was not of importance in such a case as this; it was not material whether defendant should have used the word "head" or "hand" in the letter. The question was whether the allegations contained in the letter had been proved to be true. They had the version of Dr. Girdwood, which was uncorroborated except by McGill, who admitted that he saw the letter before it was sent for publication, and raised no objection to it, and who also, it was proved, had been one of the foremost in wanting to do the doctor some injury at the time of the accident. The fallacy underlying the plaintiff's case was the assumption that Curnick's injury was of a minor character, and that the history of the case showed that. The good recovery made by Curnick was not attributable to the doctor's treatment, but to the care given by Mr. Macready, Sen. Plaintiff had no right to throw the responsibility for the care of Curnick upon Mr. Macready. Counsel submitted that the evidence of Dr. Darley Hartley showed that he was fighting the case point by point for plaintiff. He contended that Curnick had sustained a serious injury, and that

the doctor's treatment was negligent and that the letter was true in substance, and in fact. Should the Court be against him on the facts, counsel submitted that the plaintiff had not even shown any likelihood of damages. No evidence had been adduced that any damage had been sustained or that any damages would be sustained.

Hopley, J.: In this matter the plaintiff is the District Surgeon for the district of Kentani. He seems to be the only medical man there and it appears from the evidence which has been elicited in the course of the case, that he is not altogether popular with some of the people in the district, possibly because he keeps himself rather aloof from a certain class in the town, and is not inclined to be exceedingly hale fellow well met, with the result that, as far as we know, some time before the unfortunate accident which has given rise to this case, in a small matter of village politics, some of these very young men who have been engaged in this case, either as witnesses or as the recipient of the injury which resulted from the accident, had actually asked him to resign from the local Cricket Club, on the ground that he sometimes did not play in the matches. That would rather show the temperament of these young men and the class of mind that there is in them. Surely it is an idiotic policy and an extreme measure to ask a member, and a reputable member, of the club, to resign because he did not always play in the matches. The sensible course would be to take his subscriptions and to make him an honorary member. On the 20th October last the doctor was going out in the afternoon about half-past four to spend the rest of that day at the Rev. Mr. Auld's, about five miles from Kentani, and, as it happens, in the direction in which he anticipated that he might have to attend that night a confinement. With him was Mrs. Girdwood, who was herself in a delicate state of health at the time. When they started, some men were practising for some sports, and were engaged in tilting the ring. For this purpose a pole, or quartern, was standing resting on a cross with arms about three feet long. This had been procured from Mr. Macready, who is one of the oldest inhabitants, and probably one of the most responsible men in the place. There was a ring on an arm and the young men were in the usual way, cantering or galloping past, trying to take off the ring with their lances. A man called Curnick, who is the local postmaster and telegraphist, and who was riding a horse lent him by the defendant in the present case, was unfortunate enough not to be able to control the horse at the last moment, so that it swerved and knocked his head against the pole. Fortunately for him, the pole was not



fixed firmly in the ground, or his injuries might have been severe. The post was knocked over. Considering that Curnick had his hat on at the time when his head was struck, that would in itself show that the injury could not have been exceedingly serious. However, it was sufficient to stun him for a time, and he fell down on the ground and slid along on his face a short distance on the village green. Now, anyone who had known the history of a case like that, and anyone who knows anyone who knows anything about falls from horses, would at once have concluded that it ought not to have been an exceedingly severe case. The doctor was sent for; he had only gone about a quarter of a mile, and horses and mounted men being ready, they soon came up with him and stopped him; and no doubt the boy who first reached the doctor told him briefly what the circumstances of the case were. The second man then came up with him—I am not sure that it was not the defendant himself—told him more, but the defendant himself admits that when the doctor stopped, he asked him something about the accident, and whether the man was conscious, and so on, so that when he had returned to the village he knew something of the nature of the injury, and the circumstances of the case. However, having put his wife off the cart, he did what I suppose anyone else would do,—he walked across to the spot where the man was lying. This walking across is described in the letter, (which is to my mind a somewhat highly coloured account of what happened, and written with the intention of creating prejudice against the doctor) as "strolling leisurely across to the scene of the accident." The evidence, however, is that he walked across in a businesslike, ordinary way. One does not expect that a doctor would run on such occasions so that he would arrive on the scene out of breath, and possibly in such a condition that he could not give a calm consideration to the matter. The plaintiff did what any doctor would have done under the circumstances; he walked over and examined the man. The gravamen of the charge against him in this letter is that he made a perfunctory, cursory, and wholly inadequate examination of the case that was before him. It is admitted by the witnesses of the defence, by Mr. Macready and by the defendant himself, that Dr. Girdwood was there for something like four or five minutes; they say not more than five minutes at all events. Well now, five minutes is a considerable time, longer than most people seem to think, and a great deal can be done in the way of diagnosis in an ordinary simple case in five minutes, and as far as the circumstances of this case go, I do not think and I do not see the slightest reason for supposing an ordinary skilful man

could not have diagnosed the whole of the case in two minutes. All that was required was that the pulse of the man should be felt, and then passing the hand over the head would be almost enough to finish the diagnosis. Then there are the reflexes. That is not more than a matter of seconds in the hands of an experienced man. Anybody can do that in a couple of seconds. All the doctor would have to do when he saw a wound on the top of the head would be to pass his three fingers along, running one finger up the wound. It would require only a few seconds, not minutes; and I quite agree with Dr. Fuller, that such a case might possibly be diagnosed in half a minute. That certainly is somewhat quick, but we have the evidence that the doctor was with the man four or five minutes, enough time surely for a skilful man, who is admitted to be an able man at his profession and a quick worker, to make up his mind as to the diagnosis of the case. Had he found the man pulseless and lying livid there, he would have had to stay a longer time, but the man's heart was beating, the pulse was going normally though rather slowly; he himself swears he passed his hand along the wound, which would be a matter of only seconds, and sufficient to show an experienced man what the state of affairs was. He could see no blood issuing from the ears or eyes, and so he knew there was no fracture of the base of the skull. He pronounced it, as I suppose every other doctor would have done, to be a case of ordinary concussion, or a simple case of stunning. But this did not seem to satisfy the people who were round. He walked off to his surgery to prepare certain things, and he showed the young man where the stretcher was. One of them then seems to have asked him about the dressings for the wound, and in this letter it is said that he seemed to be surprised to hear that there was a wound at all. Of course, it is difficult for anyone in the circumstances to suppose that a medical man, who goes for the purpose of examining a case and finds a person lying on the ground, as Macready says, in a pool of blood issuing from his head, did not know there was a wound. It seems so absurd to suppose that a medical man, or even an ordinary common-sense man, being brought to look at an accident, would not have looked to see where the blood was issuing from. However, it was a ridiculous assumption on the part of the young men that there was a surprise on the part of the doctor to hear there was a wound at all. No doubt the doctor was surprised to hear these young men instruct him as to what his duties were. It appears that he was making a dressing. He also was going to make a sedative medicine to be given to the young man after he had recovered consciousness,

These two men, who seemed to have lost their heads, went across and told Macready that the doctor was not coming back. Instead of this announcement having the effect which it would have upon common-sense people, and leaving the impression that it could not be a serious case, they say it was like a bomb-shell bursting in their midst; and then Macready went to the doctor's house and found the doctor making up simple dressings in his dispensary. It appears that he was a bit short of carbolic oil himself at the time and so he asked whether there might be some at the hotel where Curnick lived. Having been told that there was not, he said, "Oh, very well, I will send some." Even this circumstance is taken against him as showing some sort of a grudging spirit, and that he did not then want to part with some of his carbolic oil for the purpose of this particular case. However, when Mr. Macready came across and, apparently taking an interest in the case, asked the doctor whether he was coming back, he said that he was not. Macready walked off, whether the specific instructions from the doctor as to what to do or not, does not matter much. He saw that Mr. Macready was taking an interest in this case, and as he had previously helped him, the plaintiff was justified in feeling certain that he was going to take care of the case. That was what was in the Doctor's mind, and it seems to be the sort of thing that anyone knowing a place like Kentani would have in his mind. What then ought the doctor to have done besides what he did? It is suggested that he should have gone back and done the surgical work himself. Any woman could have done it, certainly Mr. Macready could do it. Had it turned out that this man was more deeply hurt, had there been some broken bones, some of these comments might have been justifiably used in regard to the examination which was made; but the doctor was right in his diagnosis and the whole case went exactly as he expected it to go. Macready went and attended to the case as well as anyone could have attended to it. Some of them went there and jabbered and talked, and made a fuss and crowded in his room. They were turned out by Macready, and the case went in the ordinary way, and the man was put to bed and kept quiet as the doctor had said he was to be. Well now, is there any justification in such a set of circumstances as that for the publication of such a letter as this?

The letter was written on the very day of the accident by the defendant, who seems to have lost his head about this matter; and these young people thought very probably, that as the doctor had been a little short and abrupt about this matter and did not talk much—and I can quite understand his reason for not talking much to them—that this

was a good opportunity for getting at him somehow or other. The defendant wrote this letter, I do not know whether he was proud of his composition, but he went and took it to some of his friends in the bar, amongst whom was McGill. I am not concerned much about McGill's position either one way or the other in that matter, and his conduct, which has been commented upon, does not effect the issue. The letter was in pencil, and it was afterwards copied in ink, and four days later it was sent for publication. That seems to me to give these people less excuse for the course adopted, because by that time it was quite obvious that the doctor was perfectly right in his diagnosis, that it was a mere case of stunning, that he had advised the right thing, and that nothing was going to happen of an evil nature to Curnick. Curnick was recovering, it was quite clear that he would be about his work again in a few days, and yet on the 24th, four days after the accident, when everything was going well, this letter was sent for publication. It seems to me to have been a malicious and wholly unnecessary thing to do. The doctor may not have been very popular with these young men, but that certainly was not the way in which to try and get even with him. It seems to me that the letter is highly coloured, that the facts are misrepresented, and that the conclusions led to be drawn are those which are attributed to the letter in the third paragraph of the declaration, where the innuendoes are set forth. It seems to me that the things set forth are true, it might fairly be said of plaintiff that he was a negligent man, that he grossly misconducted himself in his profession, and that he exercised his duties negligently, improperly, and even with cruelty.

It is the intention of this letter to convey that meaning, it does convey that meaning, wholly unjustifiable in my opinion, and it was sent for publication to the paper for the purpose of conveying that meaning to anybody who happened to read the *Gazette*, and it ends by saying that a poor heathen kafir would not treat his dog as the plaintiff treated this accident, and that it would be a good idea to get another medical practitioner when their District Surgeon is on pleasure bent. The whole tone of the letter leads people to infer that plaintiff neglected a dangerous case for the purpose of having a musical entertainment at a friend's house. But that was a wrong impression, the facts were wrong, the conclusions were wrong, and the publication was, to my mind, actually malicious.

For that reason damages must follow. If defendant were a man of larger means, I should certainly make damages more heavy than I am going to do, and moreover it was stated at the outset of this case that the doctor came more for

the purpose of vindicating his character (I do not see how he could have helped doing that, after the publication of such a letter) than for the purpose of getting heavy damages. Yet I cannot give purely nominal damages in a case like this, because, although it is impossible to prove damages, it is not impossible to conjecture how such a letter might cause serious damage, while the damages I am about to award are much smaller than in my opinion the plaintiff is really entitled to, that is due partly to the position of the defendant, and I hope defendant has learnt a lesson, both in law and in temperance—at the same time I do not want to make them so small that people might think that I take a light view of the circumstances of this case. I think there should be damages for £50, for which sum there will be judgment for the plaintiff with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Law. Defendant's Attorneys: Walker and Jacobsohn.]

#### *Ex parte DU PREEZ.*

Mr. Lourens moved, as a matter of urgency, for an order authorising petitioner to mortgage certain property in the division of Riversdale in the sum of £350.

Order granted as prayed.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte LIS.* { 1906.  
June 9th.

Undesirable—Alien.

*Under the Common Law, no alien can claim, as a matter of right, to enter this Colony, even if he has formerly been domiciled therein.*

Dr. Greer moved for an order calling upon the immigration authorities to grant permission to Jack Lis to land in Cape Town from a German steamer now lying at the Docks.

Mr. Howel Jones opposed on behalf of the Attorney-General's Department.

Dr. Greer read an affidavit by Chris Brady (attorney to the applicant), who

called attention to an order given by the Court on the 15th December last, restraining the authorities from deporting the applicant. (15. C.T.R. 1011) The Court held that, under section 3 (subsection D) of the Immigration Act, he was exempted, on the ground of having served in H.M. Volunteer Forces during the late war. The applicant had been seen by deponent, and he said that he desired to land in Cape Town for the purpose of transacting important business. He was at present detained on a German steamer, which had arrived at the Docks this morning, and which was about to leave in the afternoon. The immigration authorities refused him permission to land.

Mr. Jones said that he had no affidavits to produce, because there had been insufficient time in which to have affidavits prepared. The applicant, however, seemed to be under the false impression that he was being kept out of this colony under the Immigration Act. As a matter of fact, there was an order from the Colonial Secretary to the immigration authorities to prevent him from landing, on the ground that he was an alien and a most undesirable character. Under the circumstances, counsel submitted, applicant had no *locus standi* in this court. He admitted that he was an alien of Russian nationality. Counsel relied on the case of *Raner v. Colonial Secretary* (14. C.T.R. 247) and the applications of Mina Belmont (16. C.T.R. 231) and certain Montenegrins, recently heard in this court.

Dr. Greer submitted that the present case was not on all fours with the cases mentioned by his learned friend, inasmuch as this man had been proved to have served in His Majesty's Volunteer Forces, and it had been held that there was no right to deport him.

[Hopley, J.: Is not this man a notorious pimp? I think I have heard the name before.]

Dr. Greer said that he had no knowledge as to that. He might mention that there was another man of a somewhat similar name.

Mr. Jones produced affidavits sworn for the previous application, and said that his lordship's designation of the applicant was correct.

Hopley, J.: There is very scanty information before the Court as to the present application, but both parties have referred to the previous record and the previous order, in which this man was the applicant, and from these affidavits, which are practically admitted for the purpose of this case, it appears that he is a Russian alien and not a naturalised British subject at all. It would also appear that he served as a Volunteer or mercenary during the late war, and in consequence, when in the late application it was attempted to

deport him under the Prohibited Immigration Act, it was held by the Court that he was exempt from deportation by virtue of such mercenary service. Since then, however, the position has changed. He has chosen to deport himself, to take himself from the boundaries of this colony, and has been in German South-west Africa, and is at present on a German ship, and now wishes to land here again. Now the question arises: can he claim, by virtue of exemption from deportation when he was in this colony, a right to come and land here whenever he chooses? Under the common law, it has been held that aliens have no right to land in this country. Does it make any difference if they have been here and have gone away again? In my opinion, it does not make any difference. He still is an alien, he is out of the Colony, and he wishes to land again, and the Colonial Secretary refuses him permission, on the ground that he is an undesirable alien. I see no reason whatever for making the order asked for in this case. There will be no order.

Dr. Greer then asked his lordship if he would be prepared to grant an order authorising the applicant, on providing satisfactory security, to land and stay in the Colony a certain time, so as to enable him to transact necessary business. Counsel said that he relied upon the decision of the Court in the case of *Mina Belmont*.

[Hopley, J.: I suppose if he consults the Colonial Secretary or the authorities, and gives security, they will allow him to land. I know nothing as to the matter here, and I shall make no order. If he can arrange it with the authorities, then let him do so, but he has no right to such an order as is now asked for.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BURTON V. SCHAEFER { 1906.  
June 11th.  
" 12th.  
" 18th.

This was an action brought by Conyers Burton, lithographic artist and printer, Cape Town, against Paul

Schaefer, trading as Paul Schaefer and Co., also of Cape Town, to recover a sum of £150 upon a contract to print and supply a consignment of postcards.

Plaintiff's declaration was as follows:

1. The plaintiff is a lithographic artist and printer, carrying on business at Cape Town. The defendant is a dealer in postcards, carrying on business in Cape Town under the style or firm of Paul Schaefer and Co.

2. On or about the 22nd July, 1905, the plaintiff agreed to supply to the defendant and the defendant agreed to take from the plaintiff 120,000 postcards, in size 5½ in. by 3½ inches, printed in colours and lithographed. The defendant agreed to supply to the plaintiff 6,300 cards in size 19 in. by 23 in. for drawing and printing 20 subjects, and the plaintiff agreed to supply 6,000 copies of each of the said twenty subjects, making a total of, in all, of the 120,000 postcards aforesaid. The said subjects were to be approved of by the defendant. The defendant agreed to pay to the plaintiff for the said postcards the sum of £150, in three instalments of £50 each, the first instalment to be paid on delivery of the said postcards, the second and third instalments payable by bills of exchange due respectively on December 1, 1905, and January 1, 1906.

3. The plaintiff proceeded with the execution of the said contract, and thereafter, in the months of November and December, delivered large quantities of the said postcards to the defendant in terms of the said contract.

4. In or about the month of November, 1905, disputes arose between the said plaintiff and defendant with regard to the said contract, and in order to bring the said disputes to an end, it was agreed between the said plaintiff and defendant, on or about December 13, 1905, that the said plaintiff should forthwith complete delivery to the defendant of two-thirds of the said postcards, and that the defendant should pay the sum of £50 to the plaintiff on the completion of the delivery of two-thirds of the said 120,000 postcards, and should further pay to the plaintiff two further sums of £50, thirty and sixty days respectively, after the complete delivery of the total number of postcards. Save as aforesaid, the said contract set out in paragraph 2 hereof remained in existence.

5. The plaintiff completed delivery of the said 120,000 postcards on or about the 15th day of December, 1905, and the said three instalments have become due and payable in terms of paragraph 4 hereof, but the defendant, though requested so to do, neglects and refuses to pay the said three instalments, or any part thereof, as promised by him.

Wherefore the plaintiff claims: (a) Judgment for the sum of £150, being the said three instalments of £50 each; (b) alternative relief; (c) costs of suit.



Defendant in his plea said that the contract was set out in a letter from plaintiff to defendant dated 13th July, 1905, and that plaintiff failed to deliver the cards within the specified time, or before or subsequent to the expiration of that time, to deliver cards properly and satisfactorily executed according to the terms of the agreement. By reason of the aforesaid failure plaintiff committed a breach of contract which entitled defendant to refuse to accept and pay for the cards actually delivered by plaintiff, and defendant did so refuse to accept and pay for the said cards. Defendant subsequently entered into a compromise with plaintiff, by which the latter agreed to assist him in sorting out the good and the satisfactory cards, defendant undertaking to pay for good cards on plaintiff supplying good cards in lieu of the rejected ones. This compromise, however, fell through because defendant failed to fulfil his part thereof. Defendant tendered to return all the cards in his possession and to pay £15 to plaintiff for certain cards which, in anticipation of a compromise, he had forwarded to his Johannesburg branch. Defendant claimed in reconvention the sum of £100 as and for damages alleged to have been sustained by reason of plaintiff's failure to supply him with good and satisfactory cards in terms of the agreement.

Plaintiff, in his replication, said that even if there was delay in delivery of the cards attributable to his default or neglect defendant was estopped from taking advantage of that fact by reason of the agreement of December 15. The tender, he said, was wholly insufficient. For a plea to the claim in reconvention, he denied that he had committed any breach of contract, or that defendant had suffered any damage for which he (plaintiff) was liable.

Mr. Sutton for plaintiff; Mr. Van Zyl for defendant.

Hopley, J., suggested that the case was one that might very well be sent to a referee.

Mr. Van Zyl said that that course had already been discussed, but the parties had been unable to agree upon a referee.

Mr. Sutton said that the plaintiff relied upon the compromise arrived at between the parties in December. Disputes had occurred between the parties, and there was a novation of the original contract, the compromise of December being come to in order to put an end to all disputes.

The plaintiff gave evidence.

Harold Jones, a partner in the firm of Findlay and Tait, attorneys, gave evidence as to the compromise arrived at between the parties on the 15th December last, and upon which plaintiff relies. Plaintiff, he said, after the interview, called and informed him that

he had been to defendant's place, but the latter had refused to allow him to sort out the unmerchantable cards. The defendant's attorneys subsequently took up the position that plaintiff had neglected to carry out the conditions of the compromise, that they renounced the compromise, and intended to revert to the original agreement.

Cross-examined: Witness was not aware that Burton had stopped Schaefer in the street and told him that it was not his (Burton's) business to sort out the cards. The agreement was that the cards should be made merchantable. Schaefer did not object to accepting cleaned cards. The arrangement was that unmerchantable cards should be rejected and replaced by good merchantable cards, bringing the total up to 120,000. He thought the meeting at which the compromise was arranged took place on Friday, December 15, not on the 14th December.

Arthur Walter Townshend, of the firm of Townshend, Taylor and Spashall, printers, said that, as regarded the cards, it would be impossible for anyone to have told the difference between a cleaned postcard and a card that was regarded as merchantable.

Cross-examined: Witness did not think they had any reason to be ashamed of the way in which this work had been done by his firm. As to the alleged spoilt cards (produced), such cards would be found on sale at any stationers in Cape Town, whether produced in England or Germany. The picture of an arum lily (Bella Donna) was produced in the colour furnished by the artist. They, as printers, were not botanists. If they had had the job in hand properly, they would not have printed the cards on such paper as was supplied by Schaefer. The cards supplied he should describe as "good" and "better"—not "bad" and "worse." They had been prepared to make good any unmerchantable cards, but he did not say they were prepared to do so now, because things had changed, and their lithographic department was not so busy then as it was now.

Mr. Van Zyl: How would you clean the cards?

Witness: I don't propose to disclose any of the secrets of the lithographic art. Further cross-examined, witness said that his firm could have sold thousands of these cards in their retail shop for the Christmas mail. His firm were interested in this case, because they printed the cards on behalf of Burton. As to the card (produced) showing the Victoria Falls, witness said it was usual to slightly exaggerate the colours in picture postcards, otherwise the cards would not sell.

Re-examined: Burton was charging Schaefer 25s. per 1,000 for the cards he supplied. Witness thought that the



card produced was too good at the price.

George FitzHenry, a lithographer, employed by Townshend, Taylor and Snashall, said that the real difficulty with regard to the contract was the kind of card supplied by Schaefer. Trouble was caused by the creasing of the cardboard, due to the fact that the material was new and unmaturing.

Mr. Sutton closed his case.

Paul Schaefer (the defendant) afterwards gave evidence. He spoke of a visit which he had paid at the request of the plaintiff to Townshend, Taylor and Snashall's works after the blue process had been reached in the printing. At that time, he said, no complaint was made to him about the cardboard creasing. Burton told him that the second lot of cardboard that he had supplied was better than the first, but he said that he really wanted a white card. Witness then ordered, on the 10th October, a white cardboard from Germany, but this order he subsequently cancelled. Witness found that the first lot of cards supplied by Burton were dirty and faulty in colour. Mr. Burton said that he would give a better delivery of the second lot. The question of the defective cards was left over until further cards arrived. Witness sent 10,000 cards to his Johannesburg branch. About one-third had been disposed of at the usual rates of 6s. or 8s. per 100. The other two-thirds were still on his hands in Johannesburg. His representative made complaints in respect of those cards. Witness went on to deal with further negotiations prior to the 15th December.

Hopley, J., informed Mr. Van Zyl that he did not want to prevent him from putting his case in the way which seemed to him to be best. At the same time, he thought there had been a novation, and that the matter, so far as the present case was concerned, really commenced on the 15th December.

Witness, in further evidence, said that they had a meeting on the 14th December. He fixed the date by the fact that it was the day before he received the rest of the cards from Mr. Burton. Witness declined to accept cleaned cards. Except as to that point, Mr. Jones's account of what took place at the meeting was correct. Plaintiff did not, as had been arranged, come to witness's office. He saw Mr. Burton in the street on the following Monday. Mr. Burton then said that it was not his affair to come and help to sort the cards, and he would not come. He also said it was his (witness's) business to sort the cards, and to send back the rejected ones.

By the Court: The cards had not even yet been sorted.

Witness (in further examination) said that when Burton would not come and

sort the cards, he thought he (Burton) was making a fool of him. He wanted the cards for the Christmas trade. He had tried to dispose of the cards locally, but he had been unable to do so. He had sent travellers out with the best of the cards. Witness produced samples of the cards produced under the contract and of cards printed in Germany.

Mr. Van Zyl called his lordship's attention to the uniform quality of the cards produced abroad.

Witness (in reply to the Court) said that he made a suggestion to Burton that an album of picture postcards should be sent to the Governor as showing the class of work that could be produced in South Africa. He was judging at that time by the sketches which had been prepared, and he anticipated good results from the printing, which, however, were not realised. Continuing his evidence, witness said that when the cards were ordered there was a good demand for picture postcards of the Victoria Falls and Cape flowers. The market was now quite stale.

Mr. Sutton produced a picture postcard, which he said had been bought during the luncheon hour at a shop in Cape Town for 2d.

Witness, asked his opinion of it, said that he would not buy such a card.

Cross-examined: Witness denied that he had refused to have anything to do with the sorting because he wanted to go up the coast. He could assign no reason for Mr. Burton having refused to go through the cards.

Charles Friedlander, attorney, of the firm of C. and A. Friedlander (defendant's attorneys), also gave evidence. He told how he urged upon the parties to come to a settlement instead of spending a lot of money in going into court.

Mrs. Helen Schaefer (wife of the defendant) substantially corroborated the evidence given by her husband.

In cross-examination, the witness said the cards that were delivered were at present in the shop. Some were lying loose in a wooden box.

[Hopley, J.: But how are they kept together?—They are just as they were [Hopley, J.: And the different designs kept together?—Yes.

A German named Schlicht, at present touring South Africa, and representing a Dresden firm of photographic post-card printers, stated the lithography of the cards depicting arum lilies was bad, and the colours had not been watched. The colours were irregularly printed. There was no uniformity amongst the cards themselves. There was also a considerable number of soiled cards which could not be cleaned.

Hopley, J., inquired if the paper was new would it be liable to stretch.

The witness replied that that would make very little difference if the address

side of the post-card was printed first. The sea journey would have rested the cardboard.

[Hopley, J.: Perhaps it had not recovered from the sea journey. There are some things which are affected by the sea journey, and take some time to get over it—delicate wines, for instance.]

In cross-examination, the witness said he had never printed a card himself, but he had superintended the work of printers for eight years.

In reply to His Lordship, the witness said that if work like that produced was done by machinery under his supervision, he would have the machinery stopped.

In further cross-examination, the witness said the fact of a post-card being true to life depended on the artist's work, which the lithographer followed. The machine in question was good, but the light in the room was bad. The firm witness worked for turned out very good work.

Mr. Sutton: And I suppose you expect the work to be turned out in Cape Town as well as it is done in Germany?

[Hopley, J.: And why not, Mr. Sutton? Don't let us be down on our own country. If a man says he can contract to do work as well as it is done in Europe, he should be compelled to do it. It is not necessary for him to say, "Oh, it is not so good, because it was done in Cape Town."]

Mr. Thorpe, the manager of Messrs. Watson, Ltd., wholesale stationers, stated he had, on behalf of his firm, purchased cards from defendant on several occasions. He was offered the cards in question, but refused them because he did not think them good enough.

In cross-examination, witness said the cards were generally purchased by his firm at £3 per 1,000.

Mr. Sutton: Would you take these cards at 25s. per 1,000?—I would not put them in my stock, but as a job line I might purchase them at that price.

Counsel having been heard in argument on the facts,

Hopley, J., said that in this case the plaintiff sued for a sum of £150 upon a certain contract entered into between him and the defendant last year, in which he agreed to supply the defendant with 120,000 post-cards of a certain size, and, of course, of a satisfactory description. Plaintiff was to supply him with the cardboard on which these cards were to be printed, and they were to be ready by a certain time. There was some delay in getting out the cards, and the time was extended, and it was agreed that they were to be completed about the middle of November. The plaintiff, who seemed to know something about the art of lithography, set about getting from the printers who contracted to do the work the

stones and the various colours necessary. Apparently the process involved 8 or 9 different coatings of paint. It was apparent from the evidence that he used an old stone. About November 17 a number of these cards were delivered, and the defendant seemed to complain at once of these cards. He complained that they were badly cut, and that the colouring was defective, and in his evidence he had pointed out how the colour was defective. He showed that the colouring had not been accurately done, which possibly was owing to want of experience, and he also drew attention to the fact that the colouring was not constant. In the course of the work it was shown that the boards had not been taken accurately over the stone, so that the colours did not lie exactly on each other, as they ought to do, and the result was an uncertainty of colour. The plaintiff admitted that the first lot of cards sent in were unsatisfactory. However, the defendant did not look on them as so hopelessly out as to prevent the contract being carried to a conclusion, and he was promised by the plaintiff that the others would be replaced, and he and his wife took out 10,000 of them, which they sent to Johannesburg to catch the Christmas trade, and in respect of this there was a tender of £15. The next lot came later on, and the plaintiff refused to take them as a whole. He had previously given to plaintiff a post-dated cheque, payment of which he stopped. The whole case rested on the reading of the letter written on December 14. To His Lordship it seemed that the reading of that letter meant to convey that he was to reject such cards in the last lot that defendant did not care about, and to return the others. It seemed that the plaintiff had not fulfilled the contract he entered into, and that the defendant's version of the story was the most credible. On the claim in convention the plaintiff would succeed in the sum of £15, but as that amount had been tendered and refused, he would have to pay the costs. On the claim in reconvention the defendant was entitled to £30 and costs. Judgment would be entered accordingly.

[Plaintiff's Attorney: G. Trollip.  
Defendant's Attorneys: C. and A. Friedlander.]

#### COOKE V. COOKE.

Mr. Swift moved, as a matter of urgency, for the appointment of a commission *de bene esse* to take the evidence of plaintiff in London (England), in an action which Mrs. Cooke has brought for restitution of conjugal rights, failing which a decree of divorce.

Application granted, Mr. Cecil Joun Dwyer, barrister, London, to act as commissioner, costs to be costs in the cause.

# SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. ANDRIES. { 1906.  
June 12th.

Fraud—Registered voter.

*To falsely pretend to be a registered voter, in order to obtain intoxicating liquor does not constitute the crime of fraud.*

Rex v. Jacobs and another (13, C.T.R., 144), followed.

Hopley, J.: A case has come before me for review from the Resident Magistrate's Court at Beaufort West in which Marthinus Andries was convicted of the crime of fraud and sentenced to two months' hard labour. The fraud alleged was that he pretended that he was a registered voter and by that means succeeded in buying a couple of bottles of brandy. The conviction must be quashed on the authority of *Rex v. Jacobs and Brits* (20 Supreme Court Reports, 82) where, in exactly similar circumstances, this Court ruled that such an act was not fraud within the meaning of the common law of this colony. The conviction must be quashed.

*Ex parte NESER AND OTHERS.*

Mr. M. Bisset moved for an order upon Roelof Andries Jansen, as sole trustee in the insolvent estate of Annie Susan Priest, requiring him to call a special meeting of the creditors and to hold in suspense a certain commission granted by the Court to examine the insolvent and owners in regard to certain transactions until the creditors should have decided whether the commission should be proceeded with. The trustee had declined to call the meeting until he had obtained counsel's opinion.

Hopley, J., said that he did not see any particular objection to giving an order on the trustee. The trustee was now practically a consenting party, and the Magistrate might safely postpone matters until after such meeting had been held. As far as the trustee's own action was concerned, it did not seem to him that the trustee had done anything improper. He supposed the application for costs against the trustee would not be pressed.

Mr. Bisset: We do not press that part of the claim. Perhaps it would be best

that the costs should stand over until application is made for rescission of the commission.

Hopley, J.: Perhaps that would be a wiser course. The order will be that the trustee call a special meeting of the creditors as requested, and that the Commissioner be instructed to postpone the inquiry for six weeks pending further steps within that period by creditors or trustee, costs to stand over.

*Ex parte WARD.*

Dr. Greer moved, on the petition of John Ward, of Wynberg, for an order for the attachment of certain funds in the hands of the South African Turf Club. Petitioner said that he was interested in racing matters, and that in all matters connected with racing he was in partnership with his brother, David Ward. From August to November, 1905, petitioner stabled and fed and had had trained at his directions certain two race horses named respectively Kingthorpe and Lent Lily. Petitioner had since discovered that the owner, J. P. Cupido, presently of Kimberley, and one Shaw, a jockey and trainer, had, about the 3rd December, removed the horses from his stables either personally or through their orders. There was a total amount due for keep and disbursements from the said Cupido of £64 10s. 11d., but Cupido, although he had repeatedly promised and undertaken to pay, had failed to do so. Petitioner was informed that there was a sum of £300 due to the said Cupido as stakes for the South African Turf Club. He was informed that the horses had been pledged to Shaw for a debt of £250. Cupido had no landed property. Petitioner prayed for an order restraining the South African Turf Club from paying over the whole or any portion of the sum of £300 to Cupido or any person on his behalf, pending an action to be instituted forthwith to recover the sum of £64 10s. 11d.

Rule nisi granted attaching the sum of £150, rule to be served personally on Cupido and on the secretary of the S.A. Turf Club, and to be returnable on the 21st June.

## SECOND DIVISION.

**ZEEMAN V. CENTRAL NEWS  
AGENCY, LTD., AND ARGUS  
PRINTING AND PUBLISH-  
ING COMPANY, LTD.** { 1906.  
June 13th.  
" 14th.

*In an action for malicious prosecution, the onus is on the plaintiff to prove that the defendant acted without reasonable and probable cause. The fact that the plaintiff was acquitted of the alleged crime affords no presumption that the defendant acted maliciously in laying a criminal charge against him.*

5. By reason of the said malicious pro-

2. The defendants admit that the plaintiff was, on or about the 17th day of November, 1905, acquitted, upon an indictment charging him with the crime of theft, presented by the Attorney-General, but save as above they deny each and every allegation in paragraphs 4, 5, and so much of paragraph 6 as is



relevant to the said claim for £2,000 damages, as specifically as if herein set out specially denying that the plaintiff has sustained any damage for which they are liable.

Wherefore the first defendant prays, subject to the above tender, that the plaintiff's claim as against it may be dismissed, with costs. And both defendants pray that the plaintiff's claim as against them may be dismissed, with costs.

Plaintiff's replication was:

1. Plaintiff admits paragraph 3 of first defendant's plea, and says that he always performed the duties of the said employment satisfactorily.

2. Defendant admits the tender referred to in paragraph 5 thereof, but says that it is wholly inadequate to meet plaintiff's claim.

3. Save as above, and save in so far as defendant's pleas admit any of the allegations in plaintiff's declaration, plaintiff says that he denies all and singular the allegations of fact, and conclusions of law in the said pleas contained, joins issue thereon, and again prays for judgment in terms of his declaration.

Dr. Greer for plaintiff; Mr. Upington (with him Mr. Howes) for defendants.

Dr. Greer objected to the presence of Mr. C. E. Solomon on the jury on the ground that, as an employee of the "Cape Times," Ltd., he was directly or indirectly interested in the case.

Mr. Solomon (in answer to the Court) said that the "Cape Times," Ltd., were shareholders of the Central News Agency, Ltd.

Hopley, J., thought Mr. Solomon should not sit on the jury. Another juror who was picked, Jacob Stoke, was also excepted to by Dr. Greer, and he admitted that he had an interest in the Central News, and was informed that he should not sit on the jury.

Dr. Greer having opened the case,

Evidence was led on behalf of the plaintiff.

John H. C. Breda, clerk in charge of the criminal records in the Resident Magistrate's Office, Cape Town, produced the records of the preparatory and other examinations in the case of Rex v. Zeeman.

The record in the trial at the Criminal Sessions was also put in.

Henry Henning, sub-inspector of the C.I.D., produced the original affidavit sworn by Mr. Portas Moses (manager of the Argus Company), on the 5th September last.

Mr. Upington asked witness if he had any other affidavits.

Witness said that he had.

Mr. Upington: Then put them in.

Witness put in affidavits by Mr. Macfarlane and Mr. Woodley, and also a statement by James Anderson.

Charles Wm. Zeeman (the plaintiff) said that he entered the service of the Central News Agency in June, 1903. He was engaged by Mr. Lindbergh, the general manager, at £10 per month, payable at the rate of £2'10s. per week. He was made inspector of the news-vendors in the street. About September of the same year Mr. Mansfield, the publisher, absconded, and witness was appointed to his position at a salary of £16 a month, payable at £4 a week.

[Hopley, J.: That does not work out to £16 a month. Four pounds a week works out to £208 a year.]

Witness said that he was engaged at £16 a month, and was paid £4 a week. Witness explained that his duties necessitated that he should have an office at the "Argus" Buildings to receive the copies of the "Argus" as they were printed, and distribute them. He described the method of checking the number of copies issued to him by means of cards. Witness said that the lot he had to deal with was the wholesale cash sales, to be sold in the streets, which he sold at the rate of 9d. per dozen. When he sold to the vendors he took back their returns; for instance, if a man wanted eight dozen papers and he produced four dozen unsold copies, witness received the returns, and charged for four dozen. At the end of each day witness made up a bundle of returns so received, plus his excess on the supply, and he returned these at nine o'clock next morning, and was given a receipt by an employee of the "Argus." The returns were checked by this employee, and he was given a receipt in a pass-book.

[Hopley, J.: Supposing that you returned only 200 and got a receipt for 2,000, who would make the profit?]

Witness: The Central News, my lord. Witness, in further evidence, said that he received the cash from the sales. This arrangement went on until July, 1905. In that month Share, who had charge of the Central News Agency's sales in the streets, went to America on a holiday. It was reported in the "Argus" that Share had gone to America to be married. Share gave witness the key of the safe, and another key, which witness had since found was the key of the cupboard. Things went smoothly, as far as he knew, until the 24th August, when he handed in the return as usual to the "Argus" representative, who counted the returns and initialled witness's book. The number of returns for that day was 301. The "Argus" representative then took the returns and threw them into the cellar. The bundle was not marked in any way. About five minutes to one Mr. Moses, the manager of the Argus Co., and Mr. Woodley, manager of the Central News Agency, came in, and Mr. Moses said: "I can only speak to you through Mr. Woodley." Wood-



ley asked him how many papers he returned that morning. Witness said 301. Woodley then said: "Do you know you can't return papers more than a month old?" Witness said then he did not. Woodley then said that he had returned papers that day for June 3 or June 6. Witness denied that he had returned old papers. Woodley asked him whose the cupboards behind, about seven in number, were. Witness replied: "Share's." After further questions, witness produced the key that Share had left with him. He opened the door, and found that the cupboards were full of old papers. Woodley then said: "Oh, here are the papers that Zeeman has stolen." Mr. Moses then produced a list showing the number of returns witness claimed to have returned, and the number that he was alleged to have actually returned. On one date that list showed that he had had 582 initialled as returns, and against that it was alleged he had returned no papers at all that day. Witness was afterwards told to go home. Woodley said: "You have robbed the Argus Co. of at least £1,000; this has been going on for the last twelve months. You should be doing six months the same as Wilson, who will probably get six months, and who is in Roeland-street now." Wilson was awaiting his trial, and he was afterwards acquitted. Mr. Moses said: "You are a parasite amongst your fellow-workmen." Witness thought he meant an infectious germ.

Witness described his subsequent arrest on a charge of appropriating £24 10s. 9d., and the proceedings in the Magistrate's Court and the Criminal Sessions. He spent one night in the cells until he was released on bail. Witness denied absolutely that he had made the admissions ascribed to him in the affidavit of Mr. Moses.

By His Lordship: Share had not made any profit on the papers that he had stored in the cupboards. Witness thought that Share, Anderson, and another (Blevins) had conspired and collected the 7,000 copies in the cupboards, so as to get witness into a difficulty.

[Hopley, J.: Is your idea that Store was playing the game that they accuse you of playing?]

Witness: That is what I suppose. In further evidence, witness said that he had made out an account showing the losses he had sustained, and on which he based his damages. Witness was a cab proprietor, and he estimated his loss at £343. He had had to sell his cab, horses, and wagon in order to raise funds for his defence. His business, horses, cabs, etc., cost him £560, and he sold the lot for £217 10s. He estimated his loss of profits on his cabs at £108, and he had a loss on wagon hire. He estimated his damages by loss of employment at £168. The cost

of his defence at the Criminal Sessions was £37. His detention in Wale-street, loss of health, and inconvenience represented the balance of £1,280..

Cross-examined: If on the 24th August he returned papers for the 6th June, he should not be making money out of it. Those were papers he should have received from the boys.

By the Court: It was not likely that the boys would have on their hands a large number of old papers dating back to the 6th June.

Cross-examination continued: Mr. Moses and Mr. Woodley, on the day they came in and spoke to him, were the worse for liquor. Until the cupboards were opened, he knew nothing whatever of the existence there of 7,000 old copies. Witness said that the papers he handed in were dropped by the checker into the cellar.

Mr. Upington: The checker had special instructions to retain the papers and take them to the front office to be checked. If he says he did not throw them down the cellar, he is committing deliberate perjury?

Witness: Yes.

Plaintiff's wife having given evidence,

Dr. Greer closed his case, subject to the right to call rebutting evidence.

Mr. Upington then called

Portas Moses, manager of the Argus Printing and Publishing Company, who said that plaintiff, acting on behalf of the Central News, received copies of the "Argus" from the machine for distribution. About June, 1905, witness complained to the Central News about the way in which plaintiff was carrying out his duties. His suspicions were aroused by differences in the circulation as disclosed in the books. The returns from the Central News to the Argus Company were exceptionally high. The Argus Company had a checker to receive the returns from Zeeman. God-year was at first the checker. Macfarlane was appointed checker in June, 1905, and he was given special instructions as to what he was to do. Witness received a report on the 24th August, through Mr. Blevins, the works manager. In consequence thereof, he gave the checker certain instructions, and later the checker came into his office with one Heydenrych, who was carrying a parcel that purported to be returns from the previous day. Witness opened the parcel and examined every copy, and he found 300 papers of the 6th June, and also, on the top, a paper of the 23rd August. Witness afterwards communicated with Mr. Woodley, and later on they both waited upon Zeeman at his office. Mr. Woodley said to Zeeman: "How long has this been going on, Zeeman?" Zeeman said: "I am sorry; I was led away by Share. It has been going on since he left."

Witness was absolutely certain that those were the words that Zeeman used.

[Hopley, J.: Is there anything in the suggestion that you had been having something to drink?]

Witness: The idea is preposterous. It is an absolute falsehood. In further evidence, witness said that they found a shortage of 41 copies in the returns of the "Weekly Argus" of the previous day. When questioned as to the cupboard, Zeeman took a key out of his pocket and handed it to Woodley. Woodley started to open the presses, and said: "This is where the papers are." The presses were packed with copies of the "Argus," the total quantity in the presses being about 7,000. Witness had no animosity against Zeeman, and he had no malicious intent.

Cross-examined: He would not deny that he had said, in the course of the criminal trial, that the whole of the 301 papers in the bundle were dated the 6th June.

Dr. Greer: You see that is an important difference from the statement you now make.

Cross-examination continued: Witness had his suspicions aroused, because he thought the machines were perhaps not putting out a sufficient supply. The automatic register told the output from the machines. If Mr. Blevins, the works manager, said that the automatic register never worked correctly, he was mistaken. If the clock went wrong, it would be immediately put right. Blevins told him on one occasion that there had been discrepancies in Zeeman's returns, but that the checker had given the thing away to Zeeman.

Dr. Greer: Mr. Moses, you seem to have had a nice lot in that office of yours?

Witness: We had.

Further cross-examined: Witness said that the returns on the 24th August were brought in to his office between 10 and 11 a.m. He supposed they would be handed by Zeeman to the checker after nine o'clock. It never struck witness at that time to consider what Zeeman had done with the actual returns of that day. Sometimes there were no returns at all in the course of the seventeen days on which a check was taken. On some days Zeeman might have no returns. Witness was of course, always glad when the paper was sold out. The checker was instructed to initial Zeeman's book, whether he produced any actual returns or not. That was part of the plan of checking.

Dr. Greer: But was the instruction to the checker that he should initial 483, when not a vestige of a copy was received?

Witness: I did not know this had been done.

Further cross-examined: A report was made by the caretaker that Anderson

was removing old papers. It did not strike witness then that they had got hold of the wrong man, and it had not so struck him yet. The bundle of papers in question was not produced at the criminal trial. The papers were left in the front office, and during the night of the 24th they were spirited away, he thought, in the interests of Zeeman. Anderson was in charge of the office that night. Witness was not absolutely sure that Anderson was in the employ of the Argus Co. on the 24th August. Whoever the caretaker was, he must have taken them as surplus papers. He did not know whether Anderson was the caretaker in the office that night.

Ernest James Woodley, manager of the Cape Town branch of the Central News Agency, said that plaintiff was a weekly servant of the company, and was paid £4 per week. His rate of wages was not £16 a month. Witness went on to speak of the incidents of the 24th August. On going to the "Argus" office, he said, he was shown by Mr. Moses a bundle of unsold copies of the "Argus." He did not look at all the papers. Those he saw were dated June 6th. He saw the returns of the weekly, and found a shortage of 51 copies between the actual returns handed in and the number claimed by Zeeman. Mr. Moses's account of the interview with Zeeman at noon was correct. Witness denied having said that Zeeman should have six months' imprisonment. Originally he did not intend to proceed against Zeeman, but, acting on instructions from the head office in Johannesburg, he made an affidavit against Zeeman on the 5th September.

Cross-examined: Wilson was at that time awaiting trial on a charge preferred by the Central News. He was undefended, and he was acquitted. In that case also witness was unwilling to prosecute. Witness's principle was that it was better to discharge the man and have finished with him, than to prosecute him. Witness believed at that time that Zeeman was guilty. His theory as to what was done with the actual returns by Zeeman was that they had been put in the presses with the other old papers. He had formed his theory this morning after listening to the evidence. He thought it was not at all improbable that a man, even if he had received three dozen returns from the previous day, would send in very old papers to be credited as returns.

By the Court: The cupboards were filled with bundles of old papers ready to be sent in as returns.

Further cross-examined: Subsequently to Zeeman's dismissal, instructions were given that no returns were to be accepted from the third edition of the "Argus." The third edition was the biggest of the day. Returns were not

taken from the "stop-press edition." Before Zeeman's dismissal, they did not accept returns of the third and stop-press editions.

Colin W. Macfarlane, a clerk in the Argus Company's employ, said that in June, 1905, he received special instructions to receive the returns from Zeeman. He was not a checker in the ordinary course, but was specially detailed for this duty. On certain occasions he signed Zeeman's book without satisfying himself that there was a parcel. He subsequently checked the parcels unknown to plaintiff, and compiled a list of the returns received and those Zeeman alleged that he had put in. Blevins also checked the parcels.

Heydenrych (the caretaker) used to take the parcels into the cellar, and witness followed him and checked the numbers. On the 24th August witness did not throw the bundle of returns into the cellar. He had received special instructions on that morning. Both Mr. Moses and witness checked the returns that day. The whole of the returns were dated June 6. The parcel was delivered to Mr. Moses exactly as witness had got it from plaintiff. There was a shortage of 41 copies in the returns of the weekly edition handed in by Zeeman.

Witness was cross-examined at some length. He said that on July 29 he got special instructions to check Zeeman's returns, and from that date the returns began to go wrong.

Jan Heydenrych, until recently a caretaker and timekeeper in the Argus Co.'s employ, said that on June 29 he received special instructions from Mr. Moses (the manager) as to the returns handed in by Zeeman. Zeeman used to throw the bundle that he brought down into the cellar. He did this every day. Witness and the checker used to go down and count the papers afterwards.

Cross-examined: Witness was given a week's notice to leave the Argus Company's service, and he had been out of work about four months. He had a disagreement with the works manager, Mr. Hamilton. The evidence given by Mr. Macfarlane as to the papers being handed to him by Zeeman each morning was incorrect. The bundles were generally thrown down into the cellar by Zeeman. After counting Bennoni's returns he gave the figures to Blevins. There was one morning when no returns were received. If the list showed seven mornings when no returns were received it might be correct. He could not remember exactly, but there were several times when he went to Mr. Blevins and told him there were no returns.

Dr. Greer called his lordship's attention to the manifest contradictions in the witness's evidence.

[Hopley, J.: The jury will be able to weigh his evidence.]

Cross-examination continued: Witness denied having, in January last, in the presence of Detective Ward, said that Anderson should be standing in Zeeman's shoes.

Alfred Eugene Blevins, master printer, Roeland-street, formerly works manager in the employ of Argus Co., said that he left the "Argus" because of a difference of opinion as to the policy that he had with Mr. Moses towards the end of July, in consequence of what he thought was insufficient checking of the returns witness instituted a system of checking. Witness instructed the clerk who received the returns from Zeeman to count the papers, and he also told Heydenrych to count them. After receiving the figures from the clerk, witness used to go into the cellar and check the returns and enter the number in his notebook. There was always a big difference between the figures claimed by Zeeman and the number of returns actually received.

Cross-examined: Witness did not know what had become of the bundle of August 24. He had finished his count on the previous Monday, and on Tuesday he gave his report to his nominal chief (Mr. Moses). Witness instituted the system of checking on July 29 of his own motion, and without instructions from Mr. Moses. He had been unable to account for the discrepancy between the number registered by the machine clock and the returns. He had found the clock absolutely reliable. He had not previously said that he found the clock inaccurate. Witness looked at the contents of the bundles of returns received from Zeeman, and he did not remember a day when there were not old papers in the bundle. By old papers he meant out of date—three or four days or three or four weeks old.

Dr. Greer: The record of the criminal trial says you stated that: "If any witness said the bundles contained old papers it is not correct." How do you explain the discrepancy in the evidence you then gave, and that you give now?

Witness said that the evidence must have been bearing upon another point.

By the Court: The deficiencies in the returns claimed by Zeeman would equal in some instances considerably more than £1 a day. There was no conspiracy to get Zeeman into trouble. Witness had had no animosity against Zeeman, and he had always admired the smart way in which he did his work.

Mr. Upington closed his case.

Dr. Greer dwelt at considerable length upon the discrepancies in the evidence led by the defendants. He submitted that all the facts of the case put Mr. Moses and Mr. Woodley upon inquiry, and that they had no right to accept the statement of the checker on August 24 as to the history of that particular bun-

dle. There were wholesale discrepancies in the evidence on a great many points between the witnesses called for the defence. Mr. Moses and Mr. Woodley were put upon inquiry by the whole of the circumstances of the case, and an account of the character of the men they had to deal with, but disregarding all these things that might have put them on inquiry they accepted statements that were recklessly made to them, and they recklessly swore affidavits. By their recklessness they had inflicted irreparable injury on an innocent man, and a man who had been found by a jury of his fellow-citizens to be innocent. He submitted that the case was one in which the plaintiff should be awarded substantial damages.

Mr. Upington said that it would be a very nice thing if every time an accused man was acquitted he was allowed to bring an action against his employer for damages. The law, however, protected a man who honestly, without any malice and upon sufficient information to justify him in coming to the conclusion that a man was probably guilty of a criminal offence laid the information before the proper authorities. As to the bundle of 301 papers received by the checker employed by the Argus. Counsel submitted that the jury must either accept his evidence or come to the conclusion that he was a deliberate perjurer? If he were a perjurer, what could be his motives? He could, counsel urged, have no motive for speaking anything but the truth. He (Mr. Upington) accepted the challenge of his learned friend that a man who was going to accuse another must have an honest belief that the person whom he charged was probably guilty, and he submitted that in this case Mr. Moses and Mr. Woodley had come to the honest conviction that Zeeman was probably guilty, before they commenced proceedings. Woodley himself did not want to prosecute, and it was only when the head office of the Central News said that a criminal prosecution was necessary that he swore his affidavit. After the plaintiff made his demand upon the Central News they repudiated liability, but tendered £20 to the plaintiff, as they said, to save further expense and annoyance. It would have been well for Zeeman if he had accepted that £20. It was by no means a remote probability that every penny of any law suit by plaintiff would have had to be paid by the Central News; that they knew; thence their desire, if possible, to keep the matter out of court. As to the claim for wages, counsel submitted that it was clear from plaintiff's evidence that he was under a weekly engagement. Without saying whether plaintiff was or was not guilty of theft, he submitted that the circumstances which came to the notice of Mr. Moses and Mr. Woodley on the 24th August were so suspicious that they were

justified in prosecuting, and, indeed, it was a duty cast upon them to prosecute.

Dr. Greer said that, as to the first part of the claim, his learned friend had gone outside the defendant's plea. The plea alleged that the plaintiff carried out his duties in a negligent, improper, and inefficient manner, but his learned friend had set up a case of malpractices. That he was not entitled to do. Counsel submitted that the letter in which the Central News tendered £20 was an admission of some liability.

Hopley, J., in summing up, pointed out that the case seemed to hinge on the question of whether plaintiff was or was not justifiably dismissed. The jury had to try a question of law and of fact. The plaintiff might have suffered hardship, but the jury had nothing to do with hardship, with equity, and so on. The question they had to consider was, had he suffered this hardship in consequence of his own acts or without any reasonable and probable cause animating his prosecutors? In an action for damages of this kind, the burden of proving all the essentials of the case rested upon the plaintiff. He must not only prove his acquittal, but he must also prove absolutely and conclusively that he was maliciously prosecuted, and prosecuted without reasonable and probable cause. The fact that plaintiff was acquitted at the Criminal Sessions raised no presumption, in law, of the absence of reasonable and probable cause for the prosecution. As long as a man was acting under a genuine *bona fide* belief that the person he was accusing was probably guilty of crime, he was protected by the law. The whole question was whether the defendants' managers had reasonable and probable cause for the steps they took in regard to prosecuting the plaintiff.

The jury found that the defendants were justified in their action, and that the plaintiff was only entitled to £2 10s. 4d.

Dr. Greer moved for judgment for plaintiff for £2 10s. 4d., defendants to have costs from date of tender.

His Lordship entered judgment for plaintiff for £2 10s. 4d., plaintiff to pay costs.

[Plaintiff's Attorney: Hirschberg.  
Defendants' Attorneys: Van Zyl and Buissinne.]



# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1906.  
June 14th.

Mr. D. Buchanan moved for the admission of Alexander Anderson Bailsillie as an attorney and notary.

Application granted and oaths administered.

## PROVISIONAL ROLL.

### ESTATE BENNETT V. CROUTZ.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### COGILL V. FOLB.

Mr. Palmer moved for the final adjudication of the defendant's estate.

Order granted.

### BESTALI V. VON METSINGER.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### POHL V. ROBINSON.

Mr. Pohl was for the plaintiff, and Mr. D. Buchanan was for the defendant. Counsel for the plaintiff moved for provisional sentence on a promissory note for £70 6s. 8d.

Mr. Buchanan applied for a postponement on an affidavit which set out that the defendant was dangerously ill.

The matter was ordered to stand over until 21st inst.

### BROMAN V. BILLINGHAM AND CO.

Mr. McGregor was for the plaintiff, and Mr. Burton was for the defendant. Mr. McGregor moved for provisional sentence on a promissory note for £325.

Buchanan, J., after hearing counsel in argument, said he did not think the case was one for provisional sentence. The parties could go into the principal case, costs to be costs in the cause.

### OHLSOON'S CAPE BREWERIES V. COHEN.

Mr. W. P. Buchanan moved for provisional sentence for £300, less £70 paid on account, and for £200 on a promissory note and judgment, under Rule 329d, for £221 17s. 9d., an amount due for goods sold and delivered.

The defendant appeared in person, and said this £500 had been advanced on an agreement when he bought a bottle-store in Long-street. Ohlssons made an agreement if he dealt with them in beer for ten years they would advance £500, which would not be called up if the agreement was kept. There was another note for £670 from a certain hotel, and Ohlssons kept that against the £500.

Buchanan, J.: You have been allowed a week's postponement; you have not filed an affidavit, and no defence is set up. Judgment as prayed.

### SEARLE V. SMITH.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £200, and that the property be declared executable.

Order granted.

### MALLY V. KARIEM.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £750, with interest, and that the property be declared executable.

Order granted.

### RIESER V. BARTLETT.

Mr. Russell moved for provisional sentence on a mortgage bond for £2,500, with interest and costs, and that the property be declared executable.

Order granted, subject to the conditions of the bond.

### HEYNES, MATHEW AND CO. V. DEYDIER.

Mr. D. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £52, account for goods sold and delivered.

Order granted.

### BANKS V. GADOW.

Mr. Toms moved for provisional sentence on two bills of exchange for 1,100 marks each.

Order granted.



**PITTS AND ANOTHER V. GEBRYLS.**

Mr. Burton moved for provisional sentence on a promissory note for £74 3s., with interest and costs.

Order granted.

**ESTATE STANFORD V. COHEN AND ANOTHER.**

Mr. P. S. T. Jones moved for provisional sentence for £1,500 on a bond, with interest, and that both properties be declared executable.

Order granted.

**ENGELS V. HENDRIKS.**

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**ILLIQUID ROLL.**

**PHILLIPS V. MACDONALD.** { 1906.  
June 14th.

Mr. Burton moved for judgment under Rule 319, in default of appearance, for £119 4s. 7d., with interest, and that certain goods be declared executable, in terms of the interdict.

Order granted.

**ESTATE MEYBURG V. WALTER**

Mr. De Waal moved for judgment under Rule 329d against the defendant to restore to the plaintiff transfers and all documents necessary for the passing of the transfer of a certain farm.

Order granted.

**DA COSTA, JACOBS AND CO. (IN LIQUIDATION) V. OWL, LTD.**

Mr. P. S. T. Jones moved, under Rule 329d, for £101 2s., balance of account for work and labour done, with interest and costs.

Order granted.

**EGERSDORFER V. THE OWL, LTD.**

Mr. J. E. R. de Villiers moved for judgment under Rule 329d for £41 3s., less £26 2s. 1d. paid on account, for work and services rendered.

Order granted.

**KALK BAY MUNICIPALITY V. FORD.**

Mr. P. S. T. Jones moved for judgment under Rule 329d for £65 12s. 6d.,

owners' rates for the current year, and costs.

Order granted.

**DRUMMOND V. ELLIOT.**

**DRUMMOND V. BROWN.**

Mr. Howel Jones was for the applicants (defendants), and the respondent appeared in person. Mr. Jones moved for judgment against the plaintiff for not proceeding with his action within the specified time.

The respondent pointed out that, according to the English law an action did not commence until the summons was served.

Buchanan, J., ordered the matter to stand over until next motion day, in order that counsel and respondent might produce authorities.

**SAVORY V. MOWBRAY MUNICIPALITY.**

Mr. Gutsche, for the defendants, moved for judgment against the plaintiff for not filing his declaration within the specified time under the rules of Court.

Order granted.

**GENERAL MOTION.**

**PETERSEN V. MAHOMED.** { 1906.  
June 14th.

Mr. Toms moved for an interdict restraining the removal of certain goods from the premises of the defendant pending an action.

A rule *nisi* was granted, to operate as an interdict pending action to be brought forthwith.

**SUPREME COURT**

**SECOND DIVISION.**

[Before the Hon. Mr. Justice HOPLEY.]

**In re INSOLVENT ESTATE** { 1906.  
**BASSON.** { June 15th.

Removal of trustee — Insolvent Ordinance, Sec. 52.

Mr. P. S. T. Jones moved, as a matter of urgency, on the petition of Alfred Hinton, of Cape Town, as joint trustee in the insolvent estate of Matthys

Michael Basson, for an order authorising the acceptance of Gysbert Willem Kotze's resignation as co-trustee and confirming the appointment of petitioner as sole trustee. Petitioner said that when Mr. Kotze was appointed he was secretary of the Malmesbury Board of Executors, but he was no longer in their employ, and he had stated that he was leaving Malmesbury. Differences had arisen between petitioner and his co-trustee in regard to liquidating and realising the assets of the estate, and the present application was in the interests of the creditors.

Counsel, having been heard in argument on the facts,

Hopley, J.: This matter comes before the Court in an unusual and, as far as I know, unprecedented way. It is an application under the 106th section of the Insolvent Ordinance for the joint trustee to be allowed to resign his office. The joint trustee, Mr. Kotze, does not make this application, and Mr. Jones (for the applicant) is bound to put his application under the 52nd section, which deals with the removal of trustees, and, according to the 52nd section, he may be removed for personal insolvency, or for misconduct in the said trust, or on account of his absence from the Colony. Now, it is not alleged that he is insolvent, and it is not alleged that he is absent from this colony, and it is not alleged directly, but it is stated that we may infer from the correspondence that has been put in, that he has been guilty of misconduct as trustee. I do not think that follows from the wording of the correspondence. The utmost I can see is that there is an accusation that, while he was *curator bonis* he dealt improperly with the assets of the estate. That would be before the time of his trust began, as he could not then have been elected a joint trustee. However, I have no doubt if misconduct as *curator bonis* were only found out after the appointment of trustee had been made, and if it could be shown that he was in a position of trust, the same sort of position which caused him to be appointed trustee, and that during the time he was *curator bonis* he committed acts of misconduct—if that could be shown, in all probability the Court would hold that these were acts of misconduct in the course of his trusteeship. The case, however, is a fairly strong one, on the ground that the joint trustee whose appointment it is now wished to set aside is practically a consenting party to his supersession. He has been written to and asked to resign unconditionally, and after some shuffling, you may call it—at all events, some fencing—he has adopted that position and sent in an unconditional resignation. I do not say there is absolutely enough on the affidavits to accuse him of misconduct, but there is enough to make me feel that

it would be in the interests of the estate, especially in view of the impending third meeting, to grant a rule *nisi*, and the order of the Court is that there will be a rule *nisi* calling upon the said Kotze to show cause why he shall not be removed from office as joint trustee, and why applicant shall not be declared to be sole trustee, rule to be made returnable on Thursday, June 28, and applicant in the meantime to act as sole trustee.

#### ARMSTRONG V JEPPE.

This was an action brought by George Armstrong and Co., agents and auctioneers, Cradock, against Heinrich Otto Ludwig Jeppe, of Draghoender, division of Prieska, to recover a sum of £101 19s. 8d. moneys advanced and disbursed for and on account of defendant.

From the pleadings it appeared that plaintiffs claimed a sum of £101 19s. 8d., and interest and costs, the amount, it was alleged, representing money advanced and disbursed for and on account of the defendant, at his special instance and request. Defendant, in his plea, admitted that £56 17s. 10d. was due, and specially denied that he had instructed or authorised plaintiff to make advances on the 23rd and 25th October, 1905, of two sums of £20 each to one Kennedy, in respect of certain carts, and he denied liability therefor. Defendant did not admit that he agreed to pay interest to plaintiffs for moneys advanced and disbursed, but he said he was ready and willing to pay £4 15s. 10d. as interest, less 16s. interest claimed on the said sum of £40. Defendant said that on or about 26th January, 1906, he tendered to plaintiffs £60 2s. 2d., being the sum of £100 2s. 2d., less £40, in accordance with the account rendered to him. He now tendered £61 3s. 8d., together with taxed costs to date of tender, in full satisfaction of plaintiff's claim. Plaintiffs, in their replication, admitted the non-acceptance of the tenders.

Mr. P. S. T. Jones for plaintiff; Mr. Sutton for defendant.

Mr. Jones said that the sole question to be determined was whether defendant should have tendered £40 16s. more than he had tendered.

Edward Bernard Biddulph, a partner in the plaintiff firm, said that a Mr. Green was a third partner in the firm, and they carried on business as general agents and auctioneers at Cradock. They became acquainted with defendant about June, 1905, when the latter called to see if any arrangements could be made as to the purchase of live-stock. Vehicles were also mentioned in the course of the conversation. Witness introduced defendant to J. and E. Kennedy, wagon and cart makers. Before leaving Cradock, defendant called at the plaintiffs' office, and said that Messrs. Ken-

nedy would require some reference as to any orders for carts to be built. Witness, in the presence of Jeppe, saw Kennedy, and said that any orders executed by defendant would be paid for by the plaintiffs on behalf of the defendant. Kennedy said that in executing the orders, he would require advances from time to time on account of the materials. When the carts were finished, Kennedy would call and inform the plaintiffs, and made arrangements about the forwarding of the carts. They also had certain transactions with defendant in reference to stock, but these were not disputed. On the 23rd October the plaintiffs advanced £20 to Kennedy, and on the 25th a similar advance was made on account of carts ordered by Jeppe from Kennedy Bros. In September witness went to Prieska, at the opening of the railway, and he saw defendant. Defendant then told him he had sent Kennedy an advance of £50 on account of a cart, wagon, and buggy. Witness expressed surprise, as he knew Kennedy was in want of money. Defendant said he had wired £50 through the Standard Bank, but had not informed Kennedy. The money would be lying in the bank all the time. When witness returned to Cradock, he informed Kennedy, and the amount of £50 was handed over to Kennedy. Witness's firm advanced the balance of the purchase price, viz., £65. A letter of demand was at a later date sent by F. W. Green to the defendant, in respect of an advance of £20 to Kennedy. The letter was not returned through the Dead Letter Office, and it was not answered. This was the second advance of £20 made by the firm. Witness did not think it was necessary to send that letter, because the general authority given to his firm by defendant was sufficient to cover such advances.

Mr. Sutton said his client denied having received the letter.

Hopley, J., said that the position taken up by the defendant on the correspondence was that the two carts were never ordered, and he repudiated all liability.

John Kennedy, of Kennedy Bros., wagonmakers, Cradock, said Jeppe told him he was to get money from plaintiffs for all orders executed on behalf of defendant. Witness was still holding the carts in dispute.

Cross-examined: It was arranged that with regard to advances on carts in course of building he was to write to Jeppe. He was to receive the balance on finished carts from Armstrongs.

Mr. Jones closed his case.

The defendant stated that he was a farmer and post-cart contractor. His farm was sixty miles distant from Prieska. He had considerable transactions with Armstrongs in June last, purchasing about £1,400 worth of stock. The transactions were

profitable to both parties. The only authority he gave to Armstrongs in regard to Kennedy Bros. was to pay a balance of £35 on the cost of a cart on which witness had already paid £10. Witness had already deposited the sum of £35 with Armstrongs. Armstrongs paid the balance on other carts without any authority from witness. He did not write to Armstrongs about their action, because there were no more dealings. He had told Kennedy that if he wanted an advance he must write to him (witness). Witness in August sent an advance of £50 to Kennedy. On the 23rd August witness ordered two more carts, and informed Kennedy that he must apply to him if he wanted an advance. He had to pay 5 per cent. interest on advances as made by plaintiff.

[Hopley, J.: Then the only reason for this suit is that you would have to pay 5 per cent. on £40 for two months?]

Witness: It will be £110, two carts at £55 each.

[Hopley, J.: But they are only charging you for the advances.]

Witness (continuing his evidence) said that the two carts he had first got were defective.

[Hopley, J.: Then you are fighting this case and repudiating these advances to get out of the contract?]

Witness: I wanted some security for my money. I wanted to see if the carts were all right.

[Hopley, J.: But you cannot make advances after the carts have been built and delivered?]

Witness (in further evidence) said that he was still willing to take the carts, but he objected to the advances made by plaintiffs. He had been kept in the dark a good deal, although he had asked for information.

[Hopley, J.: All you are fighting about is the interest on £40 at 5 per cent.?]

Witness: No, my lord; I will take the carts when they are delivered, but they must be satisfactory.

By the Court: The opening of the railway had not made any difference to him in regard to the price of carts. They must have carts made from wood grown in a dry climate, hence Paarl carts were not of much use to them.

Mr. Sutton closed his case.

Counsel having been heard in argument on the facts.

Hopley, J., said that this was a very paltry matter, and it was a great pity that the time of the Court had been taken up by such a case. He preferred to believe the evidence of Mr. Biddulph, because he thought Mr. Biddulph's memory was to be trusted rather than that of Mr. Jeppe. But he did not impute to Mr. Jeppe anything like intentional perversion of the facts, because he thought it was quite possible that Mr. Jeppe

might have forgotten the arrangement entered into. He held that there was authority in plaintiffs to make the advances, and he held that there was nothing in the documents which showed any revocation of that authority. Judgment would be given for the plaintiff for the amount tendered, with costs, and for £40, with interest to date of summons, with costs, Mr. Biddulph to have his expenses as a necessary witness.

### GENERAL MOTIONS.

*Ex parte* EXECUTORS ESTATE ( 1906.  
VAN RENSBURG. ( June 15th.

Mr. Roux moved for an order authorising the Registrar of Deeds to register transfer of certain landed property in an estate in the district of Riversdale. The first named petitioner had bought the property.

Order granted as prayed.

GREENBERG V. ROSENBERG.

Mr. P. S. T. Jones moved on behalf of petitioner, who carries on business in Cape Town, for leave to sue respondent by edictal citation for damages in the sum of £3,000, for breach of agreement, and for the attachment of certain goods now lying in Cape Town. Respondent's address was given as London, N.W.

His Lordship said it seemed to him that the proper person to be sued was the assignee in the respondent's estate, and there was also a question of domicile.

Mr. Jones said he believed Rosenberg was making considerable efforts to prevent the goods from being attached.

His Lordship said that the whole matter seemed to him to be rather questionable. The assignee should be given notice of the presence of the goods, and if it were found that he raised no objection against their attachment, then the application might be renewed. No order would be made at the present stage.

*Ex parte* SCHOLTZ.

Mr. Roux moved, on the petition of P. E. Scholtz, for the appointment of a *curator ad litem* to represent his brother-in-law, Albertus Jacobus du Plessis (an inmate of the Valkenberg Asylum) in a lunacy application.

Mr. Advocate De Waal was appointed *curator ad litem*, summons to be returnable on the 12th July.

*Ex parte* BILLSON.

Mr. Roux moved for an order authorising the amendment of petitioner's name in certain ante-nuptial contract.

Order granted as prayed.

DAVIDS V. DAVIDS AND ANOTHER.

Mr. Roux moved for an order for the removal of respondents from office as executors in the estate of the late Marthinus Davids, Kokstad, and for directions as to the appointment of an executor dative. One of the respondents had been out of the country for four years, and the other had done nothing to administer the estate, and apparently desired to be relieved of his office. It was proposed to take steps to have an executor or executors appointed in due form of law. The applicant, Mrs. Davids (widow of the deceased) recently obtained an order against respondents for delivery of half-share of certain erf.

His Lordship said that, in matters of this kind, when the respondent was not represented, it was usual to grant a rule, but in view of the special circumstances of the case, he thought nobody would be prejudiced if he at once made a final order. An order would, therefore, be granted removing the respondents from office as executors, and directing the Master to take the necessary steps to appoint an executor dative, costs to come out of the estate.

## SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon Sir JOHN RUCHANAN, and the Hon. Mr. Justice HOPLEY.]

STUTTERHEIM SCHOOL ( 1906.  
BOARD V. TURPIN. ( June 16th.

School Board—Election—Act 35 of 1905 — Divisional rate-payer.

*Under the 10th section of Act 35 of 1905, a lessee of land, who is also the occupier of the land and has paid the Divisional Council rates, is entitled to vote in the election of members of the School Board.*

This was an appeal from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court of the Supreme Court, in an application brought by the present respondent, who was an unsuccessful

ful candidate at the recent election of members of the Stutterheim School Board, to have the said election declared null and void and set aside.

The Judge's reasons were as follows:

I held that Appleby, Brown, Warren and Cochrane, who were lessees of land in the Division of Stutterheim were Divisional Council ratepayers, under Section 10 of Act 35 of 1905, and entitled to vote at an election of members of the School Board. The polling officers in pursuance of instructions received from some Government officer, rejected their votes on the ground that only owners of property were qualified to vote, in terms of the section. If the four votes above-mentioned had been received the applicant would have been entitled to be declared duly elected. Upon this ground I declare the election invalid.

Mr. Howel Jones (with him Mr. Nightingale) was for appellant; Sir H. Juta, K.C. (with him Mr. P. S. T. Jones), was for the respondent.

Mr. Howel Jones said that this was an appeal from a decision of Mr. Justice Maasdorp in an application by one Turpin calling upon the Stutterheim School Board to show cause why the election of members of the School Board for the school district on December 5 last shall not be declared invalid and informal, and as such set aside. His lordship granted an order as prayed. The present respondent (the then applicant) was a candidate for the election of this School Board, and he set out that certain four gentlemen who filed affidavits would have voted for him, and that they were refused permission to vote on the ground that they were not ratepayers, inasmuch as they were occupiers and lessees of property, and not holders of property. The point involved in this matter was a very important one, as concerning the definition of a Divisional Council ratepayer within the meaning of the Divisional Council Act. The learned judge gave his decision in the absence, through a misunderstanding, of counsel for the respondent. There was some difficulty in reopening the matter when a decision had once been given, and it was finally decided to go to appeal. The 10th section of the School Boards Act (No. 35, 1905) said: "In every School Board district two-thirds of the members shall be elected by the municipal ratepayers or by the Divisional Council ratepayers of the school district, according as the district is or is not a municipal area, and the remaining third shall be appointed by the Governor." The Stutterheim School Board was a School Board within a Divisional Council area. "Municipal ratepayer" was defined in the Act (section 3), but there was no definition of a Divisional Council ratepayer, and, of course, one must take the ordinary construction of the term "ratepayer," and the definition

which was actually given in the Divisional Council Act was a person liable to pay rates (Act No. 40, 1889, section 4). Then one had to go to that Act to find out who were the persons liable to pay rates. He submitted that the persons who were liable to pay rates were the persons referred to in section 243, viz.: "All persons owning immovable property in any division, including any municipality within such division, shall be liable to be rated for the purposes of this Act." If the Act had stopped there, the only persons liable to be rated would be the owners of property. The question then arose: did the 269th section, upon which the respondent relied, carry the case any further? Did it make an occupier or any other person than the owner liable to pay rates? The section was: "Every Council may, in suing for the recovery of rates, proceed against the owner or lessee or occupier, either separately or both of them in one and the same action, each for the whole rate, in any competent court, and recover the same by the judgment and process of such Court."

[De Villiers, C.J.: If a man may be sued for the recovery of rates, surely he is liable to pay rates?]

Mr. Jones: No, he is not liable. He is only liable, my contention is, as the statutory agent for the owner; he is a compulsory agent, and he is not the person liable to pay the rates.

[De Villiers, C.J.: He may recover from the landlord?]

Not only recover, my lord, but he may retain it. Counsel went on to point out that the Act said: "Provided that any occupier of property on which a rate has been assessed, who is not the owner thereof, and who has not entered into such occupation, pursuant to any agreement for becoming the owner thereof, shall, in the absence of any agreement to the contrary, be enabled to retain or recover from such owner the amount of any rates which he may have so paid, etc." So that, although the occupier paid the rates, he did not do so out of his own pocket. Counsel proceeded to urge that it was merely a duty cast upon the occupier by the 269th section to see that the rate was paid, and that, if he had to pay the rate out of his own pocket, he could recover it. One had to interpret what the Legislature intended in passing not only the Divisional Council Act, but also the Act of 1905.

[Buchanan, J.: Surely, in passing the Act of 1905 for the election of School Boards, the Legislature contemplated that the person on the spot who sent his children to the school was more likely to be interested than an absentee landlord?]

Mr. Jones said that they had to keep in view for the present the



financial side, and, besides, the Court would see that the effect of making an occupier a voter as well as the owner a voter would mean a double vote. That could not have been the intention of the Legislature.

[Buchanan, J.: You would give a vote to a person who held under an agreement which entitled him to become the owner?]

Yes, but he would be liable as the owner.

[Buchanan, J.: He would be liable as lessee under an agreement which entitled him to become the owner.]

Then, clearly, under the Divisional Council Act, he is liable to pay rates.

[De Villiers, C.J.: Still, the owner of the land would be entitled to vote, and you would have the same difficulty there of the double vote that you have spoken about.]

Well, I suppose there would not be many cases of that kind. Counsel went on to emphasise the fact that the School Boards Act did not say "voters," but "ratepayers," arguing from that fact that the object of the Act evidently was that an occupier should not have a vote.

Hopley, J., put to counsel the case of Beaconsfield, where, he said, there was only one landlord, viz., De Beers, and the people were tenants under leases which were renewable at stated periods. Were they to infer that in such a case only De Beers should have a vote, and that all the others should not vote?

Mr. Jones said that he did not know sufficient of the conditions at Beaconsfield to enable him to deal with such a case.

[De Villiers, C.J.: In regard to Beaconsfield, I do not know whether they are perpetual leases. But the recent decision of the Court in the case of Indwe was that where a lease is perpetual the lessee is liable for the payment of municipal rates, and for the landlord's rate, not the tenant's rate. At Indwe they wished to have all the benefits of municipal government without paying the rates.]

Hopley, J., took the case of the Standard Bank, and said that surely it could not be argued that the manager who occupied the bank premises should not have a vote, and that the Bank Corporation in London was to vote.

Mr. Jones said that they had to keep in mind what was the intention of the Legislature.

[Buchanan, J.: I should say that the intention of the Legislature was to see that the children of the district were educated.]

[De Villiers, C.J.: I find these people paid their rates.]

Well, my lord, two of them paid

their rates, but the two others had their rates paid. They did not pay their rates themselves.

[De Villiers, C.J.: But is it likely they would have paid the rates if they did not consider themselves liable to pay the rates?]

I must submit that while they may pay the rates, they don't pay it themselves, but they pay it out of the rent which is due to the landlord and pay it out of the landlord's money.

[De Villiers, C.J.: That is as between them and the landlord; but as between them and the Divisional Council they are liable.]

Mr. Jones went on to argue that both a principal and agent could not have a vote. He added that it seemed to him if the Legislature had intended that owners and occupiers should have votes they would have said so.

At the request of the Chief Justice, Mr. Jones handed up to the Bench a copy of the instructions issued by the Government for the guidance of returning officers in the recent School Board elections.

Sir H. Juta said that the Court had already decided in *De Klerck v. Marais* (8. Juta, 202) that where a Divisional Council rate was levied, not only was the occupier liable to pay the rates, but the rate became due from him. It seemed to him that that case disposed of the whole of his learned friend's argument. In *De Klerck v. Marais* it was sought to strike off the votes of certain occupiers who had not paid their rates. It was argued that these were not persons from whom the rates were due under Section 18 of the Divisional Council Act, and that, therefore, they could not be struck off. The Court, however, held that the rates were due.

[De Villiers, C.J.: There is one point that has not been raised, but, still, it is a very serious question whether the learned Judge ought to have declared the whole election void. The witnesses say that they would have given their votes to the applicant.]

They tendered their votes.

[De Villiers, C.J.: Very well; but they might have voted for the other candidates also; they don't say that they would have voted for him alone. Of course, I don't know whether the Court should now raise a question which the appellant did not raise.]

Sir H. Juta pointed out that the real respondent in the first instance did not now appear. It was merely that the Government wished to have a judicial interpretation as to the meaning of the word "ratepayer." The respondents in the motion had acquiesced in the decision given by the Court below.

Mr. Jones, in reply, submitted that the case cited by his learned friend did not bear on the point in the present case. A strict interpretation should be given

by the Court as to the meaning of the word "ratepayer" under the School Board Act.

De Villiers, C.J.: The question to be decided on this appeal is whether a lessee of property who is also an occupier, and has paid his Divisional Council rates, is entitled to vote in an election of members of a School Board in a divisional area. That is the main question raised. The School Board Act of 1905 provides in the 10th section that "in every School Board district two-thirds of the members shall be elected by the municipal ratepayers or by the Divisional Council ratepayers of the school district, according as the district is or is not a municipal area, and the remaining third shall be appointed by the Governor." The question which arises is whether the persons who had tendered their votes or had been willing to tender their votes at the election were qualified as voters or not. The words "Divisional Council ratepayers" are not defined in the School Board Act of 1905. Reference has been made to the Divisional Council Act (No. 40, 1889), where we find a definition of the word "ratepayer" in the case of Divisional Council elections. The fourth section gives the following definition: "Ratepayer shall mean a person liable to the payment of rates in any division." The Government in issuing their circular seem to have confined their attention to the 243rd section of the Act, and to have relied upon that section as giving the owner alone the right to vote, and not the occupier or lessee." The section is as follows: "All persons owning immovable property in any division, including any municipality within such division, shall be liable to be rated for the purposes of this Act." The 244th section refers to Crown lands. I quite agree with Mr. Howel Jones that if the Act had stopped there, there would have been strong reason for holding that it is only the owner that is to be held liable for the payment of rates. But, then, when we come to the 269th section of the Act we find the following: "Every Council may, in suing for the recovery of rates proceed against the owner or lessee or occupier either separately or both of them in one and the same action, each for the whole rate in any competent court and recover the same by the judgment and process of such Court." Then there are three provisos. The first is: "That any occupier of property on which a rate has been assessed, who is not the owner thereof, and who has not entered into such occupation in pursuance of any agreement for becoming the owner thereof, shall, in the absence of any agreement to the contrary, be enabled to retain or recover from such owner the amount of any rate which he may have so paid, but not

any costs or expenses which he may have incurred or been condemned to pay in the course of any suit or action brought against him by the Council for non-payment of any such rate." Mr. Jones, on behalf of the appellant, contended that this proviso shows that the intention was to make the occupier the mere agent for the payment of the rates, as he may recover the rates again from the owner. But he cannot be regarded as merely the agent, because he is held liable to pay it out of his own pocket. As between the occupier and the Divisional Council, clearly the occupier is the ratepayer. As between the occupier and the owner, no doubt, the occupier may recover again from the owner, but that does not take away the liability of the occupier to the Divisional Council. He is liable to pay rates in terms of the definition clauses, and this view is strengthened by the provisos (b) and (c). Proviso (b) is: "That any occupier of any immovable property shall be liable for any rate which had become due and payable thereon at any time before he entered upon the occupation thereof," showing that, in the contemplation of the Legislature, the occupier does become liable to pay rates after he has entered into occupation thereof. Then comes proviso (c): "That any person who may have become liable for any rate as aforesaid shall continue to be liable for such rate, although he may have ceased to own to hold on lease, or to occupy the property in respect of which the rate has been imposed," clearly showing that the liability to pay the rate was in the case of the occupier in respect of his occupation. Well, then, if there is any doubt left upon the matter, that doubt is removed by the decision of the Court in the case of *De Klerck v. Marais* (8, Juta, 202). No doubt the question for decision in that case was somewhat different from what is now raised but in order to decide that question it was important to ascertain whether any occupier, as such, was liable for the payment of rates. This question was decided in the affirmative. Clearly the learned Judge in the Court below was correct in holding that the persons who tendered their votes were persons who were entitled to vote, and ought not to have been rejected. Then there is another important question, upon which, however, there has been no appeal, and that is whether the learned Judge was right in declaring the whole election null and void. It is an important matter, and may prove an important question in the election of members of Parliament, and I very much doubt if a similar case had arisen, say, in an election for members of the circle, any circle returning three members, I doubt whether any Court would have set aside the whole of the election. In a recount, possibly the result would have

been that the last man would have fallen out, but I express no opinion on the point, but I do think that the Court, in confirming this judgment, should do so without expressing any opinion on that point which has not been raised on appeal. The Court will dismiss the appeal, with costs.

Buchanan and Hopley, J.J., concurred.

Mr. Jones (in answer to the Court) said that he appeared for the Civil Commissioner.

[De Villiers, C.J.: Well, then, the costs will be paid by him in his capacity of Civil Commissioner.]

[Appellant's Attorneys: Reid and Nephew. Respondents' Attorneys: Findlay and Tait.]

BEHR V. MURRAY. { 1906.  
June 16th.

Pound regulations—King William's Town Borough Act 27 of 1905.

*At the time of the passing of the Act 27 of 1905, the Municipality of King William's Town was under the operation of the Municipal Act of 1882, and had a legally constituted pound subject to the provisions of the Pounds' Act of 1892. By the 1st section of Act 27 of 1905, the proclamation bringing the Borough under the Municipal Act was repealed, except as to acts and things done or commenced, and under the 122nd section the existing rules and regulations shall remain as legal as if inserted in the Act, until altered by the Council. Among the powers conferred on the Council was that of establishing pounds, appointing pound masters and making pound regulations. Before such new pound regulations had been made, the plaintiff's cow trespassed on the land of the defendant, who seized her for the purpose of impounding her.*

*Held, that the seizure was legal.*

This was an appeal from a judgment of the Judge-President of the Eastern Districts Court (Mr. Justice Kotze), sitting at the Circuit Court at King William's Town, in appeal from a judgment

of the Resident Magistrate of King William's Town.

The matter arose out of a trespass by Mr. Murray's cow upon Mr. Behr's garden on the 30th June last. Mr. Behr said that the cow ate his cabbages and carrots, and he refused to release it until plaintiff had paid 2s. 6d. as damages. Mr. Murray paid the money under protest, but said the cow had been illegally detained as no pound regulations were in force at the time of the alleged trespass, and he afterwards claimed £1 from Mr. Behr in the Resident Magistrate's Court as damages for unlawful and wrongful seizure of his cow. The Magistrate gave judgment for defendant with costs. Mr. Murray then carried the matter on appeal to the Circuit Court, when Mr. Justice Kotze found that the impounding was illegal, as there did not exist at that time any rule or regulation in the borough of King applying to the impounding of cattle. His lordship reversed the Magistrate's decision, and gave judgment for plaintiff for 2s. 6d., and for defendant for 2s. 6d., and ordered each party to pay his own costs in both courts. From this judgment Mr. Behr now appealed.

The Magistrate's reasons for his judgment were as follows:

In this case Mr. H. W. Murray sues Mr. W. Behr for £1 damages. Both are resident within the borough of King William's Town, and the action arises out of the seizure, on or about the 30th June last, of Mr. Murray's cow by Mr. Behr, for the purpose of impounding her for trespass within the borough of King William's Town.

Mr. Murray alleges wrongful seizure and detention, and further that to release the cow he paid under protest 2s. 6d. demanded. Damages to the extent of £1 are demanded for the alleged wrongful action.

Mr. Smith, on behalf of Mr. Behr, pleaded the general issue, and claimed in reconvention 2s. 6d. done to Mr. Behr's property by the cow in question.

Mr. Murray, in the course of the case, admitted the cow had done 2s. 6d. worth of damage, but denied liability.

The Magistrate's reason was as follows:

The first question for decision is what law governed pounds and trespass in the borough of King William's Town on the 30th June last. Up to the 29th January, 1903, the borough was under the Kaffrarian Ordinance No. 9 of 1864, and its pounds governed by regulations under that Ordinance, approved by the Governor by Proclamation No. 49 of 1873. Those regulations were in force on the 29th January, 1903, when the borough was, by Proclamation No. 29 of 1903, brought under the Municipal Act of 1882, and the Borough Or-

dinance repealed. Upon the Municipal Act of 1882 operating, the Pounds and Trespasses Act of 1892 came into force, under Section 81 of the latter Act, superseding pound regulations, framed under Proclamation No. 49 of 1873, and, I think, beyond a doubt, repealing them.

The Municipal Act of 1882 only remained in force until the 6th June, 1905, when the New Borough Act No. 27 of 1905 was promulgated.

Sections 122 to 128 of the new Act deal with rules and regulations, and Section 122 provides that the existing rules and regulations of the borough of King William's Town, in so far as the same are not contrary to law and not repugnant to the true intent and meaning of this Act, shall remain as legal valid and effectual as if inserted in the Act, until altered by the Council in due form of law.

I was at first rather puzzled as to what was the position of affairs as regards pounds under the new Act, and after consulting a number of authorities, found the explanation in the Statute Law.

The old pound regulations had gone, and would not be revived by the removal of the borough from the Municipal Act of 1882. So, unless the provisions of the Pounds and Trespasses Act of 1892 could be regarded as regulations, the borough, under the new Act, would be without them until new ones were published.

The "Pounds and Trespasses Act of 1892" is a consolidation with some amendment of the Statute Law previously existing. The preamble of Ordinance No. 16 of 1847, then repealed, shows that "whereas the existing pound regulations of this Colony are in many instances defective," etc., etc.

"And whereas it is expedient to provide for the better regulation of all public pounds, not being within or belonging to any Municipality," etc., etc.

Considering those provisions with Section 164 of the "Municipal Act of 1882," and Sections 81 to 84 of the "Pounds and Trespasses Act of 1882," it seems to me all difficulty is removed, and the "Pounds and Trespasses Act of 1892" contains the pound regulations of this Borough until altered by the Council in form of law. See also Section 2 (2), Act 27 of 1905.

That being the case, Mr. Murray had no grounds for action, the seizure of the cow being legal and the detention justifiable until the 2s. 6d. (admittedly the fair amount of damage) had been paid.

Judgment must be for the defendant with costs and the contra claim falls away.

The judgment of Kotze, J on appeal to the Circuit Court was as follows.

In this case which is an appeal from

the decision of the Resident Magistrate of King William's Town, a somewhat interesting point arises as to statutory interpretation. It appears that in June last a cow, belonging to appellant, trespassed in the garden of the respondent and did damage to the extent of two shillings and sixpence. The respondent detained the cow and would not deliver her up to the appellant until the 2s. 6d., the amount of the damage had been paid. The appellant being of opinion that the Borough of King William's Town was without any pound regulations and that the detention of his cow was illegal, at first refused to pay the 2s. 6d., but eventually did so under protest in order to release his cow. The appellant then sued the respondent in the Magistrate's Court at King William's Town for the sum of £1, being damages sustained through the wrongful detention of his cow. The cow was detained for the purpose of impounding her for trespass in the garden of the respondent within the Borough of King William's Town. The appellant however contends that at the date of the detention of his cow, viz., the 30th June, 1905, there existed no pound regulation justifying the detention of cattle found trespassing and doing damage, and that by Common Law the only remedy is an action for the recovery of such damage. The Magistrate has very carefully and very clearly given the reasons which induced him to dismiss the claim of the appellant, the plaintiff below, and to give judgment in favour of the respondent, the defendant below, with costs. The Borough of King William's Town had its own Bye-Laws and Regulations promulgated under the King William's Town Borough Ordinance No. 9 of 1864. Under Regulation 2 of Section III. of these Bye-Laws provision was made for the impounding and detention of animals found trespassing. By proclamation No. 29 of 1903, however, the Borough of King William's Town was placed under the Municipal Act of 1882. By paragraph 164 of this Act it is provided that the Pound Ordinance of 1847 and all Acts amending the said Ordinance shall *Mutatis Mutandis* extend and apply to every Municipality hereafter constituted or brought under the operation of this Act.

There have from time to time been several amendments of the Pound Ordinance of 1847, the last of which is the Act No. 15 of 1892, known as the Pounds and Trespasses Act of 1892, which repeals the Pound Ordinance of 1847, and all subsequent Acts dealing with Pounds and Trespasses. By section 81 of the Pounds and Trespasses Act of 1892 it is provided that the provisions of this Act shall apply to every pound in any Municipality constituted or brought under the provisions of the Municipal Act of 1882. The provisions relating to



Pounds as contained in this Act therefore came into operation within the Borough of King William's Town, which was brought under the provisions of the Municipal Act of 1882 by the Proclamation No. 29 of 1903. That being so, I agree with the view expressed by the Magistrate that the provisions of the Pounds and Trespasses Act of 1892 superseded and repealed the Pound Regulations which are contained in the Bye-Laws of the Borough of King William's Town promulgated under the Ordinance No. 9 of 1864. So much appears to me to be quite clear and plain. But during the present year the Legislature passed an Act No. 27 of 1905, called "The King William's Town Borough Act of 1905." By section 1 of this Act the Proclamation No. 29 of 1903, bringing the Borough of King William's Town under the operation of the Municipal Act of 1882, and any other law, or Proclamation contrary to this Act of 1905 are expressly repealed. Section 2 of this Act, however provides *inter alia* that all *Borough Regulations* in force in such Borough of King William's Town shall (unless repugnant to the provisions of this Act) continue in force until altered or amended under this Act. Section 122 of this new Act is to the same effect. It provides that the "existing rules and regulations of the Borough of King William's Town, in so far as the same are not contrary to law, and not repugnant to or inconsistent with the true intent and meaning of this Act, shall remain as legal, valid and effectual as if the had been word for inserted in this Act, until such time as the the same shall have been altered by the Council in due form of law." By section 123 power is given to the Council of the Borough to make and alter Borough rules and regulations, and section 124 specifies the various heads or matters with regard to which regulations may be so made, in which regulations may be so made, including (sub-section 21) the establishment of one or more pounds within the Borough and the making of such pound regulations as may be necessary.

The Magistrate appears to have had some difficulty as to the meaning of sections 2 and 122 of the new King William's Town Borough Act, which expressly states that all *Borough Regulations* in force in the Borough shall, except where repugnant to the Act, continue in force until altered or amended under the Act. He considered that as the former regulations with regard to pounds contained in the Bye-laws and Regulations promulgated under the Ordinance No. 9 of 1864 had virtually and in effect been repealed by the bringing of the Borough of King William's Town under the Municipal Act of 1882 and were not revived by the removal of the Borough from the operation of that Act by the

new Borough Act of 1905, it must be taken, in order to give a meaning and effect to the language of sections 2 and 122 of the new Act, that the Pounds and Trespasses Act of 1892 should be regarded as the existing pound *regulations* for the Borough of King William's Town until altered by the Council as prescribed by these sections. Otherwise, the Magistrate thought the Borough would be without any pound regulations until new ones were framed and published. He accordingly held that the provisions of the Pounds and Trespasses Act of 1892 still contain the pound regulations of the Borough and gave judgment against the appellant, Mr. Murray, with costs. While I agree that it is to be regretted that the Borough should for the present be without any pound regulations, I think that the words of sections 2 and 122 of the new Act for the Borough of King William's Town cannot be so construed as to make the Pounds and Trespasses Act of 1892 still applicable to the Borough. It is true that Section 2 lays down that, notwithstanding the repeal of the Proclamation 29 of 1903, bringing the Borough under the operation of the Municipal Act of 1882, all Borough Regulations in force shall so continue until altered by the Council. This, I venture to think, does not mean that the provisions of the Pounds and Trespasses Act of 1892 must be considered as the Borough Regulations of King William's Town so far as the matter of pounds is concerned. It can hardly be that the Legislature intended this Act of 1892 to continue in force until the Borough Council altered the provisions of this Act by framing new pound regulations. Such a view seems to me open to a twofold objection. First of all it would indefinitely, if not perpetually, continue the provisions of the Pounds and Trespasses Act of 1892 as of force in the Borough of King William's Town, if the Council does not choose to frame new pound regulations. In the next place the Legislature, when speaking in Sections 2 and 122 of the existing rules and regulations of the Borough of King William's Town, seems rather to have contemplated the local Borough rules and regulations in force in the particular Borough of King William's Town, with which alone the new Act deals, as distinct from the provisions relating to pounds contained in the Pounds and Trespasses Act, which is a general Statute applying generally to the whole Colony. It should be borne in mind that the Borough Regulations framed and published under Ordinance No. 9 of 1864 were only affected and repealed by the Municipal Act of 1882 so far as inconsistent with that Act. Sections 2 and 4 (Subsection 2) of this Act of 1882 expressly lay that down. It is, there-



fore, quite possible and probable that many of these Borough Regulations of King William's Town, dealing with municipal matters other than pounds are still in force, and that it is to these and similar rules and regulations that the language of Sections 2 and 122 of the new Act of 1905 applies. It seems then to follow that so far as the matter of pounds is concerned the Borough is at present without any rule or regulation on the subject, for, as already pointed out, the bringing of the Borough under the Municipal Act of 1882 caused the Pounds and Trespasses Act of 1892 to operate, which later Act, while repealing the regulation as to pounds contained in the Borough Regulations of King William's Town, has now in turn been itself repealed. This may cause a temporary inconvenience to the inhabitants of King William's Town, but the Council of the Borough has the remedy in its own hands and can immediately frame and submit for approval new regulations dealing with the subject of pounds within the municipal limits.

As there does not exist any rule or regulation, either Statutory or Municipal, applying to the impounding of cattle within the limits of the Borough of King William's Town, it follows that the cow of Mr. Murray, found trespassing, could not be detained with the view of sending her to the pound. Nor does the common law of the Colony permit the impounding and detention of cattle found trespassing and causing damage, if what Voet in his Commentaries 9.1.3. lays down that, in the absence of pound regulations, the Roman Law is still in force, be true and applicable at the present day. Voet refers to Digest 9.2. lex 39 Section 1, where Pomponius says that if a man finds the cattle of another on his land he must drive them off and will not be entitled to shut them up, for he has special actions if he has suffered damage from the trespass. This may be very well where the owner of the cattle damage-feasant is known and an action *de pauperie* can consequently be brought against him, but if he be a stranger and not known it may happen that the person, who has sustained the damage, being unable to discover the owner, will be remediless. It is, however, unnecessary to pursue the subject any further for the purpose of this case, as the respondent in the Court below did not rely on any common law right of detaining or impounding the cow. The Magistrate found that the seizure and detention of the cow were legal and that the appellant (plaintiff below) could not insist on the delivery up of his cow until the sum of (2s. 6d.) two shillings and sixpence (the admitted amount of damage sustained by respondent, defendant below) had been paid. He accordingly gave judgment for the de-

fendant with costs, holding that the counterclaim for 2s. 6d. damage done fell away. As the cow was strictly speaking illegally detained in the yard of the defendant, the plaintiff is entitled, in the absence of proof of any further damage, to the 2s. 6d. which he paid under protest in order to release his cow. This sum should therefore have been allowed him in convention. On the other hand the defendant sustained damage to the amount of 2s. 6d. for which he duly counterclaimed, and if he had to restore the 2s. 6d. to the plaintiff, who had paid under protest, it follows that defendant should also have been awarded 2s. 6d., the admitted amount of damage sustained by him. The effect of this would be that the one amount or claim is set off or compensated by the other. I, therefore, think that the judgment below should have been in favour of the plaintiff for 2s. 6d. and in favour of the defendant on the counterclaim for 2s. 6d., each party to pay his own costs. The judgment below will accordingly be altered to judgment in this form. As to the costs of this appeal I do not think, under the special circumstances of the case, that I should make any other order than that each party shall pay his own costs. It is much to be regretted that the parties, who are next door neighbours, did not settle this trifling dispute between them amicably.

Mr. W. P. Buchanan for appellant;  
Mr. Benjamin for respondent.

Mr. Buchanan said that the real point to be decided in this case was whether the seizure for the purpose of sending to the pound was legal and justifiable, or wrongful and unlawful, as the plaintiff said. The whole question was whether section 2 of Act 27, 1905, the new King William's Town Borough Act, repealed Proclamation 29 of 1903, which brought the municipality under the terms of Act 45 of 1882, the general Municipal Act. It was contended for the present respondent in the Court below that, since the King Boro' Act of 1905 was promulgated on the 30th June last, the borough was taken away from the general Municipal Act, and that the Pounds and Trespasses Act (No. 15, 1892) did not apply, and accordingly that no regulations were in force in the borough relating to pounds and trespasses, except it were held that the words of section 2 (sub-section 2) saved the regulations to the borough. While the borough was under the General Municipal Act, the pound was under Act 27 of 1905. Act 15 of 1892 had been superseded, and these regulations were made under 15 of 1892.

[Buchanan, J.: There were no special regulations for King William's Town.]

If there had been no pound regulations in force in that town, under the Common Law a man has a right to send trespassing cattle to the pound. If

there was no municipal pound they could have been sent to the divisional pound. See Section 7 of the Pounds' Act.

[De Villiers, C.J.: If there is no pound the 25th section would apply.]

Exactly; the whole scope of Act 20 of 1892 is that trespassing animals must be sent to the nearest pound. That would apply even if the pound were in another division. Sections 25, 73, 83 and 84 allow animals impounded outside a municipality to be sent to the municipal pound. That is clearly put in Ordinance 16 of 1847, Section 59, which, however, has been repealed. Voet (9-1-3), Grotius and Van Leeuwen all agree that should there be no public pound, animals may be impounded elsewhere. See Maxwell on Statutes, p. 319 and 327, as to interpretation of Statutes. If it be held that the regulations cited do not apply, the man upon whose property trespass is committed would have no remedy.

Mr. Benjamin (for respondent): If it be urged that Act 18 of 1882 is still in force, it appears to be argued for the other side that pound regulations, etc., can be altered only by Act of Parliament. In this case I submit that Act 18 of 1882 applies. From 1892 municipalities who have no special Act are under Act 18 of 1882. If Section 122 be construed in the wide sense contended for it, it would make that section practically an Act of Parliament. According to the construction of the other side, the regulations of the Town Council might over-ride an Act of Parliament. Section 81 of the Ordinance contemplates that every municipality should provide its own pound.

[Hopley, J.: But what if there be no municipal pound?]

That would be the fault of the municipality. As to the construction of the Act, surely one cannot seize an animal within a municipality and send it to a Divisional Council pound. The whole tenour of the Act is that every animal seized within a municipality must be placed in the municipal pound, or in a Divisional Council pound, within the division in which it has been seized. See Voet (9-1-3) and the authorities there cited. But all these authorities are discussing purely local laws (Hand-vesting); see Grotius (3-38-11). Voet's context shows that on this point Roman Law and the Law of Holland are identical. The man whose lands are trespassed upon may sue the owner of the trespassing animals for damages, but he cannot shut them up in a private pound.

Mr. Buchanan was not heard in reply.

De Villiers, C.J.: The learned Judge in the Court below ended his judgment as follows: "It is to be regretted that the parties, who are next-door neighbours, did not settle this trifling dispute between them amicably." I quite agree

with that remark, and if it were applicable to that Court, it is equally applicable to this Court; but, of course, if people have rights, it does not depend upon the amount in dispute as to whether they are entitled to assert those rights. It appears that the plaintiff's cow trespassed upon the defendant's land and did some damage. The defendants' servant seized the cow with the object of sending her to the pound, but before she could have been sent to the pound the plaintiff's servant appeared on the scene and demanded the cow. The defendant refused to deliver the cow unless at all events the damage done by her was paid to him. Accordingly, under protest, the plaintiff's servant paid 2s. 6d. Then the plaintiff brought an action, in which he claimed damages for the unlawful seizure of this cow. The Magistrate came to the conclusion that it was not an unlawful seizure, inasmuch as the pound regulations which had been in force in the borough of King William's Town at the time of the passing of the Borough Act in 1905 were still in force in the municipality. The learned Judge, however, held, on appeal, that these regulations were no longer in force, that there was no pound in the municipality, that consequently there was no right on the part of the defendant to seize the cow, and he gave judgment in favour of the plaintiff for 2s. 6d., for unlawful seizure of the cow, and, on the other hand, allowed the counter-claim of the defendant for 2s. 6d. damage, and ordered each party to pay his own costs, and from this judgment the defendant now appeals. I am inclined to agree with the view of the Magistrate that until the borough made its own pound regulations, the provisions of the Pounds Act of 1892 remained in force as the pound regulations of the borough. Under the 124th section of the Act 27 of 1905, the Borough Council had the power to establish one or more pounds within the borough, and to provide for the erection of pounds, the appointment of pound-masters, and for making such other regulations as may seem necessary or expedient. In point of fact, when this action was brought, or, at all events, when the cow trespassed, no such regulations had yet been made. Accordingly the question arose whether the Act of 1892 was still in force. The 122nd section of the Act 27, 1905, is as follows: "The existing rules and regulations of the borough of King William's Town, in so far as the same are not contrary to law, and not repugnant to, or inconsistent with, the true intent and meaning of this Act shall remain in force as legal, valid, and effectual, as if the same had been word for word, inserted in this Act, until such time

as the same shall have been altered by the Council in due form of law." Now, I am certainly inclined to the view that this section is wide enough to embrace within the terms "rules and regulations" rules and regulations established by the Act of 1892, but I do not wish to found my decision upon this point, because I am clearly of opinion that, upon other grounds, the seizure of the cow for the purpose of taking her to the pound was perfectly legal. In the first place there was still a pound in existence within the borough, and there is nothing in the Borough Act of 1905 to make that an illegal pound. But then, assuming that it was an illegal pound, the defendant was entitled to impound the cow in the nearest legal pound. The 25th section of the Pounds Act is as follows: "Any proprietor upon whose land any animals are found trespassing may send such animals to that pound which is the nearest, by a practicable road or thoroughfare, to the land trespassed upon, and to no other pound." This is a general law applicable to the whole of the Colony, and, therefore, it is not necessary to inquire into the question as to whether the learned Judge correctly stated the common law of the Colony. I found my decision upon this section as to the right of a proprietor of any land to send the animals found trespassing upon it to the nearest pound. If, therefore, there is a trespass upon land within the Municipality, the cattle must be sent to the nearest pound within that Municipality. But supposing there is no pound at all? In my opinion, in such a case, the owner of the land upon which there has been a trespass, is entitled to send the cattle to the nearest pound even if it is not within the Municipality. It is true that until the passing of the Borough Act of 1905, the borough was under the Municipal Act of 1882, and that by the 81st section of the Pounds Act, 1892, the provisions of such Pounds Act are made to apply to every pound in any municipality constituted under the Act of 1882. That until the passing of the Borough Act of 1905, there was not, as the plaintiff contends, any pound in this municipality, then there would be no pound to which the 81st section of the Pounds Act of 1892 could apply; but it does not follow that the inhabitants are deprived of the general right to impound given by the 25th section. The owner of the land upon which there has been a trespass would still be entitled to this general right given by law, and if there is not a pound within that municipality, he is entitled, under the 25th section, to impound in the nearest pound. In the present case the defendant had not yet carried out his intention. He had seized the cow, and we may assume that he had seized her for the purpose of sending her to the nearest

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legal pound, and, therefore, in my opinion, the learned Judge in the Court below was wrong in holding that the plaintiff was entitled to recover any sum from the defendant for the defendant's illegal seizure of the cow. The cow was legally seized. On these grounds, I am of opinion that the judgment of the Court below cannot be supported, and that the decision of the Magistrate must be restored. Judgment will be for the appellant, respondent to pay costs.

Mr. Benjamin said that the appeal was being supported by the Council of King William's Town, and it was in the nature of a test. If there had been any misunderstanding, it had been due to the fact that the Municipality itself was neglectful.

De Villiers, C.J.: We have nothing to do in this matter with the Council. The Council is not before the Court. As I said before, I am strongly inclined to the view that until the Council makes its own regulations, the provisions of the Pounds Act are the regulations that are applicable. But, as between the parties before the Court, the appellant is successful, and I think he ought to have his costs. The appeal will be allowed, with costs in this court, and in the court below, and the judgment of the Magistrate's Court will be restored.

[Appellant's Attorneys: Findlay and Tait. Respondent's Attorneys: Syfret, Godlonton and Low.]

## SUPREME COURT

### GENERAL MOTIONS.

BERLYN V. BERLYN. { 1906.  
June 18th.

Mr. J. R. de Villiers moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree of divorce granted, with custody of the child of the marriage.

LOVELL V. LOVELL.

Mr. Close moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree of divorce granted, with costs, with forfeiture of any benefits of the community.

## GENESE V. GENESE.

Mr. Benjamin moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree of divorce granted, with costs.

*Ex parte* MURRAYSBURG MUNICIPALITY.

Mr. Pohl moved for a rule nisi, under the Derelict Lands Act, to be made absolute.

Rule made absolute.

## DUNDAS V. BEUKES.

Mr. M. Bisset moved for leave to sue the respondent by edictal citation, and to attach certain property.

Leave to sue by edictal citation granted, and to attach property *ad fundandam jurisdictionem*, citation to be returnable on August 1, personal service, failing which publication in the "Government Gazette" and once in the "Bechuanaland News."

## PINTO V. PINTO.

Mr. Watermeyer moved, on the petition of Joseph Pinto, for leave to sue his wife by edictal citation for restitution of conjugal rights. The defendant was stated to be at Delagoa Bay.

Leave to sue granted, citation to be returnable on August 1, personal service, failing which publication once in the "Government Gazette" and once in "O Futuro."

*Ex parte* DU TOIT.

Mr. W. Porter Buchanan moved, on the petition of Pieter Andries du Toit, as executor dative in the intestate estate of his father, Pieter Andries du Toit, for the transfer to him of certain property, which he had purchased at public auction.

Order granted as prayed.

*Ex parte* DE KLERK.

Dr. Greer presented the usual certificate as counsel in an application for leave to sue *in forma pauperis* and by edictal citation, for conjugal rights.

Rule granted, calling upon the respondent to show cause on August 1 why applicant should not sue *in forma pauperis* and by edictal citation, personal service, failing which one publication in the "Somerset East Budget."

## PENNY V. BARNA.

Mr. P. S. T. Jones moved for a certain attachment, and interdict to be set aside.

In the absence of an affidavit of service, the matter was ordered to stand over.

*Ex parte* MARAIS.

Mr. Van Zyl presented a report by the Registrar of Deeds anent the application of petitioner for an order authorising the Registrar of Deeds to issue a certified a copy of a certain mortgage bond.

Rule nisi granted, returnable on the 2nd August, calling on all concerned to show cause why the prayer of the petition should not be granted.

*Ex parte* ESTATE BATE.

Mr. Schreiner, K.C., moved on the petition of John Brown Shearer, as executor testamentary in the estate of the late Rose Isabella Bate, for confirmation of a certain sale of property in the estate of Wm. Wright, of Graham's Town. Counsel said that the sanction of the Court was asked to what was really a family arrangement by which the whole of the funds had been pooled, in order to avoid expensive litigation.

Order granted as prayed, on condition that Mrs. Rae's share of the proceeds of the sale be deposited with the Queen's Town Loan, Trust, and Agency Co., on trust, Mrs. Rae to receive during her life all interest thereof, and after her death capital to go to her children, costs to come out of the fund.

*In re* THE RECREATION SYNDICATE, LTD.  
(IN LIQUIDATION).

Mr. Gutsche moved for the confirmation of the first report of official liquidators

Report confirmed.

*Ex parte* ESTATE GERTSE.

Mr. Gutsche moved on the petition of the *curator bonis* for leave to pass transfer of certain quitrent land in the district of Worcester.

Order granted as prayed.

*Ex parte* BIESEL.

Mr. Benjamin moved for an order authorising the payment of a sum of £135 out of the estate of petitioner's late father, Friedrich Biesel, to be spent upon putting in repair certain houses in the estate, paying rates and so forth. Petitioner annexed a consent by the executrix.

Order granted as prayed.

*Ex parte* VERSTER.

Mr. Payne presented the usual certificate in this matter, which was an application for leave to sue the respondent *in forma pauperis*.

Rule nisi granted, returnable on the 2nd August, personal service, failing which, one publication in the "East London Despatch."

*Ex parte* CARELSE.

Mr. Close moved for leave to sue *in forma pauperis*. Counsel presented the usual certificate.

Rule nisi granted, returnable on the 28th June, personal service to be effected.

*Ex parte* GUSE.

Mr. Douglas Buchanan moved for leave to sue *in forma pauperis*. Counsel said he was prepared to certify.

Rule nisi granted, returnable on the 28th August, personal service to be effected.

APPEL AND LIPSCHITZ V. APPEL.

Mr. Alexander moved for an order of ejectment against respondent in respect of a certain half-share of a farm in the district of Oudtshoorn.

There was no appearance for respondent.

Ejectment order granted, with costs, possession to be given up by respondent on or before the 31st July.

MULDER V. OLIVIER.

Mr. Pohl moved for an order discharging the order of the 29th May postponing a certain sale directed to be made by a previous order of Court.

Order of the 29th May discharged.

REHABILITATION.

Mr. Alexander moved for the discharge from insolvency of Alexander Gromer.

Discharge granted.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

RIPLEY V. MORGAN. { 1906.  
June 19th.

Mr. P. S. T. Jones (for plaintiff) applied for judgment in terms of the consent paper, for plaintiff for £134 1s. 6d., together with taxed costs to date.

Maasdorp, J said that judgment would be entered in terms of consent.

Mr. Jones said that he noticed there was no provision as to interest in this matter.

Maasdorp, J: Judgment will be in terms of consent. Unless interest is introduced by consent, I cannot introduce it.

Mr. Jones said that the consent would then have to remain.

GREYVENSTEIN V. THOMPSON.

Landlord and tenant—Damage to property leased—Estoppel by conduct.

*G. had leased certain premises to T. from November 1st, 1904, till October 31st, 1905. T., however, held over till February 26th, 1906, on which date he tendered delivery of the premises. This G. refused to accept until he should have put them in the same good order and condition as they were in when handed over to him. T. remained in occupation for some weeks, and executed certain small repairs. G. now sued T. for rent for the whole time of his occupancy, for ejectment and for damages.*

*Held, that G. should have accepted delivery of the premises at the date of expiration of T.'s lease and sued him for damages.*

*Held further, that T., by consenting to remain, was estopped from claiming his right to vacate the premises and was liable for rent during the time he had remained in possession*



*for half the cost of repairs and for damages.*

This was an action brought by Hester Jacoba Greyvenstein, wife of Johannes P. J. Greyvenstein, of Barkly East, against James Thompson, barber, Barkly East, for rent and damages.

The declaration set out that the plaintiff was the owner of a certain erf No. 40, with buildings thereon, situate at Barkly East. On July 29, 1904, plaintiff, by a written lease, let to the defendant the said premises at a rent of £84, for one year, beginning the 1st November, 1904, and ending 31st October, 1905. Defendant had, since the expiration of the said period, remained in possession of the premises and had had, and still has (15th March), use and occupation thereof. Plaintiff claimed payment of 5s. per diem in respect of such occupation by virtue of an agreement entered into between the parties on or about November 8, 1905, or, failing proof of such agreement, he said that 5s. per diem was a fair and reasonable charge for such occupation. By the lease defendant agreed to keep in good repair during his tenancy all buildings and outhouses, fences, and gates, and deliver the same in such good order and cleanliness as he had received the premises in. Defendant, in breach of the agreement, had allowed the premises, etc., to fall into a state of dirtiness, disrepair, and dilapidation and had refused to deliver the same in a state of good order and cleanliness. Plaintiff said that she had suffered £5. damages in consequence thereof. She claimed (1) an order for delivery of possession; (2) payment of the sum of 5s. per diem from the 1st November to date of delivery of possession, and (3) the sum of £50 as damages.

Defendant, in his plea, admitted that he remained in possession of the said premises until February 22, 1906, on which date he tendered delivery thereof and payment of £28 10s. for use and occupation of the premises from October 31, 1905, to the 22nd February, 1906, and tendered costs to date of tender. Subsequent to the date of tender as aforesaid he had at all times been ready and willing to deliver the said premises, but plaintiff neglected and refused to accept delivery. Defendant now repeated his tender. He denied that he agreed to pay the 5s. per diem for any period beyond the lease. He said that plaintiff undertook to keep the roofing, guttering, and downpipes of the said premises in repair. He denied that he had unlawfully and in breach of the agreement allowed the buildings, outhouses, etc., to fall into a state of dirtiness and disrepair, but said that the premises were in the same state of cleanliness, order and repair as they were

in when he entered into the lease, making due allowance for reasonable wear and tear. He denied that plaintiff had suffered damages for which he was liable.

Plaintiff, in her replication, admitted the tender, but said the tender was conditional on the acceptance thereof by the plaintiff in full and final settlement of her claims. She said that the tender was altogether insufficient and unsatisfactory in view of the dilapidated condition of the premises as set forth in the declaration. She had since received delivery of the premises, except the stable without prejudice to her claim for damages.

Mr. P. S. T. Jones was for plaintiff; Mr. Roux was for defendant.

Hendrick A. Meitjes, attorney, Barkly East, at some length described the condition of the premises about the time the defendant tendered delivery, and said that the state of things was so bad that the plaintiff could not possibly accept the premises. The defendant had sub-let a portion of the premises. One Mr. Potgieter afterwards hired the premises, but when he first came to Barkly East he would not take the house. Potgieter had spent eight guineas in putting the house in a suitable condition. Witness gave evidence as to certain repairs, which should be carried out, his estimate being about £35.

Other evidence was called for plaintiff and Mr. Jones closed his case.

Evidence was led for defendant to the effect that he delivered possession as soon as he was able to get out his sub-tenants, and that the premises had been placed by him (defendant) in a condition substantially equal to that in which they were received. The property was very old.

Counsel, having been heard in argument on the facts.

Maasdorp, J: In this case the plaintiff claims from the defendant payment of rent from the first of February to such time as the defendant shall be declared to have delivered possession of the house, which was on 11th April. The plaintiff also claims a sum as damages suffered by her in respect of negligence on the part of the defendant to keep the place in proper repair. The defendant has expressed his willingness, and has tendered in his plea the payment of rent up to the 22nd February, when he vacated the place. The plaintiff contends that she is entitled to rent subsequently to the 22nd February, because the defendant was not then prepared to give up possession. It appeared that at that time the plaintiff took up the position that she was not obliged to accept the premises from the defendant until the defendant had put the place in a proper state of repair. I think the plaintiff was legally wrong. When the lease expired, and the defendant was prepared to deliver up the house, the plaintiff was obliged to accept her pro-

perty, but was entitled to claim from the defendant any such damage as she might prove herself entitled to in respect of the condition in which the defendant had left the place. However, upon the plaintiff refusing to accept delivery and handing back the keys to the defendant, the defendant, instead of insisting upon vacating the premises, and giving possession to the plaintiff, accepted the keys, and set about effecting some repairs upon the premises. He, therefore accepted the position of retaining possession after the 22nd February. The question the Court has now to decide is whether the defendant was liable to effect repairs, and whether there were repairs, which it was his duty to perform, and which he had neglected to perform. The conclusion I come to from the description given by Mr. Meitjes is that the paper on the walls was in a dilapidated condition, through the ill-usage received at the hands of the tenant, and that the doors also were in want of paint, and had been neglected during the tenancy. Upon the evidence, I am prepared to find that the painting and papering together would cost something between £25 and £30. But when these repairs have been effected, such improvements will have been effected as will be for the benefit of the plaintiff herself, and she cannot to that extent be enriched at the expense of the defendant. It seems to me that more than half of the expense which will have to be incurred to place the premises in a proper state of repair will be improvements for the benefit of the plaintiff. That would reduce the amount to something like £12. As to rent, I think if I allow an extra month as the period during which the plaintiff was kept out of possession through the fault of the defendant, that would be ample. Judgment will be given for plaintiff in respect of rent for £35, instead of £28 10s., as tendered, and in respect of the damages £12 will be awarded. Judgment for plaintiff for £47, with costs, including costs of application made by plaintiff to have the evidence of witnesses taken on commission. Defendant would have been very wise if he had saved costs by consenting to that application.

On the application of Mr. Jones,

Maasdorp, J., certified the plaintiff as a necessary witness.

[Plaintiff's Attorneys: Syfret, Godloton and Low. Defendant's Attorneys: Van der Byl and De Villiers.]

#### PENNY V. BARNA.

Mr. P. S. T. Jones applied for leave to mention this matter, which was an application to set aside a certain attachment obtained, *ex parte*, by the present respondent (Ferenz Barna). The matter came on for hearing before Mr.

Justice Buchanan on Monday, but, there being no affidavit of service and no appearance for respondent, it was ordered to stand over. Counsel now produced an affidavit of service upon respondent, who, however, did not appear.

On the petition of Barna an order was granted on the 1st June by the Chief Justice attaching a certain chronophone, of which Albert Penny is the proprietor *ad fundandum jurisdictionem* in an action to be brought by petitioner for damages for breach of contract, attachment to be discharged upon respondent giving security to the satisfaction of the Registrar for £50 to abide judgment for damages and costs. The action in question related to the employment of Barna as operator and electrician for certain singing and living pictures which were exhibited at the Good Hope Hall. Petitioner said that he had been summarily dismissed from his post, and he proposed to institute an action for £100 damages for breach of contract and unlawful dismissal. He described respondent as a "travelling showman" and "bird of passage."

Mr. Jones said that the petitioner (Barna) had taken no steps in the matter since the attachment and interdict were granted. No summons had been issued, and Penny now applied to have the attachment and interdict set aside, with costs. He read an affidavit by Penny, who said that he resided at the Belvedere Hotel, Cape Town, and was the proprietor of the Singing and Living Pictures Company. He admitted that an agreement was entered into between himself and Barna, but he said that on the 29th May he dismissed the latter for incompetency and insobriety. Barna had been specially engaged in England as an electrician and operator. Under clause 7 of the agreement he was empowered to dismiss the petitioner in the event of insobriety, or, if he had not the knowledge or experience necessary to enable him to perform his duties. On Wednesday, the 16th May, deponent engaged the Good Hope Hall for six days, commencing from Monday, the 21st May, and the same Wednesday the applicant commenced working the chronophone, and continued working daily until Monday, the 21st May, the opening night, when Barna informed deponent that the performance could not be started, as he could not get the machine right. The performance was therefore postponed until the following evening. On Tuesday night deponent again asked Barna if he was ready, and he replied, "Open the doors and we will chance it." The chronophone was worked by Barna that evening, but he had no control over it, the pictures being put on at racing speed, so that the performance, which should have lasted two hours, was over in an hour and

ten minutes. The audience were very dissatisfied, and complained that the show was a fraud. In consequence deponent instructed Barna to appear at the theatre next morning at nine o'clock, but he did not appear until twelve, and then in a half-drunken condition. The show was opened again that evening, but it was as bad as ever, and the audience clamoured for their money back. The applicant was still under the influence of liquor, and was unable to perform his duties. The performance continued in the same unsatisfactory way. The pictures were sometimes upside down, with occasional stoppages of the machine, the light continually going out and leaving the machine in the dark. The show closed on the Saturday, and deponent instructed the applicant to pack up the machine, and he dismissed him. He showed Barna a letter which appeared in the "Cape Times" of May 25 from the City Electrical Engineer, denying that the opening of the show was deferred owing to the failure of the electric current, and stating that the failure was due to a wrong connection in the consumer's electrical apparatus. Barna, when asked if this was correct, said he did not know, and did not care. Certain supporting affidavits were attached to Penny's affidavit, but

Maasdorp, J., said he did not think it was necessary to read these.

Mr. Jones said it appeared, from Barna's attitude to-day, that he was not prepared to substantiate his case.

The order of the 1st June was discharged, with costs.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

THOMAS V. KOTZEE. { 1906.  
June 19th.

This was an action in which Henry Thomas, a contractor, sought to recover £1,000 damages from Frederick Jacobus Kotzee, a farmer, residing at Parow, for breach of contract.

The plaintiff's declaration stated that he entered into a contract with the defendant to take from him 2,000,000 bundles (more or less) of wood at 9d. per 100 bundles. The agreement further provided that the plaintiff should cut, collect, and make into bundles, according to a certain sample, all such work at his own expense, and pay every Friday for all wood or bundles cut during the week. The plaintiff cut and collected 69,000 bundles of wood, and paid for them. On or about January, 1905, the defendant, in breach of his con-

tract, refused to allow the defendant to enter on his land, and continued to do so, wherefore plaintiff claimed damages amounting to £1,000.

The plaintiff, in his plea, denied that he had refused to allow the plaintiff to gather wood on the farm. He had always been ready and willing that the plaintiff should carry out all the terms of the agreement.

Dr. Greer appeared for the plaintiff, and Mr. Uppington appeared for the defendant.

Henry Thomas, the plaintiff, stated he entered into an agreement to purchase from the defendant two million bundles (more or less) of wood at 9d. per 100 bundles. To carry out this contract witness engaged men to make up the bundles at 1s. per 100. Work was done every day except on rainy days, and payments for the week's delivery was made every Friday. 69,000 bundles were cut and paid for. Witness did not take any active part in the cutting of the wood, but occasionally superintended it. In October, 1904, defendant's manager complained that unless 2,000 bundles were cut each week, independent of what his boy Adam cut, the cutting by the latter would be sold to defray current expenses.

[Hopley, J.: Was anything about an average number said in the agreement?]

Dr. Greer: No, my lord, nor a limited time.

Witness, continuing, said he told Mr. Kotzee he would put all the men he could get on the work, but that labour was very scarce. The manager wrote later stating that the defendant had instructed him to stop the cutting of the wood, witness had lost that letter. Witness went round next morning, and found that all his men had been stopped. Witness then interviewed the manager, and told him he had a contract to cut the wood, and he replied that he could not help it; he could only carry out instructions. Witness saw the defendant the next day, and drew his attention to the fact that he had been stopped. The defendant replied, "Do you think I will let you cut wood at 9d. per 100, while I am losing all my valuable cattle. Two million bundles (more or less) means that I can give you as much or as little as I please." He then locked the gate and rode away. Witness often saw the manager, and told him that as soon as he was financially able to do so, he would take the matter into court. A letter of demand was sent to defendant last March. Witness did not take legal proceedings before because he could not pay the costs of doing so. No reply was received to the letter of demand for £1,000, and subsequently the summons was served. The bundles cost witness 1s. 9d. per hundred, and he sold them at from 2s. 6d. to 3s. per 100. The wood was good, and the farm was close to the vil-

lage of Parow. The wood was known as "Rooi Krantz." After witness was driven from defendant's place he bought a bush from another man for £20, but the wood was not nearly so good. Witness had a ready market for wood at the time he made the contract with defendant. He could sell the wood as fast as he could cut it. Although witness was claiming £1,000, he did not expect to get that amount. He claimed he was entitled to 1s. per hundred bundles.

[Hopley, J.: Why don't you go on with your contract?—The place was locked, and we would not be allowed into the camp.

But in his plea defendant says you can go on?—I wouldn't risk it.

Witness, continuing, said that since he was turned away from the farm Kotzee had been dealing with the wood.

Cross-examined by Mr. Upington: Witness cut wood enough to bring in a profit of £5 per month. He could not get labour, or he would have cut more. He did not dismiss men because he had not sufficient money to pay them. Witness used to do speculation work besides selling wood. Witness always had about £5 in his pocket, and there was a constant stream of money coming in from the wood. Witness had a ready market for his wood.

When you purchased this wood, how long did you think you were entitled to cut it?—About two years.

Where is that letter you received from the manager of the farm stopping you cutting wood?—I have lost it.

Did you show it to anybody?—I did not.

You did not show it to the defendant?—No; I did not.

Continuing witness said he had purchased rails to run a light railway to the edge of the farm to convey the wood down. He did not know what he paid for them.

Do you keep books?—Not for these little things.

Then, what for?—For big deals. I am dealing in bricks now, and keep books.

And what profits do you make?—About £5 a month.

Witness (continuing under cross-examination) said his financial position had not improved since January last, but he put a small amount aside each week to get £50 together for the present action.

Are you prepared to go on the farm now and cut wood?—I don't want to have anything more to do with Mr. Kotzee.

Then you don't want to go on?—No. I want something better now.

Several witnesses were examined on behalf of plaintiff, all of whom corroborated the evidence he gave.

Dr. Greer closed his case.

Fredk. Jacobus Kotzee, uncle to the defendant, stated he arranged the contract and supervised the counting of the bundles, receiving the money and giving the necessary receipts. From time to time witness had to complain of the quantity of wood that was being dealt with. In October witness wrote on one of the receipts complaining of the amount of wood cut, and in January wrote plaintiff a letter on the subject. Witness kept a record of the work done. Plaintiff led witness to believe that he would cut about 50,000 bundles a week. Witness, who was only out here on a pleasure trip, was entitled to receive one-third of the purchase price of the timber, and moved his residence down near where the wood was being cut to superintend it, but witness was not going to waste his time counting a couple of hundred bundles a week. Witness wrote plaintiff a very polite note, drawing attention to the fact that he was not keeping his contract. Witness denied that he ever stopped the men from working. In the first place he never had any discussion with the men, but instructed his boy to speak to them when it was necessary.

Cross-examined by Dr. Greer: Do you remember making a statement to Mr. Steer in January last?—I do not.

He took your statement down. It was as follows: "In January, 1905, acting under instruction from the defendant, I wrote the plaintiff ordering him not to enter on the defendant's farm"—I never said that.

Can you say why Mr. Steer took down your statement?—He must have misunderstood me.

It was a very big mistake, an extraordinary mistake?—That may be so. I wish they would produce the letter and that would explain everything.

Did you say subsequently, "The plaintiff saw me, and wanted to know why the said letter had been sent to me, and I informed him that I had been instructed by the defendant to do so?—I cannot remember what Mr. Steer states I said.

Did you say that?—Not so pointedly as that.

What do you mean by "pointedly"?—I said if you call me I will be a hostile witness.

Witness (continuing) said he thought that his conversation with Mr. Steer was only a friendly one.

"What have you been doing since then?" inquired counsel?—I have been prospecting.

Where, at Parow?—At Parow! What can you find at Parow. I indulge in an occupation I am very fond of—prospecting—but not in Parow.

What are you doing now?—I am back again at Skeelpot Vlei.

Where?—At Lonely Hut, the little house hidden away in the forest.



And are you still prospecting?—I like the place very much, but I do not go in for prospecting there.

In further cross-examination, it appeared that the farm had lately been purchased by Messrs. Joyce and McGregor, and witness had obtained from them the right to cut wood on the place in dispute. At the rate they were going on, it would have taken about 16 years to cut the wood.

In re-examination, witness stated that no statement was submitted to him by Mr. Steer for signature.

Frederick Jacobus Kotzee, jun., the defendant in the case, stated he left the whole subject of the contract and the supervision of the work in the hands of his uncle, the last witness. His uncle showed him the letter written in January drawing his attention to the fact that he had broken his contract. The letter did not tell him that he was not to go back to the farm. Witness never authorised his uncle to order the men off the farm. He denied having had a discussion with the plaintiff.

In cross-examination, the witness said that if Thomas had had any complaints, he could have gone to witness.

Dr. Greer: But he says he did?—He's a liar.

In further cross-examination, the witness said the plaintiff led him to believe that he would cut 20, 30, 50, and even 100,000 bundles a week. The portion of the farm sold to Joyce and McGregor was not the portion worked by Thomas.

Witnesses were called for the defence to show that Thomas stopped the work himself, as it was alleged he could not pay the wages' bill.

Counsel were then heard in argument, on the facts, after which

Hopley, J., said this was one of those cases in which the whole matter turned on a question of evidence, pure and simple, and it was one of those cases which he regretted to say were not unfrequent in this country, and in which the evidence was so contradictory that either one side or other must be committing perjury. Under these circumstances, one had to examine all the circumstances to see where the probabilities of the case lay, or, at all events, to say whether all the surrounding circumstances lent themselves to the view that the plaintiff had made out his case, because the plaintiff came into court knowing that the burden lay on him of proving his case. The judges had got more or less skilled in the art of weighing evidence and trying to find where the probabilities lay, and yet very frequently there were cases that troubled the most experienced, and one felt the limitations of human fallibility at all events. In this case the plaintiff told the Court that he entered into a contract, a copy of which he produced. It was an agreement by which he had a right to take 2,000,000 bundles of wood

from this farm, and for which he had to pay a sum stipulated in the contract. There was direct evidence that this, although it looked a big contract, was not sufficient to make the Court believe that the customers were falling over one another to get the wood. At the beginning of the contract there was a big output, but that gradually came down, and this was explained by witnesses for the defence, who said they were told there was not work for them in cutting the wood, owing to competition, and that they would have to go. All the figures showed that the demand could not be as great as the plaintiff wanted to make out, as the weekly cutting got less and less, and the defendant saw that the contract, which was to have lasted for two years, looked like lasting for sixteen years, and plaintiff was remonstrated with repeatedly. The plaintiff said he had five men a week permanently engaged, but admitted that they cut 200 bundles a day each, which meant 6,000 bundles a week, and the returns put in did not show these figures, or anything like them. The plaintiff accounted for his stopping the work by stating he was peremptorily ordered off the ground. This was denied by the defendant, who stated that he only wrote advising the plaintiff to get on with the work. It was quite possible that the plaintiff came to the conclusion that he could make more money with less labour outside, and therefore decided to abandon the contract, for he stated that he only made £5 a month out of the work. He could not see that the plaintiff had established his case, but if he found the letter which he stated he had lost, he would have good grounds for a further action. Therefore, there would be absolution from the instance, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

GREEK V. KELLER AND ( 1906.  
OTHERS. ( June 20th

Riparian proprietors — Public  
stream—Irrigation—Right of  
passage—Act 40 of 1882.

*The applicant, a riparian proprietor of land along the banks*



*of a public stream, being desirous of diverting his share of water for irrigation purposes from a higher level than his own land and of leading it over the land of the respondent, an upper riparian proprietor, applied for an order permitting him and his surveyor to enter upon the respondents' land, in order to determine the line of passage to be claimed under Act 40 of 1882.*

*Held, dismissing an appeal from a Divisional Court, that as the appellant had established no legal right to divert the water before it reached his land, he could not claim a right of passage under the Act 40 of 1882 over the respondents' land.*

This was an appeal from a judgment of Mr. Justice Buchanan, in an application by Andries Johannes Albertus Greeff, of Stolsvlakte, division of Oudtshoorn, for an order upon Josephus Johannes Antonie Keller and others, also of Oudtshoorn, for facilities to enable applicant to determine a line of passage for the conveyance of water to his farm. The matter came before the Divisional Court of the Supreme Court upon notice for an order to authorise applicant and a surveyor to enter upon the lands of the respondents on the farm Van Wyk's Kraal, in order to determine a line of passage for the conveyance of water from the Oliphant's River to applicant's farm, Bakenskloof, and the amount of compensation to be offered in respect thereof, in order to enable applicant to give notice to respondents in terms of section 3 of Act No. 26, 1882, and to take further proceedings in terms of the said Act, and, if necessary, of Act No. 40, 1899, with a view to the acquisition by applicant of a right of passage of water across respondents' lands. Applicant and respondents are riparian proprietors of land on the Oliphant's River, a perennial stream, the farm of the applicant being situated below that of the respondents.

The learned Judge in the court below refused the application (15 C.T.R., 958).

His Lordship's judgment was as follows:

Applicant and respondents are riparian proprietors of land on the Oliphant's River, a perennial stream, the farm of the applicant being situated below that of the respondents.

The application is a novel one, and renders it necessary to ascertain how far the common law has been altered

by the various Acts of Parliament relating to the right of passage of water. In the first place there is not at common law any such right of entry as is here claimed, nor does the Act in terms give any such right. But as the object of the Statute, as stated in the title is "to afford greater facilities to persons having a right to water to convey the same across the lands of other persons," where a right of water exists, I think it may be assumed that the possessor thereof should have such facilities given him as are necessary to make the right of passage, accorded by the Act effective and operative. The right of entry seems to me a necessary incident to the right of passage, and I would not dismiss the application on this ground alone.

But the 10th section provides that no proceedings authorised by the Act shall be taken in any case where the right to the water for which a passage is claimed is in dispute, until such dispute shall have been settled by the Court. The respondents here deny the right claimed by the applicant. Water rights have been the subject of considerable litigation in this Colony, and from the volume of decisions there may be deducted the general proposition that at common law water may be classed either as private or as public or common.

Under the latter class falls water flowing in perennial streams capable of common use, and under the former class, water in streams not public or common, water from springs arising on and kept within private property, water obtained from wells or collected on private property, and such like. To private water there can be an absolute right of ownership just as there may be to any other tangible property. Water in a public stream stands on a different footing. From the very nature of things, there can be no ownership of public water while it is still flowing in the stream and before it has been appropriated. A riparian proprietor may have a right of user, but it is controlled by the right of others. All who can get to a public stream are entitled to take water for what has been called a primary user, such as for drinking purposes and the sustenance of life. A riparian proprietor has also the right to take water for what has been called secondary purposes, such as irrigation and the like, but the user of the water for such purposes must not be to the detriment of the rights of others. Water taken from a public stream can only be used for secondary purposes on the riparian property, and after such user must be returned to the stream for the benefit of the public and of the lower proprietors with no other loss than that which irrigation or similar user has caused. If a lower proprietor was to go higher up a public stream and take thence past an intermediate pro-

prietor's land, water which he was entitled to use only on his own land, he would be interfering with the rights of such intermediate proprietors. At common law the right to take water for irrigation and the like is a right attaching to the ownership of the riparian property and consequently cannot be exercised until the water of a public stream has reached the property.

What rights, then, have been conferred on riparian proprietors by Statute? The first enactment on the subject was Act No. 24, 1876; Section 1 of which provides that "every person shall be bound to give a passage across his land to water derived from springs, dams, reservoirs or any other sources." Section 4 enacts that whoever desires to carry water across "the lands of another shall be bound to prove that the quantity of water whereof he is the proprietor is sufficient for the purpose of which it is destined." Reading these sections together and having regard to the sources named from which the water to be conveyed is obtained, I think it is clear that the right of passage given by this Act was confined to what are called private waters, in which there might be a proprietorship. There is no direct reference to the water of a public stream and no attempt has ever been made at law to extend this Statute to any other water. These provisions were repealed by Act No. 26 1882 upon which the applicant now mainly relies for the right claimed. Section 2 of this Act provides that "every person having a legal right to any water in any stream or river, or derived from any spring, dam, or reservoir, and wishing to employ it in irrigation, etc., shall have the right to convey such water "from and over" any land belonging to any other person. Here again the legislature has refrained from any express mention of public streams, and though the words "any stream or river" are used, they must, I think, be read in conjunction with the words "legal right to water" therein. All the sources of water here mentioned could be sources of private waters, in which there could be a right of ownership as against the world. In Sir Henry Juta's selection of "leading cases on water rights." I am reminded that when the Act of 1882 was under discussion in Parliament clauses were proposed which would have made it clear that it was intended to give a riparian proprietor who had a right to take water, a legal right to such water, but the clauses were withdrawn. If this was an indication of the desire of the legislature to limit the right of passage to what was recognised as private waters it would point against the intention to establish such a right as the applicant now sets up. The jealousy with which upper and lower riparian proprietors guard their respective rights is matter of common knowledge and may

account for the rejection of the clauses referred to. But whatever the cause, the words adopted by the Legislature must govern the intention and meaning of the Act. Much stress has, in argument, been placed upon the words in the second section giving a person a right to convey water "from" as well as "over" the land of another person. But I cannot overlook the difference in position between the person having a "legal right to water" and one who has only the right to take water. If the words of the section are confined to water to which a person may have a legal proprietary right, there is no departure from the common law. But to read these words changing the common law, and as giving to a person who has only a right to take water, to which water he had no proprietary right, until he has appropriated it, a legal right to water still flowing in a public stream, would, in my opinion, be an interpretation not justified by the context. If it is desired to deprive upper proprietors of their rights, apt and clear words should be used in the Statute.

It should not left to deduce such an interference with private rights from words capable of bearing a different interpretation and which are applicable to other conditions. As the applicant has not, in my opinion, established a right to the water for which the passage is claimed, this application must be refused with costs.

Mr. Schreiner, K.C. (with him Mr. Close), for the appellant. Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for the respondent.

Mr. Schreiner: We claim the right as upper proprietors to go on the respondent's land and take water. Potgieter is a proprietor on the opposite side of the river, and he has given us the right to take water. We do not claim a right of abutment on the left bank of the river. Respondents say that our furrow would cause great damage to their land, but an arbitrator might direct that this water should be conveyed by pipes. It is impossible for anybody to comply with the provisions of Act 26 of 1882, Sections 3 and 4, unless he can first inspect the land. The question is, have we a right to water under Acts 26 of 1882 and 40 of 1889?

In the Court below his lordship held (1) that "right to water" meant "legal right" and (2) that the streams spoken of in Act 26 of 1882 do not include public perennial streams.

[De Villiers, C.J.: Is not the question as to public perennial streams settled by *De Wet v. Hiscock* (1 E.D.C., 249) and *Nel v. Kleinhaus* (15 C.T.R., 120)?]

The Act of 1882 speaks of any stream or river. See *Juta Leading Cases* (p. 466). The rights of non-riparian proprietors are covered by the words "from or over" (Act 26 of 1882, Sec-

tion 2). What was said in debate in the "House" on this Act cannot affect its construction.

[De Villiers, C.J.: No man has a right to take water until it either comes on his land or becomes contiguous to it.]

We do not claim absolute *dominium* of the water but we say that under Act 26 of 1882 we have a right to take water from the respondent's land, and that the common law was altered by this Statute. The Act was defective inasmuch as it did not prescribe the mode of the division of water. See also Act 40 of 1899, Section 10. Section 8 of Act 26 of 1882 is not repealed by Act 40 of 1899. Any superior Court can fix the place of diversion. Section 10 must not be overruled. See *Stewart v. Uniondale Municipality* (7 S.C.R., 110). Section 10 of Act 40 of 1899 throws an important light on Act 26 of 1882, and is a definite declaration of the law. Mr. Mulder could not go on the land and, therefore, could not make an accurate survey. In Oudtshoorn nearly every one has to take water from above his property. There water rights have been divided and sub-divided almost in *infinitum*. Sections 8 and 10 of Act 40 of 1899 protect all rights to water. In the absence of a servitude the right of abutment is clearly recognised. We only ask for a reasonable share of the water; we do not just now say what that share is.

Sir H. Juta (for respondent): This case raises two points: (1) May a lower proprietor go on to the land of an upper proprietor and take out water? (2) May the appellants come on to our land, make their survey, and then decide on their course of action? As far as I can understand, the original rights given to lower proprietors were given by Act 26 of 1882; Act 40 of 1899 was supposed to be merely declaratory of the Common Law. Until this Act was passed no lower proprietary claimed the right to go on the land of an upper proprietor and take water. No doubt there are cases in which a lower proprietor will have to take water from another person's land. If a riparian farm be sub-divided and one portion is on the river bank and the other is not, the owner of the latter has a right to a share of the water and the only way he can get it is by taking it from the neighbouring property. In such a case a lower proprietor might say: "One or other of you may have a share of the water, but you cannot both get it." The decision in *Stewart v. Uniondale Municipality* (7 S.C.R., 110) has always been held to be law. By Act 26 of 1882 a man may lead off such water as he has a legal right to use. But unless he be a riparian proprietor he has no legal right to a single drop. A man has no legal right to water till it comes on his land; a man can have no *dominium* in flowing water, he can only have a right

of user. If by Section 10 of the Act of 1899 it had been intended to extend these rights the Act would surely have been more clearly drawn. Section 10 is particularly involved, but see Section 6. Section 10 speaks of "the water assigned to him" (the riparian proprietor); but assigned by whom? Section 10 does not authorise a man to go on the land of an upper proprietor.

[Maasdorp, J.: Section 6 refers to matters which are not the subject of litigation; Section 10 to matters litigated.]

But Sections 6 and 7 provide for an appeal and therefore clearly contemplate litigation. If Act 40 of 1899 had been intended to give a lower proprietor the right to take out a furrow on an upper proprietor's land surely that would have been clearly expressed, but Section 10 does not give even to the Supreme Court power to order this to be done: Section 10 creates no new right. It seems to me that the appellant should have applied to a Water Court for a right of abutment, and has followed a wrong procedure in coming to this Court.

[Maasdorp, J.: If there was no Water Court, what was he to do?]

I do not know. Then again, by what Acts are rights such as are now claimed given? Certainly not by Section 4 of Act 26 of 1882. There is no Act which gives the appellant power to wander all over our land with surveyors, their servants and all their appliances.

[Hopley, J.: How could a furrow be cut without taking levels by means of instruments?]

One of the witnesses says he could judge the levels from the road.

Mr. Schreiner in reply.

De Villiers, C.J.: This is an appeal against a judgment of a Divisional Court dismissing an application for an order to permit the applicant and his surveyor to enter upon the respondent's land in order to determine a line of passage for the conveyance of water from the Oliphant's River to the applicant's farm, Bakenskloof. The respondent is an upper riparian proprietor, and for the purposes of this case it may be assumed that the river is a public one and that the applicant, through whose property it flows, is entitled to a reasonable share of the water for the purpose of irrigation. In the absence, however, of a right acquired by prescription or convention, or in some other lawful manner he is not entitled to take the water out of the river until it reaches his farm. This is a principle underlying all the decisions of this Court in regard to the rights of riparian proprietors. It is a principle which has also been recognised by the English Courts especially in the case of *Williams v. Harland*, which was cited with approval by my predecessor, Sir Sydney Bell in *Retief v. Louw* (Buch., 1874). In the former case it was said by Hol-

royd, J.: "Running water is not in its nature private property. At least, it is private property no longer than it remains on the soil of the person claiming it. Before it came there it clearly was not his property. It may, perhaps, become *quasi* the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other persons had acquired a prior right to it."

In this country the Courts have recognised the right of a person on whose land water rises which does not form part of a public stream to use such water as his own without regard to the claims of lower proprietors. In regard, however, to public streams the riparian proprietor, in the absence of rights acquired by contract or by prescription, is entitled to only a reasonable share until the water reaches his land. The question now arises whether a riparian proprietor is entitled under the 2nd section of Act 26 of 1882 to claim a right of passage over the land of upper proprietors for the purpose of leading out his reasonable share from a part of the stream flowing above his own land. This right can be claimed only by a person having a legal right to water. The applicant's counsel contended that a legal right to water embraces the right to lead out water and does not necessarily mean only the right to the ownership of the water. But if the right to lead out the water arises only when such water reaches his land it is impossible to hold that the Act was intended to enable a lower proprietor to anticipate that right by exercising it before the water reached his land. If this had been intended nothing would have been easier than to use appropriate language for the purpose, such in fact as appears to have been proposed, but not carried, in Committee of the House of Assembly when the Bill was passing through Parliament. Much stress has been laid on behalf of the applicant on the use of the words "convey such water *from* or over land belonging to another person," and it was contended that the employment of the term "from" supports the applicant's case. The use of this word certainly raises some doubt as to the true meaning of the section; but in order to deprive persons of undoubted rights a great deal more is required. The draftsman may have intended to benefit the lower proprietor at the expense of the upper proprietor, but the intention of the Legislature must be gathered from the language construed as a whole and according to the ordinary rules of interpretation. In support of his contention as to the true intent and meaning of the Act of 1882 the learned counsel for the applicant has referred to the 10th section of Act 40 of 1899. That section

certainly confers very wide powers on the Court in certain cases of dispute between riparian proprietors, but it does not apply to a case like the present. The only dispute between the parties is as to the applicant's right of entry for the purpose of finding a suitable passage over the respondent's land for the water which the applicant is entitled to lead out of the public stream. If the applicant is not entitled, as of right, to lead out this water above his own land he cannot claim such right of passage either under the 2nd section of the Act of 1882, or under the 10th section of the Act of 1889, or under both combined. It may well be that it is for the public interest that such a right should exist, but it should be conferred in unequivocal terms by the Legislature. I understand that an irrigation bill is now passing through Parliament, and an opportunity will thus be offered of giving clear effect to the intentions of the Legislature. As the law stands, however, I am of opinion that the learned Judge was right in refusing the application: and the appeal must, therefore, be dismissed with costs.

Maasdorp and Hopley, J.J., concurred

[Appellant's Attorneys: Tredgold, McIntyre and Bisset. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

MULLER V. JEAREY. { 1906.  
{ June 20th.

This was an action instituted by F. Muller, merchant, Cape Town, against Thomas Daniel Jearey, who resides in Cape Town, but trades in German South-West Africa, for the recovery of the sum of £34 10s. 9d., the balance of an account for goods sold and delivered.

Mr. McGregor, who appeared for the defendant, applied for the adjournment of the case on the ground that his client was unable to attend owing to his having an attack of enteric fever. His client only arrived from Damaraland on Tuesday, and was too ill to have a consultation with his attorney.

Mr. Burton (for plaintiff) said he could not very well oppose the application, but he thought his client was entitled to the costs of the day. This was the second occasion on which the case had been adjourned, and the plaintiff, who was ready to proceed to trial, had had no notification of the present application.



The application was granted, and the case adjourned for trial on or before August 21, the defendant to pay the costs of the day.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### PROVISIONAL ROLL.

MARRIOTT V. MORES KAISER { 1906.  
AND JACOB KAISER (TRAD- { June 21st.  
ING AS KAISER BROTHERS).

Mr. Douglas Buchanan was for plaintiff; Mr. W. Porter Buchanan was for defendants.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £1,000 and for the property to be declared executable.

Mr. W. P. Buchanan opposed the application on a deed of assignment which he said set out that in consideration of the applicants ceding all their property to the assignees they were released from all their debts and the estate passed away as completely as if it were in an insolvency to the assignees.

Hopley, J said he did not think this was a case in which he could grant provisional sentence, and the application would be refused with costs.

### MARAIIS V. ADAMSTEIN.

Dr. Rainsford said that in this matter leave was granted to sue by edictal citation, and he moved for provisional sentence on a mortgage bond for £6,500 and £32 11s. insurance premiums, for the property hypothecated to be declared executable, and for an order attaching the rents.

Order granted.

### POHL V. ROBINSON.

Mr. Pohl was for the plaintiff, and Mr. Douglas Buchanan was for the defendant.

This was an application for provisional sentence on a promissory note for £70.

Mr. Buchanan urged that the matter was not one for provisional sentence, but that plaintiff should be ordered to go into the principal case.

Hopley, J: In this case defendant is sued on a promissory note for £70 6s. 8d. made by him on the 20th April last. That promissory note was made to pay balances which then alleged to be due to his attorney on an attorney's bill of costs, fees and disbursements in divorce proceedings which the attorney had been conducting on behalf of the present defendant, in which he was the plaintiff, and which he seems to have obtained what he wanted, viz., a divorce from his wife. In that bill of costs, which was received upon the making of this promissory note, it is clearly set forth that the attorney says he only received £60 on account, and the defendant may be an ignorant man, but he may not be so ignorant as not to have seen that it was only alleged that his attorney had received £60 by cash on account of the various sums which he had disbursed and various fees which were due to him. He could, of course, have had his bill of costs taxed before he paid it, but he did not choose to avail himself of that right, and he there and then signed a promissory note to settle the bill of costs and got a receipt. Now it is said that that note was obtained under duress. I am not satisfied that that has been proved. Provisional sentence will be granted, but I cannot see why this Court has been selected for a matter which might have been settled in the Magistrate's Court at Uitenhage, and, therefore, in giving provisional sentence against him, I will only give Magistrate's Court costs.

### AREND V. RIX.

Dr. Greer moved for a provisional order of sequestration to be discharged. Provisional order discharged.

### LUCKES V. MAHOMED.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### LOGAN AND OTHERS V. WATERS.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### BROWN LAWRENCE AND CO. V. BARTHOLOMEW.

Mr. Sutton moved for the final adjudication of defendant's estate as insolvent.

Final order granted.



**STEYTLER AND CO. V. FLETCHER.**

Mr. W. Porter Buchanan moved for the final adjudication of defendant's estate as insolvent.

Defendant applied for an extension of time, and said he thought that in 14 days he would be able to settle matters.

The matter was ordered to stand over for a consultation between the parties.

Later on, Mr. Buchanan said that he could not consent to a postponement.

Defendant, in answer to the Court, said he owed £13,000, and had property which had cost £24,000.

Defendant's son-in-law said that arrangements were being made by which they hoped to meet all liabilities. The defendant owed, apart from bonds, £1,100.

The matter was ordered to stand over for a week.

*Postea* (June 28th).

Mr. W. Porter Buchanan again made application for the final adjudication of the defendant's estate as insolvent. The matter had been postponed on Thursday last to enable defendant to take advantage of an offer he said he could obtain. This offer had fallen through. Counsel also applied for the appointment of Mr. W. A. Currey as provisional trustee, his petitioners being eight creditors, representing claims over £9,000. The estate consisted of landed properties in Salt River, Woodstock, Cape Town, and Sea Point.

Mr. P. S. T. Jones, for Messrs. Witt and others, seven creditors, representing claims over £2,600, moved for the appointment of Mr. G. W. Steytler as provisional trustee.

Final adjudication granted, and Mr. Currey appointed provisional trustee, with power to collect rents.

**STEYTLER V. THE EASTERN PENINSULA ESTATE AND WATERWORKS SYNDICATE.**

Mr. Palmer moved for provisional sentence on a mortgage bond for £1,800 with interest, and for £3 16s. premiums of insurance, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**TOORT V. DALY.**

Mr. Roux moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £10 12s. and £87 4s. 7d. costs.

Dr. Greer (for defendant) applied for a suspension of the order, and said that the defendant was without means and out of employment.

Defendant was called, and he said that he was without means. His wife

had certain means, which were gradually getting exhausted. He had other creditors representing £300 or £400. Some time ago he offered the plaintiff £10 a month through the agency of a friend, who had, however, now gone away. Witness now offered £2 a month. His health had been bad for some time. He had been living by speculating and racing.

Cross-examined: His wife had shares in the Burger Estates and the Klappmuts Racing Club. The house they occupied cost £4,500. The occupants were his wife and himself and his mother-in-law and three orphans.

Mr. Roux said it was very hard upon the creditors that they should not get paid while defendant resided in a house that had cost £4,500.

[Hopley, J.: You want him to live in a "house" that cost a good deal more, I believe?]

Decree of civil imprisonment granted with costs, to be suspended on payment of £5 per month at the offices of Messrs. Van der Byl and De Villiers on the 1st day of each month, first payment to be made on the 1st July, with leave to plaintiff to apply for an increased order.

ILLGNER V. WINFIELD. { 1906.  
June 21st.  
„ 25th.

Provisional sentence—Conditional acknowledgment of debt—Further claims—Procedure.

*Plaintiff sued defendant for provisional sentence on a letter in which defendant tendered to pay some £81 on condition of receiving a discharge in full; plaintiff in his summons also claimed a further sum said to be due, or alternatively that defendant should be ordered to render and debate an account.*

*Held, that as plaintiff should have either sued on the letter for the £81 tendered, or have gone into the principal case, provisional sentence must be refused, with costs.*

Mr. Burton moved for provisional sentence for £87 18s. 2d., on an acknowledgment of debt contained in a letter dated April 25, 1906, written by defendant. The summons, counsel stated, also claimed £63 19s. 4d., being further balance due to which defendant wrongfully and unlawfully withheld moneys collected for the plaintiff from the North German Insurance Company by the de-

fendant, or, in the alternative, for an account supported by proper vouchers, the debate and payment of such sum as may be found to be due. At present plaintiff only applied for provisional sentence on the acknowledgment of debt for £87 18s. 2d.

Dr. Greer opposed, and read an affidavit by Frank Winfield, law agent, Claremont, who said that he was instructed by defendant to take steps to recover from the North German Insurance Company certain money upon insurance policies. A power of attorney was given to him by plaintiff. He recovered certain sums for loss to plaintiff's building and furniture. He received from the company only £175 in respect of the furniture loss; the other amount, in respect of the building, was paid direct to the bond-holders' attorneys. Deponent had tendered £87 18s. 2d., being the balance due to plaintiff, after deducting his charge in accordance with the agreement. He was put to considerable trouble about the claim. The company disputed the claim on the ground of fraud. The agreement was that deponent was to be allowed in respect of his services 5 per cent. upon the amount paid by the company, in addition to his usual fees. From the correspondence appended to the affidavit, it appeared that the plaintiff objected to the defendant's charges as excessive, and that he had refused to accept the tender as a full discharge. Counsel also read an affidavit by Mr. C. Brady, defendant's attorney.

Dr. Greer submitted that the plaintiff was not suing upon an acknowledgment of debt. He contended that the whole amount of £175 must be treated, together, and that plaintiff could not sue piecemeal in this way. If there must be a debate of account, then it must be a debate of the whole account.

Mr. Burton submitted that plaintiff was entitled to judgment as claimed. The amount was admitted by defendant to be owing and plaintiff was entitled to apply for judgment for that amount, and to take such steps as he might choose afterwards as to the balance. Counsel was not aware of any reason why the claim should not be brought in this form.

Dr. Greer, in reply, submitted that plaintiff must elect to take his course in the first instance, and that he could not split up his claim in this way. There was no precedent for this application.

*Cur. Adv. Vult.*

*Postea* (June 25th).

Hopley, J: This is a case in which one Winfield is summoned for provisional sentence on an alleged acknowledgment of debt, on a balance of account for £87 odd. The summons, however, goes on further to summon him to show cause why he should not pay the sum of £63 19s. 4d.,

being a further balance due to the plaintiff, which defendant, it is said, wrongfully and unlawfully withholds, or alternatively, an account and debate. These sums appear to arise from a series of transactions which have arisen out of the fact that the defendant was employed by the plaintiff to recover certain sums of money from an insurance company. He recovered certain sums, and he made certain charges, and eventually he wrote a letter to the plaintiff, which is the liquid document relied upon in this case. In this letter defendant tenders to pay to the plaintiff the sum of £81 odd, on giving him a full discharge. It is now contended that the plaintiff can sue provisionally on this letter, and still retain the further right to go on with the summons for any other amount which he may say is due. I do not think that was the right course to pursue, and one that the Court could sanction. It seems to be a contradictory course for the plaintiff to adopt—in the first portion of the summons to say that he sued on this as an admitted balance of account, and then to say that it is only a portion of the balance of account on which he took judgment—and that he could go still further into the account, and say there was more due to him. This is not an out-and-out acknowledgment of debt; it is a conditional acknowledgment of debt. They ought to have elected to take one course; they cannot do both, and provisional sentence must be refused, with costs. Of course, such portion of the summons as relates to this claim for provisional sentence can stand as summons in the principal case, if plaintiff elects to go into the principal case.

#### PAARL BOARD OF EXECUTORS V. GINSBERG.

Mr. Van Zyl moved for provisional sentence on two mortgage bonds for £1,700, with interest, bonds having become due by reason of the non-payment of interest. Counsel also asked for judgment for £12 premium of insurance and for the property specially hypothecated to be declared executable, and for rents due to be attached.

Order granted.

#### ILLIQUID ROLL.

DONAGHY V. SAPIRE. { 1906.  
June 21st.

Mr. Lewis moved for judgment under Rule 329d for £30, arrears of rent and cancellation of a certain lease, with interest *a tempore morae*, and costs of suit.

Order granted.

**RUNCIMAN V. THE BRITISH FREE RIGHTS BENEFIT SOCIETY.**

Mr. Gutsche moved for judgment under Rule 329d for £75, balance of moneys lent and advanced.

Order granted.

**MICHAU AND DE VILLIERS V. DALY.**

Mr. De Waal moved for judgment under Rule 329d for £68 10s., amount of account, representing services rendered and disbursements made in the action of *Toort v. Daly*, and for interest *a tempore morae*, and costs.

Order granted.

**LEZARD V. DRUMMOND.**

Mr. P. S. T. Jones moved, under Rule 330, for leave to sign judgment against the defendant for not proceeding with an action instituted by him against applicant for £1,500 damages for breach of faith.

Defendant appeared in person, and read an answering affidavit. He submitted that the application was out of order, because it was served upon him before the notice had expired. There had been negotiations for a settlement of the action, hence he had taken no further steps to file a fresh declaration after the original declaration had been thrown out.

Hopley, J.: It seems to me that this application must be acceded to. As long ago as November last a summons was issued, and thereafter in due course, I presume, a declaration was filed. Upon that, appearance was entered, and exception was taken to the declaration that it disclosed no cause of action. After argument, his Lordship the Chief Justice had held that there was no cause of action disclosed in the declaration. He, therefore, threw out the declaration, but, as a matter of indulgence, he gave leave to the plaintiff to amend the declaration if he could find facts, or he could find that he could say that he had a good cause of action on the declaration. I do not exactly know how the declaration would have been shaped, but, at all events, what I do know is that the Chief Justice, as a matter of indulgence, gave him time, without putting him upon special terms to amend his declaration. Under the rules of Court that means that he had 14 days from the date of the order to amend the declaration. The rule 334 (b) is very stringent, because it says, upon the expiration of such limited period as aforesaid, or of such 14 days the leave to amend shall become *ipso facto* void, unless the time is extended by a Court

or a Judge. Now, after the expiration of the 14 days, had the plaintiff come with good cause shown, and told the Court why he had not filed within 14 days, on showing merits and good cause, the Court would undoubtedly, as was done in the case of *Pfitzer v. Klette* (6 E.D.C., 196), have allowed him further time. He has done nothing of the sort, and since the 17th February he has not taken a single step in the way of putting his pleadings right in this matter. He now comes, and says that that was due to the fact that he had been trying to negotiate a settlement not only in this case, but also in one against the defendant, Lezard's brother, which seems to have nothing to do with this case. I cannot look to that case nor say how it is shaped, but it is clearly denied by the attorneys for the present applicant that they on their side ever entertained anything in the way of proposals for a settlement, or gave the present respondent any cause for thinking that they would accede to any settlement in that matter. Their bill of costs was taxed, but those costs have not been paid to this day. Respondent seems to have gone up to them one or twice, and made proposals which they describe as audacious. I do not mind them describing the proposals as audacious, but I think it was wrong in the affidavit of the attorney to speak of the respondent as an habitually audacious man, and that that is a statement which ought not to have appeared on the affidavit. However, this affidavit is to the effect that such proposals were at least not entertained by them, and it seems to me that even to-day he does not show that he has shown good cause or some substantial way in which he could amend his declaration so as to have a good cause of action. It seems to me that Mr. Jones, in applying as he does to-day, will not debar him from prosecuting his action in the proper way. It seems to me that respondent has not done what he ought to have done within the time allowed by the rules of Court, and the application must be given against him, with costs.

**ESTATE SCHOLTZ V. JUBB.**

Mr. Struben moved for judgment in terms of consent for £145, with costs, including costs of application for interdict.

Judgment in terms of consent filed.

**LIQUIDATORS OF CLARKE AND CO. V. GOVEY AND CO.**

[At the time of going to press, this case was standing over for judgment. It will be reported in Part 3 under the date of the judgment.]

*Ex parte* MNQUANDI.

Mr. Roux applied for a fresh direction in regard to this matter, which was a petition to have applicant's father declared insane and incapable of managing his affairs. Counsel said that a *curator ad litem* had been appointed, and the summons was returnable for that day, but, owing to the great cost of bringing witnesses from Tembuland, where the parties lived, he asked leave to have the matter decided upon affidavit.

It was ordered that the matter be removed to the next Circuit Court at Cala, and that applicant be appointed *curator bonis* of the alleged lunatic, this order to be served upon the *curator ad litem* (Mr. De La Court).

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D).]

ARNDT AND COHN V. DEUTCH-  
AUSTRALISCHES DAMP-  
SCHIFFS GESELLSCHAFT. { 1906.  
June 22nd.

This was an action to recover £44, in respect of damages caused to certain plate-glass, which the defendants undertook to deliver at Cape Town in the same good condition in which it was put aboard.

The declaration set out that the plaintiffs carried on business in partnership at Hamburg; the defendants traded in Cape Town through their agents, William Spilhaus and Co., who were sued in their capacity as agents for the defendants. On the 15th October there were shipped on board the S.S. Altona certain four cases of plate-glass in good order and condition, and the company agreed, in consideration of freight prepaid by the plaintiffs, to deliver the glass in like good order and condition. The S.S. Altona arrived in Cape Town on or about 14th November, 1905, and about the same day the cases were delivered to the plaintiffs' agents. One of the cases was not delivered in like good order and condition in which it was shipped and the contents were broken. By reason of the breach of contract plaintiff claimed £44.

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The plea admitted the formal allegation, but denied that any damage was caused on board. When the cases were delivered the contents were not broken.

Mr. Upington (with him Mr. Long) was for the plaintiffs, and Sir H. Juta, K.C. (with him Mr. M. Bisset), was for the defendants.

Stephen Philt, managing clerk of Messrs. Govey and Co., who were acting for the plaintiffs in Hamburg, stated that in October one Jacobs, carrying on business in Cape Town, ordered a certain amount of plate-glass. Upon the arrival of the cases his firm received certain information from the Harbour Board, and in consequence of that went down to the Docks. The cases were stored at Jacob's store. Witness's firm, on information from Jacobs, communicated with Messrs. Spilhaus and Co., defendants' agents, and offered them inspection of the case. They were notified that the case was going to be opened.

Michael Wolffe, storeman at the shed where the vessel was berthed, said he remembered the discharging of the case in question. It was his duty to examine the case to say if there were any traces of damage. He had the case put on the "discrepancy list," because he noticed two of the corners were chipped and a bolt was missing in the centre. The case was carefully put on the Harbour Board lorry. Shortly afterwards Jacobs came down and examined the case.

Cross-examined by Sir H. Juta: There was nothing in the landing to show that the glass was damaged. Very often the glass was in a good condition when the cases were chipped. He always tried to protect the Harbour Board in putting down slight damages.

Herbert George Reynolds, a clerk in the employ of the Harbour Board, said three of the four cases discharged from the Altona were marked damaged.

Alfred Ernest Jacobs, glass merchant, carrying on business at Cape Town, stated that in October, 1905, he gave an indent order on Govey and Co. for certain plate-glass from the plaintiffs. He examined the case, and found the batons chipped, and a bolt missing. He saw the damaged glass after it had been unpacked.

Frank William Freeman, shipping clerk to Wm. Spilhaus, recollected the cases being put on the wagon. The Harbour Board officials pointed out the damages, which were a missing bolt and chipped batons. There was no splintered place underneath the case. Witness refused to sign the discrepancy list as far as this case was concerned. Jacobs examined the case, and seemed quite satisfied with it. Witness knew nothing more until asked to sign the order, which he refused to do. Witness invariably accompanied consignments of glass to their destination. In this case,



witness refused to have anything to do with this consignment, as the liability ceased at the ship's side. It was not correct to say that witness promised Jacobs to accompany the wagon. The side of the case could have been taken off at the Docks, and the contents examined. Some days after, witness received a message to go to Jacobs to examine the case, but he refused to do so, as Jacobs had taken the liability on himself by ordering the removal of the case from the ship's side. The case was eventually opened, and witness saw the broken glass, with which a mark on the case corresponded, and which was not there when the case left the Docks.

In cross-examination, witness said that once the plaintiff took possession of the case at the Docks the liability of the ship ceased. Witness was satisfied when the case was put on the trolley that there was no mark on the case. If there had been, it would have been pointed out to him by Jacobs or some of the Harbour Board officials.

Is the dent you speak about large?—I have not seen it.

[De Villiers, C.J.: Then how do you know you would have seen it at the Docks?—I was told where it was.

In further cross-examination, the witness said that after the receipt of the message to witness the opening of the case, he immediately repudiated all liability. Witness had no knowledge that the case was being taken to the store to convenience the inspection of the contents. It was the invariable practice, if the ship's agent consented, to send cases of plate-glass to the consignee's store to be examined. It could be examined at the Docks. Witness did not remember any cases of plate glass going to Mr. Beardmore's store with a damaged receipt, unless he accompanied them.

I put it to you that, with your approval, this case was sent to Jacob's store to be examined?—No.

Witness (continuing) said that at the Docks he took up the position that the cases were examined, and that the ship's liability then ceased. Witness declined to accept the cases as damaged cases, and refused to sign the discrepancy.

In re-examination, witness said that many ships insisted on the cargo being inspected before it left the side of the ship.

Mr. Spilhaus stated he recollected receiving a letter from Jacobs stating that his representative had consented to the case being taken to the store. Witness mentioned the matter to the last witness, who denied doing so. Witness interviewed Mr. Govey on the matter, and Mr. Govey expressed himself satisfied with the result of the examination.

Thos. Hoban, stevedore, stated he superintended the discharging of the Altona. He recollected the case in question, and examined it in the hold. The

bolt was missing, but in witness's opinion that did not cause any harm. The batons were slightly chipped. Witness did not see the dent in the case. If he had seen it he would not have moved it without permission. The case was put on a Harbour Board wagon. It paid witness to be careful in handling cargo, because on two occasions he had had to pay for oversights.

In cross-examination, witness admitted that the firm he worked for were engaged by Spilhaus and Co.

I see you "break" the cargo for them?—I do not break any cargo.

You know fully well the meaning of the term "break"?—I do not.

It is a term generally used amongst stevedores?—I have not heard it before.

Captain Burmester testified to inspecting the case on behalf of defendants when it was in Jacob's possession, and seeing the dent in the bottom of the case. In his opinion the case must have dropped on something blunt.

This concluded the evidence, and counsel were heard in argument on the facts.

De Villiers, C.J., said that in this case the plaintiff claimed damages against the defendant company for damage done to goods which were shipped from abroad. The damage consisted of the breakage of plate glass, which was said to have been in this case shipped in good order and condition. The bill of lading was executed at Antwerp, and contained the usual clauses. In his opinion the words shipped in good order only applied to the external portion of the case. This clause was taken as admitting that the package was shipped to all appearance in good condition, and the shipper should give *prima facie* evidence to that effect. In the present case no evidence has been given as to the internal condition of the contents of the case, but the plaintiff's counsel relied on the fact that in the declaration the cases were alleged to have been shipped in good order and condition. Now the question is, what was the meaning of those words in the declaration. Was it such that the defendant must be taken to admit that internally the goods were all right. It was clearly shown that the good order and condition referred to by the plaintiff in his plea was the good order and condition referred to in the bill of lading. If the plaintiff wished to aver that the plate-glass was shipped in good order and condition, then the defendant to win his case would have to prove that that was not so. It lay with the plaintiff to prove that the glass in the case was unbroken at the time it was handed into the possession of the defendant. He did not wish to found his judgment on that point, only as it was a technical point that should have been attended to in the drafting of the pleadings it had been clearly proved in the present case, that Jacob removed the



case, and he was satisfied that Jacob in so doing acted as the agent of the plaintiff. The shipment of goods was really consigned to him, and as having chief interest acting on behalf of the plaintiffs he consented to the removal of the goods to his own store. He (his lordship) was not satisfied from his evidence that there was any arrangement with the defendant's agent, Freeman, that there should be a further examination. Jacobs might have been misled, because there was a general practice that the agents should visit such goods at the store of the consignee, and he might have assumed that Freeman would go to the store and examine the goods, but the Court is not satisfied that there was any arrangement for the removal of these goods, and, therefore, the removal of the case to the store throws on the plaintiff the burden of proving that this case had been injured before it left the ship's side. It is impossible to know everything that occurred to that case after it left the ship's side, but they had had the driver of the wagon and his evidence certainly was in favour of the view that the glass was injured after it reached the store. He was a most important witness, and one who had no interest in the case. According to his evidence, immediately after the case had been removed from the wagon it came with a jerk on to the ground. Unfortunately the Court has not sufficient evidence as to the height which it must have fallen, but it does not require a fall from a very great height to cause a serious injury to plate-glass. If the owners proved that the damage was done to the glass while it was in the ship's custody, then they would have grounds to proceed, but as that had not been proved there would be absolution from the instance, with costs.

#### FRYER V. WELCH.

Mr. Upington moved as a matter of urgency for an order interdicting the respondent, C. S. Welch, from holding an auction on the Grand Parade on Saturday morning.

The affidavit of Henry Francis Montague Fryer, the applicant, stated that in January last an agreement was entered into between him and the respondent, by which it was agreed that the respondent was to conduct auction sales on the parade for the partnership. In consequence of grave and continued breaches of duty, and misconduct, on the part of the respondent, applicant consulted his attorney, and placed the matter in his hands. An advertisement appeared in the "Cape Times," and applicant had been informed by customers of his firm that respondent intended holding an auction on the Parade on Saturday morning in his own

name and for his own benefit, notwithstanding that the agreement had been cancelled, and as a result the business of the respondent's firm would be seriously injured.

A rule *nisi* was granted, calling on the respondent to show cause why he should not be restrained as prayed, with costs, returnable on Thursday next. The rule *nisi* to operate as a temporary interdict.

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

MYBURGH V. MYBURGH. { 1906.  
June 22nd.

This was an action brought by Willem David Myburgh, of Prieska, against his wife, Mrs. Myburgh (born De Jager) for restitution of conjugal rights, failing which a decree of divorce.

Plaintiff's declaration was in the following terms:

1. The plaintiff resides at Prieska and the defendant at Hope Town in this colony.

2. They were married to each other in community of property at Kimberley on April 24, 1902, and the marriage still subsists.

3. Prior to April, 1905, plaintiff lived with defendant at Hope Town.

4. On or about April 19, 1905, the plaintiff having no occupation, left Hope Town for De Aar in search of employment, and on about May 13, 1905, left De Aar for Prieska, where he succeeded in obtaining employment, and where he is earning sufficient to maintain the defendant, and although he has repeatedly asked defendant to come and live with him she has failed and neglected to do so.

Wherefore the plaintiff claims:

- (a) A decree of restitution of conjugal rights.
- (b) Failing compliance with which a decree dissolving the said marriage.
- (c) Forfeiture of all marriage benefits.
- (d) Alternative relief.
- (e) Costs of suit.

Mr. Pohl for plaintiff. Defendant in default.

Evidence having been given,

A decree of restitution was granted, defendant to return to or receive the plaintiff on or before the 15th July, failing which, to show cause on the 1st August why a decree of divorce should not be granted, with costs, and why she should not be declared to have forfeited the benefits accruing from the marriage.

PHILLIPS. AUNE AND CO. } 1906.  
V. WHEELER. { June 22nd.  
                                  " 25th.  
                                  " 26th.

This was an action brought by Phillips, Aune and Co., surveyors and engineers, Cape Town, against Thomas H. Wheeler, of Maitland, to recover two sums of £52 10s. and £200.

Plaintiffs, in their declaration, said that in December, 1904, they supplied to defendant, at his special instance and request, certain blue prints showing sections of the Maitland-Paarl-Wellington Divisional Council road, with properties abutting thereon between Salt River and Bellville (then known as D'Urban-road), for which they were entitled to charge £52 10s. In or about the beginning of February, 1906, the defendant entered into an agreement with the plaintiffs wherein they agreed to draft and prepare for the defendant certain plans and sections of the proposed tramway known as the Salt River-Bellville Tramway, and the defendant agreed to pay to the plaintiffs the sum of £200 for the said plans and sections, and the work and labour to be expended thereon. Defendant also undertook and promised to supply the plaintiffs with all information and data necessary to enable them to draft the said plans and sections. Thereafter, upon instructions from defendant, they set to work upon the said plans and sections, and the said plans and sections had been completed, except in so far as they did not show the tram line and certain limits of deviation, which they said could only be shown when the defendant supplied them with certain data and information. They had tendered, and again tendered, the said plans and sections, but defendant refused and neglected to pay the said sum. Plaintiffs claimed the sums of £52 10s. and £200, in respect of the said blue prints and plans and sections. Alternatively to the second portion of the claim, they said they were entitled to £200 as damages.

Defendant, in his plea, said that the plaintiffs prepared plans of the said road on behalf of the Divisional Council, by whom they were paid. Knowing that defendant was intending to promote a private Bill in Parliament for authority to lay a tram line on the said road, they offered him every assistance in their power, on condition that he would eventually give them the work of preparing Parliamentary plans for the private bill. Thereafter, during plaintiff's absence in Europe, he was lent the blue prints in question gratuitously by a clerk in plaintiffs' office in order that he might annex it to an application that he was making to the Divisional Council. He had only now received the said blue prints back from the Council, and he tendered them to the plaintiffs. As to the other part of the claim, he said that plaintiffs spe-

cially agreed to complete and deliver the said plans and sections in such a state and at such time as would enable him to deposit the same with the clerk of the House of Assembly on the last day of February in accordance with the rules of the House, and it was also agreed that he should pay £100 on delivery of the said plans and sections, £50 within thirty days thereof, and £50 upon the approval of the said plans by the Parliamentary examiner of plans for private bills. While denying that he undertook to supply any details or information, he said that he duly supplied all such information and data. He said that wrongfully and unlawfully, and in breach of agreement, plaintiffs failed to deliver the plans and sections within such time as was agreed. In reconvention defendant claimed £250 as damages by reason of having been delayed for a year in the promotion of the said Bill.

To this plaintiffs filed a replication denying the allegations of defendant and a plea in reconvention denying liability for the damages claimed.

Mr. Roux was for plaintiffs; Dr. Greer was for defendants.

H. van der Westhuysen, secretary of the Divisional Council, having been called.

William White Phillips (one of the plaintiffs) gave evidence as to the steps which he took in the preparation of plans of the tramway with a view to depositing them with the Clerk of the House of Assembly. He said that he was constantly delayed by reason of the failure of the defendant to supply him with the necessary information. Mr. Wheeler told him that he had an agreement with all the owners on each side of the projected tramway. Witness made a search at the Deeds Office. He turned up every diagram, and he found that in only one case had an arrangement been made, and that was in the Goodwood Estate. They had deducted a piece of ground to give him sufficient width, but no arrangement had been made in the case of the Kensington Estate, Boston township, and Edendale township, but if witness had laid down the limits of deviation he should have had to cut through small allotments. Witness wanted Mr. Wheeler to come to a decision one way or another as to the limits of deviation, but he never would. The time for depositing plans with the Clerk of the House of Assembly was the 28th February, and it was getting desperately near.

[Maasdorp, J.: This work has been done. This session of Parliament has been lost, but there is another session. What is supposed to be going on now as to the tramway?]

Mr. Roux: I am not instructed.

Dr. Greer: Perhaps I may say, my lord, that we tender to accept these plans, and pay for them, when completed, when they are satisfactory Par-

liamentary plans. As far as we are concerned, we are going on. On the pleadings, plaintiffs are not entitled to payment of any sum whatever until the plans have been delivered to the defendant in a condition proper for depositing with the Clerk of the House of Assembly. We are still prepared to take the plans.

Mr. Roux (to witness): You are prepared to complete the plans if you get the information?

Witness: Oh, certainly. Continuing his evidence, witness said that Wheeler and he afterwards went to the Divisional Council offices, but the secretary declined to let them look at the agreement, though he read out a few clauses. From the clauses read out, witness would not have had sufficient information to proceed. When the clause as to the Brooklyn line was read, Mr. Wheeler seemed to be disheartened, and said it was no use going on. The only information that witness now wanted in order to complete the plans was the blue prints showing the original position of the tramline and the line of deviation. With this information, witness thought that, working hard, they would be able to complete the plans in 12 hours. Witness was cross-examined at some length by Dr. Greer.

By the Court: Witness had not, until to-day, heard that the idea of acquiring rights over private property had been abandoned. He had understood all along that the width was to be 65 feet.

Einer Aune (a member of the plaintiff firm) said that he was one of the surveyors engaged on the survey of the Maitland-road to Bellville on behalf of the Divisional Council. He went to Europe later on, and on his return he found that Mr. Wheeler had obtained certain blue prints of the survey from their office. Witness asked Mr. Wheeler if he had made any arrangement about the prints. Wheeler said that he had not, but he (witness) must make the charge as low as possible. Had witness been at the office, he would not have let Mr. Wheeler have the plan unless he had first got the permission of the Divisional Council. In further evidence, witness said that Wheeler promised to supply them with the lines of deviation, but he did not do so. They were working outside, taking the levels for the plans, for about a fortnight. If Mr. Wheeler had supplied him with proper information, they would have had the plans ready in sufficient time for Parliament. Witness did not know even to-day what the contents of the agreement with the Divisional Council were.

Cross-examined: They had not entered the item of 50 guineas in their books, because the whole matter was irregular. He regarded it as a serious breach of etiquette that Wheeler should have been allowed to take away the blue prints before the consent of the Divisional

Council had been obtained. At the same time witness considered that they were entitled to sell copies of the survey to whomsoever they thought fit. They could not put down the deviation, because they did not know upon which side of the road the crossings were to be laid. The plans produced were not sufficient for a Parliamentary Bill; there were still several features which should be included. Witness admitted that there were certain details which could have been filled in by his firm, as required by Parliament, and which had not been done. He was not aware that it had been arranged when they took the plans in hand that the line should go between the cemeteries. He meant that he was not certain whether the line was going round or between the cemeteries. Mr. Wheeler told them that his Parliamentary agents would not go on until he had got the agreement signed.

By the Court: Witness thought that the tram line would be about 4 ft. wide, and that the condition was that there should be 20 ft. of road on each side.

[Maasdorp, J.: The condition is that the tramway shall not be taken upon any road that is less than 65 ft. wide, and that where the road is not 65 ft. it must be widened.]

Henry Herbert Evans, civil engineer, said that he had surveyed the road in question for an opposition scheme. He was occupied upon the work for five months; they were working at high pressure. They did not quite finish the Parliamentary plans, as they were awaiting the Divisional Council's decision as to the width of the road. Their application to the Divisional Council was refused, as another scheme was, the Council said, already before them. He should think that by ordinary working the plaintiffs' plans could be taken from their present stage and completed for Parliamentary purposes in about two days. He estimated the value of the plans from £250 to £300. It was a necessary preliminary in the preparation of plans to have the consent of owners all along the line.

Thomas Roberts, Government land surveyor, valued the levelling of the plan, assuming it was the road and nothing very difficult in the running, at £8 a mile. Assuming all the information was to hand, it would require 20 guineas to make the plan, and £30 to get the further information for the owners' reference book and searches. If he had to survey and make a proper plan of the whole line, he would charge about £900.

Mr. Roux closed his case.

Thomas H. Wheeler, defendant, stated he had been engaged in large works before this undertaking. In 1903 he began work in connection with the tram line by making application to the Divisional Council for leave to lay lines

over their road. A plan was sent in with the application. The Council deputed seven of the members to meet witness on the road. They considered it was necessary to have a survey of the whole road, and the plaintiffs were the successful tenderers. In 1905 he got a concession from the Divisional Council. In 1904 the plaintiffs made overtures to witness wanting him to bind himself to give them all the work. They offered to give witness every assistance. Witness would not bind himself, but said he would consider the matter. The blue from the copy of a plan was nothing; it was one of the little accommodations they got from offices. The Divisional Council ultimately said they would keep him on the main road, instead of the deviation round the back of the Jewish Cemetery. There was never a figure mentioned about the price of the plans. Mr. Phillips subsequently said in conversation about the blue that to charge for it must have been a mistake, and that he would speak to his partner.

By His Lordship: The plan of the road, which was a blue from the original held by the Divisional Council, had absolutely nothing to do with him. Pritchard's plan was absolutely correct, and witness could have gone on with that. That plan, however, although accepted by the Divisional Council, was not sufficient for Parliament. After spending a deal of money on the scheme, he submitted a plan to run round the back of the Jewish Cemetery. The Divisional Council, about March, 1905, decided to keep witness back on the main road. The road was all right until he reached the point between the cemeteries.

Theodore de Villiers, Government land surveyor, stated he had considerable experience in preparing plans. The plan drawn in this case by the plaintiffs was by no means a Parliamentary plan; it was purely a survey. Where the levels were taken, the line must run, so that the levels would be useless either to the left or the right of the road, if it was decided the line was to run there. To do everything in connection with the plan, he would ask for £1,000.

Vincent Alex. van der Byl, partner in the firm of Van der Byl and De Villiers, stated, if he had got the plans and the book of reference in time, he would have been able to put the Bill before Parliament. It was absolutely unnecessary to obtain the consent of the owners before lodging the Bill.

Dr. Greer closed his case.

*Postea* (June 26th).

Counsel having been heard in argument on the facts,

Maasdorp, J.: The first claim of the plaintiffs in this case is for the payment of £52 10s., for the preparation of certain plans or blue prints by them, at the request of

the defendant. It seems that these plans were made under the following circumstances: In December, 1904, the defendant intended to introduce a private Bill into Parliament for legislative powers to construct a tramway from Salt River to Bellville. It was the object of the defendant to lay this line as far as possible upon the public road under the jurisdiction of the Divisional Council. He set about getting arrangements made with the Divisional Council as to the terms upon which they would consent to the provisions proposed in the Bill, or the terms upon which they would abstain from raising any objection to the Bill. The difficulty at the time that stood in the way of the Divisional Council and the defendant was this: While the Divisional Council was perfectly willing that the tramway should be laid upon the public road, it appeared that in certain portions of the road there was not sufficient width for the purpose, and that provision would have to be made to widen the road, in order to grant the necessary facilities for laying the tramway. In due course the defendant, who was anxious to press his business, thought it advisable to lay plans before the Divisional Council, pointing out to them that the tramway could take a certain route at such portions of the road where the difficulties existed. He consequently went to the plaintiffs, who had been busy for some time in preparing the plans for the Divisional Council, and had surveyed the whole of that road, and who, therefore, had facilities to help him in the matter. They had promised that they would assist him so far as lay in their power with the information they then possessed, knowing that under the circumstances they would be able to grant the necessary assistance at a more reasonable rate than anyone else, who had to obtain the necessary information. In the absence of the plaintiffs, their clerk, in the ordinary course of his employment, supplied the defendant with a plan, or with blue prints, upon which he marked the route of the tramway, as proposed by the defendant. Armed with this document, the defendant proceeded to the office of the Divisional Council and laid before them a plan which he had formed for overcoming the difficulties as to the narrowness of the road. He no sooner commenced to state his wishes than he was informed that such a scheme as he proposed would be no longer necessary, because the Divisional Council had made up their minds to allow him to lay the line along the whole length of their road, with certain provisions as to certain spots where the necessary width could not be obtained. After that, these plans were no longer of any use to any of the parties. But it was quite clear, when they were prepared, the defendant thought that they were



necessary, and would be useful, and whatever the result may have been, the plaintiffs must be paid for the work they did at his request, in the ordinary course of business. The defence set up is that the work was done gratuitously, that the plaintiffs had offered to assist him in the business which he was then carrying through. But there is nothing in the whole of the evidence given by the defendant himself which proved that the plaintiffs had undertaken to make this plan gratuitously for the defendant. And the defendant himself says no price was mentioned; it was the ordinary accommodation which parties granted one another. That may have been the impression he was under. The plaintiffs are supported by the circumstances that as soon as they discovered what work had been done by their clerk, they intimated to the plaintiff that they expected remuneration for the work, and a letter of demand was sent. There is no document put in on the part of the defendant repudiating the claim. Under the circumstances, I think the plaintiffs are entitled to succeed upon that part of the case, and it certainly appears upon the evidence that the charge is an extremely reasonable one, and if the defendant had obtained the same services from anyone else, the charge would have been an extremely heavy one. The second claim of the plaintiffs is for the preparation of work done in respect of certain plans required by the defendant, to be laid before Parliament when his private Bill was introduced. Upon that point, there is a special arrangement as to remuneration. The plaintiffs undertook that work for the payment of £200; £100 to be paid upon the delivery of the plans, £50 within thirty days, and £50 upon the approval of the plans by the Parliamentary examiners. It would appear, from all the circumstances which were in the contemplation of the parties that it was fully necessary that these plans should be lodged with the examiners before the end of February. Time was, therefore, the essence of the contract, and the work had to be performed before the 28th February. The question arises as to what it was exactly that was expected from the defendant in the preparation of their plans. We have the evidence of what I may call experts in the case as to what was absolutely necessary and considered sufficient by the examiners when these plans were laid before them. It is said that nothing more would be required than to lay down deviations upon a plan according to a certain scale, to mark the route of line, and to give the elevations. These are the main requirements, and I need not mention the minor ones. It is said, upon these requirements being observed, the plan would be considered. I am quite prepared to accept the position that, upon

certain formalities being observed, and the plans being framed in a certain form, that the examiners would pass them as meeting the rules of Parliament. But it is quite clear that no one would dream of going to Parliament with plans which merely satisfied the necessary requirements of the rules as to formalities in the framing of that plan. They will consider the best form in which it would be likely to promote the passage of the Bill, and wisely, in this case, the defendant, before preparing his plan, consulted these parties who were interested in the matter, and who would have had a right to object in case their rights were interfered with in any way by the proposed construction of the tramway. The first body of men whom it was necessary to consult was in this case the Divisional Council. The defendant set about making the best arrangements he could with the Divisional Council as to the terms upon which they would be satisfied to sanction the construction of the work. These arrangements are embodied in a long agreement, and amongst the provisions contained in the agreement is the following: "The defendant is not to commence any operations on the said road unless and until he shall have secured so much land from the eastern boundary of the Maitland Municipality to the terminus at Bellville as would enable the Council at any time hereafter to widen the road inclusive of side walks to 65 ft." Here one of the conditions arranged is that the Municipality would consent to the terms of the Bill, which he intended to introduce into Parliament, and that the road should be throughout all its length—with the exception of some small portions of the width of 65 ft. In order to obtain the necessary width the next step the defendant took was to ascertain whether he could expropriate land for the required purpose from each of the owners along the road. He entered into communication with the owners to obtain consent in the same way as the consent of the Divisional Council. The plaintiffs were fully aware that they would have to lay down the lines of deviation in accordance with arrangements. It is quite true it is not necessary to obtain the consent of property owners before introducing the matter into Parliament, but there would be slight hopes of success if the defendant had gone to Parliament without consulting the Divisional Council, though his Bill might be formally correct. Judgment will be for the plaintiffs for £52 10s. for the blue prints, and £150 for work done upon this plan, with costs. It seems to me even at this stage it would be wise of the parties to proceed with their agreements, because on the one hand the plaintiffs would be entitled to the payment of another £50,



and the defendant would have the satisfaction of having the work finished by the plaintiffs, who are in possession of such information as may be valuable to him. Upon the judgment being satisfied, the plaintiffs will deliver up the plan to the defendant.

[Plaintiffs' Attorneys: Michau and De Villiers. Defendant's Attorneys: Van der Byl and De Villiers.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

*In re* ESTATE MELMAN. { 1906.  
June 23rd.

Provisional sequestration—Execution.

*No execution can be levied in any estate which has once been placed under provisional sequestration until the provisional order is discharged.*

De Villiers, C. J.: The Registrar has called the attention of the Court to a case in which provisional sentence was given at the suit of Dempers and Van Ryneveld against one Melman. After that a provisional order of sequestration was granted by the Judge. On the return day of the order there was no appearance, but there was no discharge of the provisional order. Subsequently another judgment was given against Melman at the suit of other people, a writ of execution was issued, and now that writ will be executed unless the Court stops it. It is clear that the writ cannot be executed because the provisional order still exists. Until that provisional order is discharged the estate is sequestrated, and no judgment can be executed. If the attention of the Court had been called to the fact that the provisional order was still in existence, the Court would never have given the second provisional sentence against the defendant. Having given that provisional sentence, that sentence should not be executed so long as the provisional order stands.

PALMER AND DA COSTA, JACOBS AND CO. LTD. V. "THE OWL," LTD.

Mr. Benjamin moved for a winding-up order against the respondent company and for the appointment of Mr. J. M. P. Muirhead as official liquidator. Counsel said that the matter was of some urgency, as he understood that if the company was placed under a winding-up order it would be necessary for provision to be made for running the periodical so as to preserve certain advertisement contracts, which he understood were the principal assets. He proceeded to read the petition of Thomas Palmer and James M. P. Muirhead (as liquidator of Da Costa, Jacobs and Co.), who said that they were creditors for the sums of £337 18s. 2d. and £110 1s. 8d. respectively. Certain judgments had been obtained against the company, and these had not been satisfied. The company was unable to pay its debts. The principal asset of the company was its right in the periodical known as the "Owl," published weekly in Cape Town, and the most remunerative portion thereof was the advertisements, and it was desirable that steps should be taken to ensure that the advertisement contracts should be continued.

Dr. Rainsford (for the respondents) applied for the appointment of Mr. Frederick C. Grant as joint liquidator with Mr. Muirhead, and for some restraint to be placed on the powers of the liquidators. He said that they objected to the liquidators having power to dispose of the assets, more especially the goodwill of the paper, without consulting the creditors and without submitting any offer they might receive to the creditors. Counsel read a replying affidavit by Mr. Bright (secretary of the respondent company), who said that he was one of the largest shareholders of the company. He submitted that Mr. Grant should be appointed joint liquidator. He had reason to believe that Mr. Muirhead was hostile to the best interests of the largest shareholders in the said company. The claim by Mr. Palmer was subject to a counterclaim of an almost equal amount.

Mr. Benjamin read an answering affidavit by Mr. Muirhead, who said that there was no necessity to appoint two liquidators in so small an estate. The prospect of a dividend for the creditors was, he said, very slight. He denied that he was hostile to the interests of any of the shareholders.

De Villiers, C. J.: It seems to be common cause that the company should be wound up, and the Court will make an order accordingly winding up the company. As to the appointment of liquidator, there seems to be no necessity for having two liquidators. The Court will appoint Mr. Muirhead as official liquidator, with the powers mentioned in the 149th sec-

tion of Act 25 of 1892. The opposing creditors, however, make a suggestion which under the circumstances seems to be reasonable, and that is before the goodwill of the company is sold a meeting of the creditors be held and the goodwill be sold on such terms as the majority of the creditors in number and value should decide. If there be no majority both in number and value, the liquidator himself may decide. As this modification is made at the suggestion of the opposing creditors, I think the costs may well come out of the estate.

*Ex parte* DREYER.

Mr. Sutton moved, on the petition of the tutor of certain orphans, for leave to mortgage certain landed property in the sum of £650. The Master's report was favourable.

Order granted as prayed.

MACREADY V. GIRDWOOD.

Medical attendant—Contract.

*A person's ordinary medical attendant is not by the fact of previous attendances bound by an implied contract to continue his attendance in case of subsequent illness.*

This was an appeal from a judgment of the Resident Magistrate of Kentani in an action in which the present appellant (William Brown Macready, trader, Kentani) sued the respondent, who is the District Surgeon, for damages in two sums of £50.

The matter was intimately connected with a recent libel action heard in this court, in which Dr. Girdwood obtained damages against a young man named Todd, who is employed by Mr. Macready at his store, for alleged defamation contained in a letter signed "An Onlooker," which had appeared in the "Transkeian Gazette." In that case, Macready was the principal witness for the defence.

The present appeal arose out of an action brought by Mr. Macready against Dr. Girdwood for £50 damages for breach of contract, in that defendant had, on February 1 last, refused to render medical services and assistance without just and reasonable cause, and £50 damages, in that defendant had wrongfully and unlawfully intimidated and coerced a certain native (Alfred Dubase) from dealing with plaintiff, whereby plaintiff had suffered loss of profits as a trader and had been injured in his business and reputation as a trader.

From the evidence given in the Court below it appeared that in the course of last year plaintiff saw Dr. Ward at Butterworth professionally, and when he came back defendant seemed annoyed. He said that he did not object to him (Macready) seeing another doctor if through him. On the 1st February defendant refused to attend plaintiff unless he took a solemn oath that he had nothing to do with a letter which had appeared in a paper at Butterworth, written by a young man in his (plaintiff's) employ. Plaintiff declined to take such an oath. He was ill for three days, and was not attended by Dr. Girdwood. The native Dubase was employed by Dr. Girdwood, and when called by plaintiff he said that he had not been coerced by defendant, although he admitted that he had previously sworn an affidavit in somewhat different terms.

The Magistrate gave judgment for the defendant, with costs, on both claims.

Mr. Benjamin for appellant. Mr. Burton for respondent.

Mr. Benjamin argued that there was an implied contract between plaintiff and defendant as to the latter's services, but he acknowledged that he could not carry the case any further.

Without hearing Mr. Burton,

De Villiers, C. J.: If the plaintiff was seriously ill at the time he sent for the doctor it is certainly to be regretted that defendant did not attend the plaintiff. At the same time defendant had received very great provocation. A very serious libel had been published, apparently against the defendant, and plaintiff had told the defendant that it was one of his own household who had written that libel. Defendant had asked plaintiff to give him his assurance that he had not aided and abetted the writer, which assurance plaintiff had refused to give. Upon that the defendant gave his whole position in writing, which was as follows: "You asked me this afternoon to define my position in writing. I do so now. As the writer of the defamatory libel is a member of your family and lives under your roof, I require your assurance in writing, on your word of honour as a gentleman, that you neither aided nor abetted him throughout the whole of the proceedings. On receipt of this assurance, I am prepared once more to open up medical relations with you personally. As for Mrs. Macready, I have already intimated my willingness to treat her as before, provided you do not make this impossible." The question is, is this a breach of contract? To construe it as a breach, there must be clear proof of contract. To my mind, there is no clear proof of contract, either express or implied. It was open to the plaintiff to employ the services of another doctor, and it was open to the defendant, if his humanity would allow

him, to refuse to attend the plaintiff when he was ill. There was no legal obligation upon him to attend, whatever the moral obligation might have been. Therefore, I am satisfied that the Magistrate was quite correct upon the first part of the case. As to the second part of the case, I do not see what possible case the plaintiff could have had. It is said that defendant had induced Dubase (his servant) not to deal with plaintiff at his store. I won't go into the question now as to whether the Magistrate rightly construed the law on the matter. Assuming that this was actionable on the part of the defendant, there was no clear proof whatever of damages sustained by the plaintiff by reason of the defendant telling his servant not to deal with plaintiff. We have no evidence as to what the custom was before, or what it was afterwards, not a tittle of evidence as to damages. Therefore, the Magistrate was right in dismissing the case altogether. The appeal must be dismissed, with costs.

Hapley, J concurred.

#### BOTHA V. NAUDE.

Ord. 6 of 1843, Sec. 126.

*The 126th Sec. of Ord. 6 of 1843 refers to the confirmation of the first account in an insolvent's estate.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Aliwal North, sitting at Lady Grey, in an action brought by the appellant against the respondent to recover £22 10s.), reduced to £20 so as to bring the matter within jurisdiction, as damages for breach of agreement in connection with the alleged failure of defendant to deliver to plaintiff in February last certain fifty lambs, which he had sold to plaintiff in August last.

In the Court below, exception was taken to the summons on the ground that plaintiff had no *locus standi in judicio*, being an unrehabilitated insolvent, without leave to trade. The exception was upheld, with costs, by the Magistrate, who founded his decision on the 49th section of the Insolvent Ordinance, and who added that, from the 71st section, it seemed to him that the plaintiff must have written authority from the trustee. The Magistrate also quoted the case of *Brown and Another v. Green* (8 Juta, 193).

Mr. Upington was for appellant; Mr. W. Porter Buchanan was for respondent.

Mr. Upington submitted that the Magistrate had overlooked a very im-

portant section of the Ordinance, viz., 126, by which plaintiff was clearly entitled to sue, seeing that the first account and plan of distribution in his estate had been confirmed by order of the Supreme Court.

Mr. Buchanan said he was bound to admit that the Magistrate had gone wrong in this case, but it was upon a point which was by no means clear from the authorities.

De Villiers, C. J.: It is quite clear in this case that the Magistrate overlooked the clear and express terms of the 126th section of the Ordinance, which says that from and after the making of a decree, and confirming the account and plan of distribution, the insolvent shall be entitled to acquire property, and in the case that was cited, the Court has held that the confirmation of the first account is such a confirmation of account as was contemplated by the 126th section. Counsel for the respondent has called the attention of the Court to the head-note in the case of *Warner's Assignness v. Warner's Trustees* (4 Juta, 227), where it speaks of the "final account," but there is nothing I can find in the facts, as stated in the report, or in the judgment, which justified the use of the word "final." It might be as well to call attention specially to this mistake in the head-note, as it might possibly have misled the Magistrate in the Court below, and might mislead others. The appeal must be allowed, with costs in this Court and the Court below, and the case remitted back to the Magistrate to be tried on the merits.

Mr. Buchanan urged that the costs in the Court below should be ordered to abide the result of the trial.

De Villiers, C. J.: I do not think the Court should encourage the taking of such an exception, which was wholly untenable. The appeal will be allowed, with costs in this Court and the Court below, except costs of summons and service thereof, and the case remitted to the Magistrate to be tried on the merits.

Hopley, J concurred.

#### JANSEN V. FOURIE.

Ejectment—Magistrate's jurisdiction—Act 20 of 1856, Sec. 10.

*Sec. 10 of Act 20 of 1856 gives a Magistrate no jurisdiction to try an action for ejectment brought at the suit of a trustee in an insolvent estate.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Graaff-Reinet in an action for ejectment brought by the present appel-

lant (Roelof Andries Jansen) against respondent (Christian W. F. Fourie), in respect of a certain piece of land situate at Adendorp.

It appeared that plaintiff is sole trustee in respondent's insolvent estate, and as such trustee some time ago sold to one Tilbrook certain landed property. He said that this property carried with it a right of use and occupation of certain adjoining property, which respondent was now occupying, and which he refused to vacate. He desired to secure for Mr. Tilbrook the right of occupation of the property that Fourie refused to vacate.

In the Court below exception was taken to the summons on several grounds, and the Magistrate held that under section 10, Act 20 of 1856, he had no jurisdiction to try the case, and therefore upheld the second exception which had been taken by defendant to this effect.

Mr. M. Bisset was for appellant; Mr. Benjamin was for respondent.

Mr. Bisset submitted that the Magistrate's decision was wrong. What the appellant claimed in the Court below was an ejectment order against the defendant from the use and occupation of the land. He did not claim any right or title to the land.

Mr. Benjamin submitted that the only section that could possibly apply to the matter was the 10th section, and the only person, therefore, who could have sued was the owner of the land, and not the trustee. The great difficulty in this case was to know what the claim was about. Clearly, it was a very vague occupation right that plaintiff was seeking to establish.

De Villiers, C.J.: This is an action for ejectment brought into the Magistrate's Court. Several exceptions to the jurisdiction were taken. It is only necessary now, for the purposes of the appeal, to consider the second exception—that the Court has no jurisdiction under the 10th section of Act 20 of 1856. That section mentions the cases in which an action of ejectment can be brought against an occupier of land "at the suit of any person (or his lawful attorney, administrator, or executor), under whom such occupier has holden or has occupied the same in virtue of any lease, contract, or agreement." There is no proof in this case, no allegation, of lease. It is said that the plaintiff is the lawful attorney, administrator, or executor of the purchaser of this property. Even if he were, it would not bring the case within this section. In point of fact, there is no evidence whatever that the plaintiff is the lawful attorney, administrator, or executor of the person in whose name the land now stands registered. Another case in which an action of ejectment may be brought is "at the suit of any person (or his lawful attorney, administrator, or executor) whose name is en-

registered in the Land Registry of the Colony, as the proprietor of any such lands, tenements or premises, against the tenant or occupier thereof." Well, the plaintiff is not registered in the Land Registry as the proprietor. The land has been sold; it has gone entirely from the plaintiff, and, further, he cannot sue under this section. The next case is "at the suit of any tenant (or his lawful attorney, administrator, or executor) holding a subsisting written lease of such lands, tenements, or premises, under the person whose name is enregistered in the Land Registry of the Colony as the proprietor thereof, against any occupier of such lands, tenements, or premises, whose right or alleged right of occupation is not derived from the person whose name is enregistered as aforesaid as the proprietor thereof." There is no case of tenancy here; the trustee has no tenancy at all. "Provided always that the title to the ownership of any of the lands, tenements, or premises aforesaid shall not in any such action be in question, but only the right of occupation." It is clear that the case does not fall within the 10th section, and, as far as I can judge, there is really a title to land in dispute, but it is not necessary to go into that. This is not one of those cases of ejectment which are provided for under the 10th section, and, therefore, exception to the jurisdiction was properly taken. The appeal must be dismissed, with costs.

Hopley, J concurred.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN  
and the Hon. Mr. Justice HOPLEY.]

MCDONALD V. AFRICAN { 1906.  
BANKING CORPORATION. } June 25th.

Bill of exchange—Bank—Sale of  
goods—Negligence.

This was an appeal from a judgment of the Resident Magistrate of East London in an action brought by the present respondents against the appellant to recover £24 2s. 11d. on certain bills of exchange.

From the record, it appeared that in the Court below appellant was sued for



£13 6s. 11d. on a bill of exchange, dated July 13, 1903, drawn by Carson and Evans on McDonald and Co., and payable on 6th September, with interest and 17s. 6d. noting expenses, and for £9 1s., balance of account on a second bill of exchange for £64 3s. 3d. between the same parties, with interest and 17s. 6d. noting expenses. Defendant denied liability, and for a counter-claim said that the goods in respect of which the bills were accepted arrived at East London in or about August, 1903. In pursuance of plaintiff's request, in August he gave written authority to them to clear and dispose of the goods, to satisfy the amount of the bills. The bank took possession of the goods, but instead of selling them forthwith, as was the custom, they unlawfully and negligently kept the said goods for some months, and then sold them too late for the goods to realise the amount of the bills, to the prejudice of plaintiff in reconvention. He therefore claimed £24 2s. 11d. as damages. The goods in question were aerated waters, stationery, and lard, and defendant at the time was engaged at Stutterheim.

The Magistrate, in his reason for judgment, said that the transaction in this case was one of documents against payment and not of documents against acceptance as alleged by defendant. He was satisfied that defendant was unable to meet the bills at the due date, and that he did not then concern himself about the goods, and he made no such arrangement with the bank as alleged. The bank seemed to have acted with perfect *bona fides* throughout. Defendant having accepted the bills, was liable for any deficiency there might be. Judgment would be given for plaintiff as prayed, with costs, and the claim in reconvention would, therefore, fall to the ground.

Mr. Burton was for appellant (Duncan McDonald); Mr. Benjamin was for respondents (the African Banking Corporation, East London Branch).

Mr. Burton argued that the fact that Newman, an auctioneer, had instructions on August 31 to sell the goods was corroboration of the case set up by defendant. It was clear that Newman was the bank's agent. There was no explanation given in the Court below why the goods were not sold at once. Counsel commented on the fact that on the documents there was not a single communication between the parties from September, 1903, to March, 1906. The bank knew full well when the goods arrived that defendant's account was largely overdrawn. In March, 1904, Newman sold the goods by auction and then they realised a substantial sum less than their value on the bill of lading, viz., £24 0s. 11d. Then the bank communicated with the drawers, and accepted from them £34 1s. 4d. in full settlement of drawers' liability. The history of the case showed that defendant's ver-

sion was the more probable one. It was singular that plaintiffs did not produce the instructions they gave to Newman their agent at the end of August, 1903.

The Court pointed out that in the copy of the record before them Newman was stated to have said he received instructions on the 31st December.

Mr. Burton said that his copy said the 31st August, but even then the bank had not produced their instructions to Newman.

Mr. Benjamin submitted that the position taken up by the bank was the strictly legal one. There was no evidence of negligence on the part of the bank in regard to selling the goods. There was no proof of damages whatever. Furthermore, the bank had no authority in this case to sell. McDonald had actually been trying to sell the goods previously, but had failed. The only persons who could have disposed of the goods were the drawers. Mr. Burton having been heard in reply,

Buchanan, J: Messrs Carson and Evans of London drew upon the defendant two bills of exchange for £64 3s. 3d. and £13 6s. 11d. These bills were sent to the respondent bank at East London together with the "shipping documents" i. e. bills of lading made "to order" and other documents necessary to obtain possession of the goods. The bills of exchange were presented to the defendant who accepted them. He was unable on the due date to pay the amounts and, consequently, the shipping documents were not given up. At his request, however, the goods were cleared by Messrs Newman and Company and placed in their store. Defendant continuing to be unable to pay the bills of exchange, instructions were given to Newman's, as far as one can gather from the evidence, both by defendant and the bank, to try to dispose of the goods so as to liquidate the bills of exchange. Newman says that attempts were made to sell them with defendant's knowledge and upon his instructions. A sale could not be effected until some time afterwards, not in fact until Newman received positive instructions to sell the goods and then they were sold by public auction. A sum of £24 was received for the goods and £31 was received from Carson and Evans. These two amounts left £9 1s. still due on the first bill of exchange. The second bill is still unpaid and there is an item of 17s. 6d. for noting of protest. The total amount of £24 2s. 11d. was sued for in the Magistrate's Court.

To the plaintiff's claim the defendant pleaded a denial of liability, but all through the evidence there is nothing whatever to show that the defendant is not liable on these bills. There is no defence of any kind set up against the claim and against the credits given to him, and judgment certainly ought to



have been given against the defendant given on the claim in convention. But the defendant sets up a claim in reconvention for an equal amount to that due to the bank on the bills of exchange for damages alleged to be suffered on account of the negligence of the bank, in not effecting earlier sales. The Magistrate has found that there was no negligence on the part of the bank, and the evidence given in the Court below amply supports this finding of the Magistrate. It was always open to the defendant at the time, when he thought the bank was negligent to have paid the bills of exchange and received possession of the goods and to have sold them, but he was unable to do so. The agent he appointed to sell the goods tried to do so, but without success. The only question in dispute is as to whether on this claim in reconvention the defendant has succeeded in making out a substantial claim against the bank. He has failed to do so and I think the Magistrate was quite right in the judgment which he gave. The appeal, I think, is unfounded, and must be dismissed with costs.

Hopley, J., concurred.

#### HILTON V. HAMILTON.

Magistrate's Court case—Default—*Bona fide* mistake as to time of Court sitting—Costs.

*Where, owing to a bona fide mistake as to the time of the sitting of the Court a plaintiff makes default, he should be allowed to re-open the case on payment of wasted costs.*

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an interpleader action brought by the present appellant against the respondent.

From the Record it appeared that the interpleader arose out of an action between Hamilton and Beesley and Co. Owing to a misunderstanding on the part of the present appellant, Hilton as to the time when the Magistrate's Court sat when the interpleader action was called on, appellant was not in Court. The case was called at 10 o'clock, and he did not appear until half past ten. The Magistrate gave judgment against him by default. The appellant then instituted a second action on the ground that this judgment by default was merely absolute from the instance.

The Magistrate, in his reasons for judgment, said that the summons was dismissed with costs. The Court held that the plea of *res judicata* had been established. The case was set down

after the summons at applicant's request, and he made default. The A.R.M. then dismissed the summons, and declared the property claimed by him to be executable.

Mr. Benjamin was for appellant (Alfred Hilton); there was no appearance for respondent (James G. Hamilton).

Mr. Benjamin, having briefly addressed the Court in support of the appeal,

Buchanan, J.: Through some mistake as to the time of the sitting of the Court, appellant was not present at the time judgment was given. He was there shortly after, and this, I think, was a very good reason for re-opening the case. It was not wilful default or negligence. When he was prepared to re-open the case, he ought certainly to have been allowed to do so on paying costs. The case will be referred back to the Magistrate for hearing on the merits, subject, of course, to the payment of the costs. The appeal will be allowed, with costs, costs in the Magistrate's Court to abide result.

Mr. Justice Hopley concurred.

#### REX V. NQUINI.

Municipal regulations—*Ultra vires*—Act 45 of 1882.

*The Municipality of K. had framed a regulation under Act 45 of 1882, whereby every person having grazing rights on the commonage was bound to register such stock as he had there grazing and to make a "solemn declaration" that such stock was his bona fide property.*

*Held, that inasmuch as the Act gave no power to the Municipality to exact such declaration, the regulation was ultra vires, and the Municipality was ordered to pay costs of appeal.*

This was an appeal from a judgment of the Resident Magistrate of King William's Town, sitting at Keiskama Hoek, who had convicted appellant of infringing the Municipal regulations by failing to register by solemn declaration stock on the Commonage, and had fined him 5s.

From the record it appeared that regulation 6 framed by the Keiskama Hoek Municipal Council, under Act 45 of 1882, and gazetted on September 22, 1905, provides for the registration at the Council offices on certain dates of the number of stock for which any person shall have

grazing rights on the Commonage, and the owner of such stock shall make a solemn declaration that the stock in his *bona fide* property. Appellant, Tom Ngini, who is a Government paid headman, was charged with failing to comply with this regulation between the 1st and 21st March. Exception was taken in the Court below that the regulation was *ultra vires*, and that accused had clear rights by prescription.

The Magistrate, in his reasons for judgment, said that he did not think the regulation was *ultra vires*. As regarded prescription, it would be seen that the accused did not have the free and uninterrupted use of the Commonage for more than thirty years. He found accused guilty.

Mr. Benjamin was for appellant; Mr. Uppington was for respondent.

Mr. Benjamin submitted that the regulation was unreasonable, and, therefore, *ultra vires*. The Council already had the records of the stock kept by these people, and it seemed to be a work of supererogation to compel them to come and make a solemn declaration at certain periods. The Council, he submitted, had no power to impose this restriction as to *bona fide* property. There was no evidence further that defendant had any stock. Counsel also submitted that defendant had a right by prescription. It was highly unreasonable, he contended, to restrict a man's rights of grazing to his own *bona fide* property.

Mr. Uppington, dealing with the question of prescription, said that inasmuch as Keiskama Hoek, before being created a municipality, was in 1881 constituted a Village Management Board, and regulations were thereafter framed which did control and regulate the grazing rights of people, it could by no means be said that appellant had had an undisputed right of grazing his cattle upon the commonage. As to the question of whether the regulation was *ultra vires*, counsel submitted that the regulation was a perfectly reasonable one. It was a reasonable provision such as it was contemplated the municipality could make under sub-section 23, section 109, Act 45 of 1882. The regulation provided not merely that defendant should register, but that he must also make a solemn declaration, thus imposing two duties upon an inhabitant grazing his stock on the commonage. He contended that the regulation was divisible, and that, even if the second part was *ultra vires*, the Court may hold that the first portion was *intra vires*. The Court was not bound to throw out the whole of the regulation if only a part was *ultra vires*.

Buchanan, J: The appellant was prosecuted in the Magistrate's Court held at Keiskama Hoek for contravening Section 6 of the Regulations of the Municipality of Keiskama Hoek.

These regulations provide that every registered owner or occupier of land shall have certain grazing rights over Municipal commonage and the number of cattle which may be grazed by such owner or occupier is fixed by the third regulation. The fifth regulation reads. "It shall not be lawful for any person having grazing rights to sell, let, or otherwise dispose of such rights to any person whatsoever." Then comes the regulation in question (the sixth): "On the first day of March and September in each year each person shall register at the Council office the number of stock for which he shall have grazing rights on the Commonage and shall make a solemn declaration that the stock is his *bona fide* property, etc." The accused is charged with failing to register "the number of stock for which he shall have grazing rights on the commonage, by solemn declaration that the stock is his *bona fide* property." To this charge the accused pleaded, firstly, that the regulation, as it stands, is *ultra vires*, and, secondly, that he has a prescriptive right of grazing over the commonage. I may as well dispose of the defence of prescription at once by saying that if he has a prescriptive right he has not properly raised it in the pleadings, and, moreover, such a right has not been proved, and, consequently, this second defence need not be further taken into consideration. The objection to the regulation as to its being *ultra vires* is one which, I think, should be held good. The Municipality has the right, under the general Municipal Act, No. 45 of 1882, to provide for the management and protection of all common pasture or municipal lands, and to fix the number and description of the live-stock any inhabitants shall be allowed to keep thereon. But nowhere in that Act or elsewhere is any power given to any municipality by regulation to require a solemn declaration from any person as to the quantity of stock which he has, or on any other fact. Now, a solemn declaration has acquired to some extent a technical meaning in the different statutes of this Colony, especially by Act 18 of 1891 and by the previous Act of 1883. Solemn declarations are allowed now to be substituted where the law previously required an oath to be taken, and it is clear that in this sense a solemn declaration can only be made in the cases provided for by law, where there is a judicial proceeding either before a Court or arbitrators, or under the Insolvent Ordinance, or some inquiry of that kind, and in proof of certain allegations which are required by law to be made, such as declaration of purchase and sale, wills, etc. This solemn declaration takes the place of the oath previously required, and any person guilty of making such a solemn declaration falsely is liable to be prosecuted for perjury; but no person could be prosecuted for making a

false solemn declaration such as is required by this regulation. I think it unreasonable also for a municipality, after fixing the number of stock which each owner or occupier of land is entitled to graze upon the commonage to say that he shall make a solemn declaration that his stock is his *bona fide* property. There are many reasons why this is unreasonable, which I need not go into now. I think the charge against the accused is not merely that he failed to register his stock, but that he failed to register by making a solemn declaration. The Town Clerk in this evidence said, "The offence against the accused is now—registration of stock as per charge sheet." It is clear that the not making a solemn declaration is part of the charge laid against the accused, and I think under all principles of law he ought not to be required to make this solemn declaration in this manner, and that the bye-law, in requiring this solemn declaration to be made, is *ultra vires* of the municipality of Keiskama Hoek. The conviction will be quashed, and it is only fair that the municipality should pay the costs. The appeal will be allowed, with costs of appeal against the municipality.

Hopley, J., concurred.

*Ex parte* ESTATE RALANI. { 1906.  
June 25th.  
July 9th.

#### Will—Construction—"Heirs."

This was an application for leave to petitioner (who is executor) to transfer certain landed property at Makobeni, Lady Grey, to himself, as the sole heir under the will of his parents. Mr. Benjamin was for petitioner; Mr. Douglas Buchanan appeared as *curator ad litem* to certain minors.

Counsel having been heard in argument on the facts.

*Cur. Adv. Vult.*

*Postea* (July 9th).

Buchanan, J.: The testators bequeathed their farm to their three sons, Stephen, Isaac, and Enoch, "their heirs and assigns." They then gave certain movable property to their daughters. They instituted as residuary heirs their sons and daughters and their respective heirs, administrators, and assigns for their absolute benefit as tenants in common. They prohibited any of their sons from leasing or otherwise disposing of his share in the farm without previously obtaining the consent in writing of his brothers, "or in case of the death of one or both of them the legal representative of such deceased son or sons," according to the law of succession, as settled by the

Glen Grey Act. Two of the sons, Isaac and Enoch, predeceased the testators, leaving issue. The survivor, Stephen, now claimed to be sole legatee of the farm, to the exclusion of the issue of his brothers. The true test for construing a will is the intention of the testator, but such intention must be gathered from the will itself, and the language used must be construed in its ordinary meaning, unless other parts of the will clearly show that a different meaning is to be followed. The construction which our law, placed on the institution of a person and his heirs is that it is a grant to the legatee personally, and that the words "his heirs" may be treated as surplusage, or as words of description. It is contended in this case, however, that the testators intended their will to provide for all their descendants, and by using the words "their heirs and assigns" they intended that the provision for the predeceased sons should pass over to their children. In some cases the institution of children has been held to be wide enough to include grandchildren. But if the word sons in this case is to be read as including grandsons, then only one of the predeceased sons left male descendants, and the claims of the female descendants would be rejected, which would be equally opposed to the argument founded on natural equity as would be rejecting the claims of all the grandchildren. The question really is, can the addition of the words "their heirs and assigns" be read, not as words of institution, but as words of substitution. After consideration of the various decisions of the Court, I am unable to come to that conclusion. Nor do I think the clause restraining alienation aids the minors. That clause only comes into operation after the beneficiaries have come into possession of the bequest. The residuary clause also does not affect the bequest unless there has been a lapse. But in this case it cannot be said that there is a failure under the will. The bequest is of the whole farm to the three sons specifically named. It is not a bequest in equal shares or as joint owners of undivided shares. The farm is bequeathed as a whole, and, if any one of the intended legatees fail, the bequest still operates, and the remainder take by virtue of the *jus accrescendi*. There is nothing else in the will to indicate the intention of the testators, and, failing any other expression qualifying their meaning, the Court must take the words used by the testators in their ordinary acceptation. Possibly the testators did not at the time of making their will consider the contingency of the predecease of any of their sons, but whether they did or not they made no provision for such an event. The words used by them would not ordinarily confer any estate on the grandchildren, they cannot now be construed as amounting

to a substituted institution of the grandchildren in the event of a predecease of any of the sons. The applicant is, therefore, entitled to an order authorising the transfer to himself of the whole farm. The costs will come out of the estate.

Hopley, J., concurred.

[Applicant's Attorneys: Wahl, Fuller and De Clerk.]

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* KOTZE.      { 1906.  
   { June 25th.

Mr. W. Porter Buchanan moved, on the petition of Gysbert Willem Kotze, late secretary of the Malmesbury Board of Executors, for leave to resign his position as joint trustee in the estate of M. M. Basson. The matter had already been before the Court on the application of the other trustee (Mr. Hilton), and a rule had been granted. Counsel said that petitioner intended to leave the Colony and go to the Transvaal.

Leave was granted to petitioner to resign as prayed, and, subject to such resignation, the rule granted on the application of Mr. Hilton was made absolute, and the remaining trustee was authorised to administer the estate.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BONN V. WATSON.      { 1906.  
   { June 26th.

Pleading — Architect — Artistic decorations.

This was an action brought by Adelbert Louis Mouni Bonn, architect, Cape Town, against Herbert Gordon Watson, of Kenilworth, to recover the balance of charges for professional services.

Plaintiff, in his declaration, said that in or about August, 1904, defendant engaged his services as architect in connection with the building of certain premises at Kenilworth, and plaintiff thereafter duly performed all such labour and

professional duties as he was bound to do in connection with the said building. There had become due to him £143 16s. 6d., as shown in the account annexed to the declaration. Defendant had paid £20, but he neglected and refused to pay the balance, viz., £123 16s. 6d., which amount plaintiff claimed, with interest and costs.

Defendant, in his plea, denied that the account annexed to the declaration was an accurate account, or correctly framed, and more particularly disputed the items of £5 5s., tracings and builders' schedules in duplicate prepared for the Wynberg Council; and £23 2s. 9d., for supervision. Defendant, at the time of the said engagement, agreed to pay the plaintiff, in respect of the said services referred to, the customary and usual remuneration of an architect, according to the custom of architects in Cape Town, and no more. By the custom in Cape Town, the remuneration in respect of such services as aforesaid, including the furnishing of quantities and schedules, was 7½ per cent. on the cost of the said building, viz., £1,542, and there thus became due as such remuneration £115 8s. 9d., and no more. Whereof he had paid £20, and before issue of summons had tendered, and again tendered, the balance of £95 8s. 9d.

Plaintiff, in his replication, admitted the tender, but said that the same was wholly inadequate, and he admitted payment of £20, as stated in the declaration. As to paragraph 2 of the plea, he said that the item of £5 5s. was a fair, usual, and proper charge, and that the item of £23 2s. 9d. represented a fair remuneration for certain special and detailed work of supervision performed by the plaintiff outside the ordinary routine of his duties at the special instance and request of the defendant.

Mr. Burton (with him Mr. Lewis) was for plaintiff; Mr. Upington was for defendant.

Mr. Burton said that the plaintiff had given notice to the defendant of an amendment of the replication to add after "supervision" the words, "as well as certain extra work."

Mr. Upington opposed the proposed amendment, and contended that it raised a fresh cause of action.

After hearing counsel on certain facts, Hopley, J.: The only application before me is one by Mr. Burton to amend the replication by adding after "supervision" the words, "as well as certain extra work." That seems to me to be opening up a cause of action in the replication, which is not fairly imported in the declaration, and, as such, it seems to me to be an application to allow an irregularity in pleading, which I do not know that this Court has yet allowed, and I do not think that this application ought to be acceded to.



If, at a later stage, application is made to me to amend the declaration so as to give the real cause of dispute between the parties, I might, or might not, allow it at that stage, but at present the application being for amendment of replication, I must refuse it.

Mr. Burton said that he was placed in an awkward position, as he did not know whether he would be entitled to lead evidence bearing on one of the principal causes of dispute. He might, perhaps, state what the "extra work" was. Plaintiff, in addition to being an architect, was also an artist. The parties had been great friends, but their friendship had been broken. Defendant, who was very anxious to have a pretty house, asked the plaintiff to specially design for him certain stained glass windows, which was done. He also specially designed paintings, ingle-nooks, panels, etc.

Mr. Upington said that he had no objection to the real points in dispute coming before the Court, but if any substantial change was made in the pleadings there might be some prejudice to his client.

[Hopley, J.: If plaintiff can frame a proper amendment to his declaration, he may do so. Defendant will have the power to frame a paragraph in his plea in order to meet that. If it is only a matter of whether his paintings are worth £23, and whether he should charge the sum of £5 5s., it seems a pity to have this lawsuit. However, I cannot tell people to be sensible, and go to arbitration about these little things.]

The Court was eventually adjourned for a quarter of an hour to enable the declaration to be amended, in accordance with the wishes of the plaintiff.

On the resumption of the Court, Mr. Burton handed in an amendment of the declaration, so as to bring the whole of the points in dispute before the Court.

Evidence was given by the plaintiff and Wm. Hawke, architect, of the firm of Hawke and McKinlay, and Mr. Burton closed his case.

Mr. Upington called Frederick Cherry, architect, and Charles Henry Smith, architect, and closed his case.

At the conclusion of the evidence, a point was raised as to the value of the landscape painting in three panels over the mantelpiece of defendant's house, executed by the plaintiff.

Mr. Upington said that, owing to the alteration of the pleadings, he was not prepared to lead evidence on the question of the value of the painting. He would suggest that that part of the case should be referred to somebody, to be agreed upon between the parties, to assess what would be a fair remuneration. That amount so assessed, his client would be prepared to pay. The only other course that he could suggest was that he should now apply for a post-

ponement of the case to enable defendant to obtain expert witnesses, who would have to go out for the purpose of examining the work.

[Hopley, J.: All I can say to the parties is that probably that would make it a very expensive picture one way or another. The difficulty would be to know your expert. How do I know who is a recognised arbiter in fine arts here?]

After further argument by counsel,

Hopley, J., suggested that, in order to make an end of this matter, 10 or 12 guineas would be a fair price to pay. He did not say that that was a fair value of the work done by plaintiff, but it might be the basis of a compromise.

Mr. Burton, after consulting his client, said that he thought the plaintiff would not object to the sum of ten guineas. He added that the plaintiff said he had been put to considerable pains, and that the painting was worth the money put down for it.

Mr. Upington said that his client would be prepared to pay 10 guineas for the painting.

Counsel having been heard on the other branches of the case,

Hopley, J.: A case like this makes one feel how very frequently people allow their tempers to run away with them and bring cases into court which ought never to be heard of anywhere near the precincts of the court. This is peculiarly a case of that sort where plaintiff and defendant started as very good friends; apparently, from the correspondence, they were constantly together, and entered into a contract for work which was to give one of them a nice artistic little house, and was possibly one of the stepping-stones to fame for the other. Yet here are these two people, who up to a certain point carry on amicably, thrown entirely off their balance of common-sense—I don't say both of them, but, at all events, one of them—and behaving in such a way as to make ultimate recourse to a law court almost the only way of settling their difficulties. Well, I am not here to preach morality or common-sense or anything else, but at the same time I must look to the conduct of the parties when I come to that portion of the case which has to deal with the costs of this action. After all, the whole thing before me is as to whether two small sums of £23 odd and £5 5s., altogether about £28, claimed by the plaintiff, should be allowed or not. I cannot help remembering, in regard to this that a very reasonable proposal was made by the attorneys of the defendant—that as this small sum of less than £30 was in dispute between the parties, they should refer it to some practical man to see whether it was owing or not. The answer of the plain-



tiff to that was simply a point blank refusal to entertain anything of the sort, and plaintiff relied upon his account which, he said, had been admitted by the other side. Now, the question is whether on the pleadings as they stand and on the pleadings as they have been amended there is anything due to the plaintiff, and, if so, how much? Taking the larger sum of £23 2s. 9d. first, there was upon the original pleadings a charge of  $1\frac{1}{2}$  per cent. for supervision. That is in addition to 5 per cent. and  $2\frac{1}{2}$  per cent., which had already been admitted on the sum total of the whole account. There was no explanation or note in the account, which was rendered considerably before action, but this supervision was anything but supervision. As to the question of whether defendant had professed himself contented with the account, he was entitled at any time to question any one of these items, especially after matters had reached the more acrimonious stage. Of the sum of £23, an amount which for the purposes of this action had been fixed at 10 guineas, had been agreed upon in regard to the three panel paintings over the mantelpiece. It is said that this amount of £10 10s. is included in the claim for £23 2s. 9d. for extra work outside the architect's routine of work. Well, the question is whether the other work which is charged for should be treated as extras for which the architect is entitled to charge. An architect is not simply a person who draws the bare walls of a house and the form it should take, but he would undertake to add the tasteful touches. The rest of the charge of £23 seems to relate to the design for certain artistic fixtures, such as an ingle-nook, benches, stained glass window, etc. As far as I can see, those are things which fairly come into the contract, and I do not see that the plaintiff has any right to ask for special remuneration for them. Then as to the question of the amount of five guineas for supplying a tracing of the plans to the municipality, there is some conflict of evidence as to whether in the absence of anything like a special contract with regard to such tracings, it is a charge which is looked upon as an ordinary charge which architects are entitled to make. I think, in the absence of a special contract as this is a matter which is in the interests of the architect as well as the employer, and in view of the fact that the architect does this preliminary work, which enables the contract to begin, the whole of this item must go. The result is that the tender of the defendant, except as to the sum of ten guineas, is sufficient, in my view of the case. The plaintiff had, by the time when the tender was made, written what I cannot help calling a very intemperate letter, in which the terms used are such that no self-respecting man in the position of defendant could possibly approach him

in regard to anything like a friendly settlement. With regard to the costs, it is true that to-day plaintiff has recovered ten guineas more than the amount of the tender, but it is equally true that there would have been no litigation, in my opinion, but for the line which plaintiff adopted in the letter, and but for the line which he afterwards adopted when arbitration was suggested; and, furthermore, if there had been an item of ten guineas specially specified in the pleadings, it is extremely likely that, in the circumstances, defendant would have been advised upon these facts, if known to his legal adviser, to tender it as soon as the amount was ascertained. Therefore, I can see no reason whatever for depriving the defendant of the successful position he is in in defending this action, by making him pay the costs. The result will be that there will be judgment for the plaintiff for £95 8s. 9d., and a further amount of £10 10s., making a total of £105 18s. 9d., the plaintiff to pay the costs of this action.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ELIASON V. KATZ. { 1906.  
June 27th.

This was an action brought by Morris Eliason, baker, of Cape Town, against Mendel Katz, also of Cape Town, to recover a sum of £35 5s. in respect of wages.

Plaintiff, in his declaration, said that in or about the month of August, 1904, defendant was carrying on business as a baker, in Sir Lowry-road, Cape Town, and he engaged plaintiff to assist him in the said business. The wages paid to plaintiff varied from time to time. On the 10th December, 1904, an account was debated between the parties, and a balance of £50 was arrived at as due from defendant to plaintiff. Thereafter a sum of £17 15s. was agreed upon between the parties, as wages due from defendant to plaintiff (in addition to the sum of £50), at the rate of £4 5s. per week from the 11th February to the 4th March, and also one week at the rate of £5. A sum of £32 10s. had been paid by defendant on account, leaving a balance owing of £35 5s., which sum defendant refused and neglected to pay. Plaintiff prayed for judgment for £35 5s.

Defendant, in an amended plea, said that the moneys due from defendant to plaintiff in respect of the said wages up to and including the 10th December, 1904, were duly paid to the plaintiff. On or about the 10th December, 1904, in consideration of the payment of £50 by the plaintiff, the defendant admitted the plaintiff as a partner in his bakery business. The said partnership was terminated by mutual consent, on or about the 14th January, 1905. Thereafter, accounts were debated and settled between the parties, and plaintiff had received from the said estate all that he was legally entitled to under the said partnership. On the 14th January, 1905, the defendant again engaged the plaintiff to assist him in the said business at a weekly wage of £4 5s. Plaintiff remained in the defendant's employ as aforesaid until the 14th March, 1905, and duly received from defendant the whole amount of wages due to him in respect of the said period of service. Defendant admitted that he had refused to pay the sum claimed by defendant, and said that, by reason of the premises, he was under no liability to the plaintiff in respect of the said sum or any other sum.

Mr. Alexander was for plaintiff; Mr. Lewis was for defendant.

Morris Eliason (the plaintiff), who gave his evidence in Yiddish, was called. He stated that he had instituted criminal proceedings against the defendant in the Magistrate's Court, under the Master and Servants' Act, for this sum of £35 5s., which was alleged to have been withheld by plaintiff. Defendant asked him many a time to become a partner, but witness always refused.

Cross-examined: Witness did not know whether the Magistrate said the defendant was not guilty. He did not get his wages awarded to him by the Magistrate. He remembered on the day when the remains of President Kruger were brought to Cape Town defendant took him for a walk, and they went to the office of a Mr. Schultz. Witness did not speak, and he took no part in the negotiations. The conversation was carried on in Dutch between defendant and Mr. Schultz. Some days afterwards defendant said that he had made an agreement, and he must go to Mr. Schultz's office to sign it. Witness had never told Mr. Schultz that he had gone into partnership with Katz, and that he (witness) had put £50 into the business, and Katz had put in £100. About the end of February he saw a packet of 1,000 account forms, headed "Katz and Eliason." Witness asked Katz why his name was on the bills. Katz's bookkeeper said that it did not matter, and he put the bills in the drawer. Katz said that he would erase witness's name from the forms.

Mr. Alexander closed his case.

John Henry Cecil van Breda, clerk in the Resident Magistrate's Court, who put in the record in the case of *Rex. v. Katz*.

Morris Katz, defendant, stated that the plaintiff was in his employ in a bakery business in Sir Lowry-road. In the beginning of December the plaintiff paid £21 for a half share in the goodwill of the business. An agreement was subsequently drawn up, but was not signed, although it was agreed they should be in partnership. At this time they were losing over the business. In January, the plaintiff said he did not wish to be any longer partner in the business, which he left without any notice. It was agreed that witness should pay him £29, balance of the goodwill, in instalments. The bookkeeper paid the plaintiff his salary for the seven weeks.

E. J. Schultz, attorney, gave evidence as to Katz and Eliason calling upon him in December for the purpose of having a deed of partnership drawn up. The deed was drawn up but not signed.

Maasdorp, J., said to his mind the position was that at one time a certain sum of money was due, and the question was whether it had been paid. The onus of proof, however, was on the defendant.

Having heard Mr. Lewis in arguments on the facts,

Maasdorp, J., said the evidence of the defendant was that £50 was paid in cash, and the question was whether the £50 owing to plaintiff at the end of the year had been taken out of the capital account. If not there was documentary evidence to account for it. The partnership had not been proved, and that being so, the £50, according to the only book produced, was still owing to plaintiff. Judgment would be for the plaintiff as prayed, with costs.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1906.  
June 28th.

Mr. W. Porter Buchanan moved for the admission of Abraham Pieter de Villiers as a notary.

Application granted and oaths administered.

Mr. Sutton moved for the admission of Elijah Cohen as an attorney and notary. Application granted, oaths to be taken before the Registrar of the High Court at Kimberley.

### PROVISIONAL ROLL.

#### TRUSTEES. AFRICAN HOMES TRUST V. GLASGOW.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £80, with interest, the bond had become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### BANK OF AFRICA V. DE VILLIERS.

Mr. Lourens moved for provisional sentence on a mortgage bond for £1,761 8s. 6d., with interest, the bond had become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### WHITE, RYAN AND CO. V. COHEN.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Final sequestration adjudicated.

Mr. Alexander afterwards moved for the appointment of Mr. W. Bishop as provisional trustee.

Order granted.

#### SAUERLANDER AND KRUGER V. DAPINO.

Mr. Van Zyl moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### FOUBIE V. SWART.

Mr. Toms moved for provisional sentence on two promissory notes.

Sentence as prayed.

#### CAMP'S BAY ESTATE V. TROUTMAN.

Mr. Lourens moved for provisional sentence upon certain conditions of sale for £7 10s., being 2nd, 3rd, and 4th instalments of purchase price of certain ground, with interest.

Sentence as prayed.

#### MICHAU AND DE VILLIERS V. DALY.

Mr. De Waal moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £68 10s., being fees and disbursements made by defendant's attorneys in a recent case.

Dr. Greer (for defendant) said that his client was in a poor state of health, and without means or employment. He was prepared to offer £1 a month.

Mr. De Waal said that he could not accept that offer.

Defendant was called. He said that a decree was granted against him on Thursday last, and it was suspended on payment of £5 a month. He would have to pay that money by the help of a friend.

By the Court: Judgment was given against him in the original case for £10 12s. and costs. The costs were about £150.

Defendant added that he could not offer more than £1 a month at present. He was married out of community of property.

By the Court: Witness was a speculator.

Mr. De Waal: You are a great racer, Mr. Daly?

Defendant: I have done a lot of it; I don't run myself.

Further cross-examined: He was living at a house at Rosebank, one of the best in Rosebank. Witness managed his wife's business, but she had had no business to manage lately. His wife sold her shares in the Burger Estates last week for £500. She held about 300 shares in the Klapmuts Racing Club. She had a dairy at Rosebank, which was managed for her by Mr. Van Straaten. Mr. Van Straaten was not a jockey, he was a gentleman. He had ridden horses for witness at the races, but as a gentleman rider. The dairy was a losing concern.

By the Court: The property belonged to his wife, who had received it by inheritance from her father.

Decree granted, execution to be suspended upon payment of £1 per month, the first payment on the 1st proximo.

#### DEMPERS AND VAN RYNEVELD V. MELMAN.

Mr. De Waal (for plaintiffs) moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

#### CAPE TIMES, LTD. V. FOWLS AND EGGS CO., LTD.

Mr. M. Bisset moved for provisional sentence upon a promissory note for £52 14s. 6d.; counsel also applied for judgment, under Rule 329d, for £100, hire of certain goods let by plaintiffs to

defendant, together with an order on defendant to return the said goods.  
Sentence as prayed.

VAN SCHLICHT V. THEUNISSEN.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £500, less £194 paid on account, with interest; counsel also applied for the property under clause 2 of the bond to be declared executable.  
Sentence as prayed.

STABILE V. KABER.

Mr. Roux moved for provisional sentence on a mortgage bond for £100, with interest, bond due by reason of three months' notice having been given; counsel applied for the property specially hypothecated to be declared executable.  
Sentence as prayed.

BROWN, LAWRENCE AND CO. AND OTHERS V. LEVY.

Mr. M. Bisset moved for a provisional order of sequestration to be made final.  
Order granted.

ILLIQUID ROLL.

ELLIOT V. DRUMMOND. { 1906.  
BROWN V. DRUMMOND. { June 28th.

Rule of Court 330—Bar.

*The time within which by Rule 330 a plaintiff may be barred for not proceeding with his action runs from the date of the issue of the summons.*

Mr. Howel Jones (for plaintiff in each case) said that these matters were standing over for production of some authority to be cited for Rule 330. The application was for leave to sign judgment against the plaintiff in both cases for not proceeding with his action, having been duly barred. The question raised was as to the construction of Rule 330. Counsel said that he had been unable to find any direct authority in this court, and he must rely upon the practice of the Court. He also referred to the practice of the English Courts, in reference to which some question was raised by the defendant at the last hearing.

Defendant said that both summonses in this case were issued on the 21st February. The one intended for Brown was addressed to "John William Wood," of Vryburg, and the Deputy Sheriff returned it, saying that the

name was unknown. The name "Wood" was a clerical error, and should have been Brown. The summons was amended, and it was not served on Brown until the 15th March. He submitted that, so far as that case was concerned, the summons was not issued until the 13th March, so that he was, he contended, still within the two terms in Brown's case.

Buchanan, J.: The only point arising in this case is the construction of the 330th Rule of Court, which says that any person may be barred if he does not proceed with his action in a certain time after which the action was commenced. According to the English authorities from which this rule was taken, the action commences from the issue of summons. The time since the issue of summons has elapsed, and plaintiff is entitled under the Rules of Court to have judgment signed against defendant for not proceeding with his action. The practice of this Court is in accordance with the practice of the English Courts. The application will be granted, with costs.

RIGG V. VAN BEENEN.

Mr. Gutsche moved for judgment, under Rule 329d, on an alternative prayer for cancellation of a certain sale.  
Order granted for the amount claimed, amount to be paid in ten days, failing which, order on alternative prayer.

SUTHERLAND V. BLACK.

Mr. Lewis moved for judgment, under Rule 319, in default of plea for transfer of certain ground at Plumstead, with costs.

Ordered to be mentioned later in the day, owing to there being no proof of service.

Later, proof of service was produced, and an order was granted for transfer within one month.

REHABILITATIONS.

Mr. Douglas Buchanan applied for the discharge from insolvency of Ernest Peverell Kitch.

Granted.

Mr. Lewis made a similar application on behalf of Barnett Edelstein.

Granted.

Mr. Toms made a similar application on behalf of Richard William Wingfield.

Granted.

Mr. P. S. T. Jones made a similar application on behalf of Lewis Tiffin.

Granted.

## GENERAL MOTIONS.

KEATING V. KEATING. { 1906.  
June 28th.

Dr. Greer moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights. Respondent's passage money from New York to South Africa had been tendered, but she had not returned to this country.

Rule made absolute.

*Ex parte* BERTLEY.

Mr. Bailey moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* RIDLEY.

Mr. Douglas Buchanan moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

## SCHEEPERS V. FOSTER.

Will—Assumption of executor—  
Appointment as co-executor  
—Letters of administration—  
Procedure.

*A.S., the widow of G.S. (with whom she had made a joint will under which she was appointed executrix), after the death of G.S. took out letters of administration and assumed F. as co-executor, who, however, omitted to take out his appointment in that capacity. A.S. thereafter revoked the deed of assumption. On the death of A.S., F. claimed to be executor of the joint estate, and the heirs now demanded that he should be ordered to return the notarial deed under which he claimed to act.*

*Held, that the heirs should have called upon the Master to call a meeting of next of kin to A.S. to appoint an executor. The Court directed the Master to call such meeting with authority to appoint an executor dative.*

This was an application on notice of motion calling on the respondent to

show cause why an order should not be granted, declaring a certain act of assumption, purporting to have been passed in favour of the respondent, cancelled, and of no force and effect.

Mr. Benjamin was for the applicant, and Mr. W. P. Buchanan was for the respondent.

Counsel having been heard in argument,

Buchanan, J.: The late Mr. Gideon Scheepers, and his wife, Anna Scheepers, made a joint will, in which they appointed each other executors of the estate of the first dying. After Mr. Scheepers' death, Mrs. Scheepers took out letters of administration, and she placed the management of the estate in the hands of Mr. Foster, an attorney of Oudtshoorn, as her agent. Mr. Foster administered for some time, and he also obtained from Mrs. Scheepers a notarial document assuming him as executor with her in the estate of her late husband. Disputes arose between them, and Mrs. Scheepers wished to terminate Foster's agency, and demanded back the papers of the estate which she had given him, but he refused to return them. Foster saying that he held them as a lien for advances made. The matter came before the Court in August last year, when Foster was called upon to deliver up the papers, and particularly the title deeds belonging to the estate (15. C.T.R., 708). Foster set up his lien, but the Court decided against him, and he was ordered to give up the title deeds held by him forthwith. In his affidavit Foster stated the fact that Mrs. Scheepers had executed a notarial deed of assumption, but that he had not acted upon it or taken out letters of assumption from the Master, and Foster handed in the notarial document which he filed with the papers connected with the motion. There seems thus to have been a clear revocation by Mrs. Scheepers of her authority to Foster to take out letters of assumption. When Mrs. Scheepers died, the Master called a meeting of next of kin to appoint an executor dative to the estate of Gideon Scheepers. At that meeting the next of kin wished to appoint one of the heirs, Gideon Scheepers, jun., but Mr. Foster's agent produced the protocol of the attorney who had drawn up the original deed of assumption, and upon that protocol claimed that Foster still represented the estate, and that consequently no other executor could be appointed. This claim the Magistrate, acting for the Master, sustained, and refused to take steps to appoint an executor dative. Here, in my opinion, the Magistrate erred. It is true that Foster had at one time possession of a deed of assumption, but he never acted upon it, and when he was called upon to give up the papers of the estate, he sur-



rendered the deed. I do not think that he has any right now to claim after the death of the widow, who in her lifetime, in effect, had revoked the assumption, to be appointed as assumed executor. This application has not assumed the proper form. The proper course would be to authorise the Master to call a meeting of the next of kin to appoint an executor dative in this unrepresented estate. No order can be made on the application. The Master is directed independently of the application to call a meeting of next of kin, with authority to appoint an executor dative to the estate of the late Gideon Scheepers. There will be no order as to costs.

FOURIE V. INCORPORATED LAW SOCIETY.

Articled clerk—Break of service  
—Matriculation examination.

*The Court refused leave to an articled clerk to break his service for the purpose of pursuing his studies for the matriculation examination.*

Mr. Roux moved, on the petition of Karl Hendrik Fourie, for leave of absence from service of articles of clerkship at Aliwal North until after matriculation examination in December next. He asked for leave of absence for five months and ten days in connection with his studies.

Mr. Douglas Buchanan appeared on behalf of the Incorporated Law Society and produced a letter addressed to the petitioner by the secretary of the society, in which he stated that his Council disapproved of breaks in the service of articles such as petitioner proposed to make, as being contrary to law, and also to the purpose of the articles. The Council also considered that the period of three months would be sufficient to take for the matriculation examination. Mr. Buchanan said that the letter described the position taken up by the society, and he also pointed out that there was no affidavit by Mr. Smuts, the petitioner's principal.

Mr. Roux drew the Court's attention to several decisions already given in applications for breaks of service for the purpose of pursuing studies, and said that the petitioner was in the hands of the Court as to how much time should be allowed.

Mr. Buchanan said that the matriculation examination was an examination that ought to have been taken before petitioner entered into his articles.

Buchanan, J.: Under the old practice every articled clerk was required to serve for a period of five years, and as that was a considerable period of time,

occasionally, by indulgence, the Court allowed interruptions in the service. Eventually this term of five years was reduced to three years. The Rules of Court require that during the whole of that time the articled clerk is to be instructor in his profession as an attorney. In this case the articled clerk wishes to break his service, not for the purpose of being instructed in the theoretical part of his profession, but, in fact, to go back to school for a period from June to December, so that he may pass the matriculation examination. That is certainly contrary to the intention as well as to the letter of the Rules. There has occasionally been leave given to a clerk to break his service for the purpose of passing the law examination, as that is studying the theoretical part of his profession, provided that when he resumes he serves for a period of three years, but that is very different from this case. There will be no objection to save entering into fresh articles to give the applicant leave to break his service, but on his return he will have to serve three years consecutively.

ENGELS V. ENGELS.

Mr. De Waal moved for an order upon respondent, as executrix testamentary of the estate of the late Maria Engels (born Alexander) to sign liquidation and distribution account, or for leave to the Master to confirm the same without her signature. Petitioner was one of the children of the late Maria Engels, and her surviving spouse, Wm. Engels. The survivor had waived his life interest. Counsel applied for an order in terms of the alternative prayer.

[Buchanan, J.: Why not remove her from her office and allow the Master to appoint an executor dative, who can sign the account?]

Mr. De Waal said that the estate was very small, and there had already been certain applications to the Court.

Order granted removing respondent from office, and the Master authorised to appoint an executor dative.

COLONIAL GOVERNMENT V. SELISHO.

Mr. Howel Jones moved, on the petition of the Assistant Treasurer, for leave to attach a certain farm in the district of Taungs *ad fundandam jurisdictionem* and for leave to sue respondent by edictal citation for a debt of £21 1s. quit-rent and stamp duty. Respondent's last address was care of certain attorneys at Thaba 'Nchu, O.R.C.

Leave to sue granted and property attached, citation to be returnable on the 31st August. Personal service, failing which service upon Bromley and Riet, attorneys, and one publication in the "Gazette" and "Bloemfontein Post."

*Ex parte* TURLEY.

Mr. Douglas Buchanan moved, on behalf of petitioner, for leave to sue *in forma pauperis* for damages for seduction, etc.

The matter was referred to counsel for report and certificate.

*Ex parte* REID.

Mr. Bailey moved for a certain rule *nisi* to be made absolute, authorising the cancellation of two lost mortgage bonds, due publication of the rule having been made.

Rule made absolute.

## LAWLEY AND CO. V. HERRER.

Dr. Greer moved for an order authorising attachment of a certain inheritance falling due to respondent from the estate of the late J. P. Herrero, and restraining the executor from paying out the said sum, pending an action to be brought by petitioners for recovery of £74 4s. 10d. for clothing supplied. Seven years would elapse, said counsel, before the inheritance would be payable.

Rule granted attaching the property in the hands of the executors, pending an action to be instituted by petitioners forthwith.

## GERMAN GOVERNMENT V. SCHILLER.

Mr. Roux moved for a certain award of arbitrators to be made rule of Court.

Award made rule of Court, with costs.

*Ex parte* O.C., CAPE MOUNTED RIFLEMEN.

Mr. Howel Jones moved for the transfer of certain property at Port St. John's. In 1888 certain landed property was granted by the Governor to the 8th Troop of the Cape Mounted Riflemen and his successors in title. The present application was to have transfer effected from Major Howard-Sprigg to Colonel Lukin.

Application granted, property to be registered in the name of the O.C. in trust for the C.M.R.

*Ex parte* MARAIS.

Mr. Russell moved for the appointment of a *curator ad litem* to represent certain minors in the division of certain property.

Application granted, Robert A. Dower, attorney, of Bedford, to act as curator.

*Ex parte* ZUID AFRIKAANSCH RYTUIG EN BOUW MAATSCHAPPY, BEPERKT.

Mr. Benjamin moved for the confirmation of a resolution reducing the capital of the company by cancelling 1,300 fully paid up vendors' shares surrendered to the company, and a further 700 shares fully paid up.

A rule *nisi* was granted calling on all interested to show cause on August 2 why the prayer of the petitioners should not be granted, and why the word "reduced" should not be dispensed with. One publication in the "Gazette," "Ons Land," and in the local paper.

*Ex parte* HOME.

Mr. W. P. Buchanan moved for leave to the applicant to give evidence by means of affidavit in a suit against her husband for divorce. The applicant was at present in poor circumstances, living at Bethlehem, in the O.R.C. The defendant had been barred from pleading.

Application granted.

*Ex parte* LOGAN.

Mr. Roux moved for the appointment of a *curator ad litem* to the petitioner's husband, Wm. Logan, of Aliwal North, who displayed symptoms of senile imbecility.

Application granted, Matthys Andries de Witt appointed as *curator ad litem*, summons to be returnable at the next sitting of the Circuit Court at Aliwal North.

*Ex parte* DARTER.

Mr. McGregor moved for an order authorising the substitution of certain erven as a security, under an ante-nuptial contract, in lieu of a life policy, which the petitioner found it difficult to keep up.

Application granted.

## DRUMMOND V. TRUSTEE, INSOLVENT ESTATE MACKINTOSH.

Dr. Greer was for the applicant, and Mr. P. S. T. Jones was for the respondent. The application was for leave to set aside an order of the Court restraining the applicant from collecting certain debts in the estate under a cession. The creditors decided at a meeting that the assets were so small that they would not incur legal proceedings to contest the assignment. Counsel for the respondent agreed to the withdrawal of the interdict.

Interdict discharged, with costs, the money collected to be handed over, less

costs. His Lordship added that it was a pity the creditors had not the money to fight this matter.

*Ex parte* LINSOTT.

Mr. Pohl moved to have a certain order of Court rescinded declaring Bertha Linscott of unsound mind, and transferring to her the management of her own affairs. There was a medical certificate that she had recovered.

Application granted.

*Ex parte* CARELSE.

Mr. Watermeyer moved to make a rule absolute authorising the petitioner to sue *in forma pauperis*.

Rule made absolute, Mr. Close to take the reference and Messrs. Fairbridge, Arderne, and Lawton to act as attorneys.

*Ex parte* HERRING AND LEWIN.

Mr. Alexander moved for leave to the petitioners to register an ante-nuptial contract. They were only resident in the country a short time, and were informed that to be married out of community of property it would be sufficient to be married before a Magistrate.

Leave granted to register a notarial agreement embodying the terms of the ante-nuptial contract.

*Ex parte* MABEE AND ANOTHER.

Mr. Lourens moved for leave to pass transfer of certain property in the interest of certain minors. The Master's report was favourable.

Application granted.

*Ex parte* ESTATE MILNER.

Mr. Douglas Buchanan moved for leave to the *curator bonis* to raise £100 to meet the liabilities in the estate of Wilfred Hardy Milner, of Wynberg, who had been declared a lunatic.

Application granted.

*In re* B.S.A. ASPHALTE AND MANUFACTURING CO., LTD. (IN LIQUIDATION).

Dr. Greer, for the liquidators, moved for the confirmation of the first report.

Mr. Allen, late managing director to the company, appeared, and took exception to certain allegations in the report.

Buchanan. J., said that matter was not raised at present. Application granted, July 15 fixed as the date when all claims to be proved and for the list

of contributaries, the unpaid calls to be paid in two instalments on the 1st August and 1st September.

OOSTHUIZEN V. SAUNDERS.

Mr. P. S. T. Jones moved for leave to attach certain property in execution of a judgment of this Court. Counsel (replying to the Court) said that notice had not been given to respondent, who resides at Willowmore.

Rule *nisi* granted, returnable on the 1st August.

*Ex parte* ESTATE WEIS.

Mr. Gutsche moved for leave to petitioner, who is one of the executors in the Estate Weis, to take transfer of certain property in Cape Town and at the Paarl, which had been bought at public auction.

Order granted as prayed.

*Ex parte* COMBRINCK.

Mr. Roux moved for leave to petitioner to sue the Colonial Government *in forma pauperis* for damages. Counsel said that he was prepared to certify now.

Rule granted, returnable on the 5th July.

*Ex parte* JOYCE AND MCGREGOR.

Mr. Palmer moved for an order authorising the amendment of a general plan of the Goodwood Estate, by the erasure of certain streets. The application was rendered necessary by purchases made by the Railway Department to put down a station, to be known as Vasco Siding.

Rule *nisi* granted, to be returnable on the 12th July, and to be published once in the "Gazette" and once in the "Cape Times."

GOLDSTEIN V. MAY.

Mr. Lewis moved, on behalf of George May (defendant in the suit) for a commission *de bene esse* to take the evidence of Mrs. Lily Parry at the Eaton Convalescent Home.

Application granted, Mr. Advocate Suttan to be commissioner, and costs to be costs in the cause.

*Ex parte* DIXON.

Dr. Greer moved, on the petition of Mary K. Dixon, for leave to sue her husband, Henry Dixon, by edictal cita-



# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

RHODESIA CONSOLIDATED, { 1906.  
LTD. V. RIXON. { June 30th.  
{ July 2nd.

Principal and agent—Excess of authority — Ratification of part of contract.

*Where an agent enters into a contract with a third person in excess of his authority; the principal is not entitled, as against such third person, to claim the benefit of part of the contract while rejecting the rest.*

*The manager of the plaintiff Company entered into a written contract with the defendant, whereby the latter undertook to supply to the Company a certain quantity of corn at a fixed price and within a given time, whilst it was orally agreed that the manager should advance to the defendant the sum of £200, for which amount the latter was to sign his promissory note in favour of the manager to be kept in his safe as a security for such advances. The manager deposited the note with his banker as security for his over-draft and at the due date of the note, the defendant was obliged to pay part of the amount to the banker. The manager had no authority from the Company to take the defendant's note in his own favour for the advance, and there was no evidence of collusion between the defendant and the manager.*

*Held on appeal from the High Court of S. Rhodesia, that the plaintiff Company was not entitled to claim from the defendant more than the balance of the advance after deduction of the amount which he had*

*been compelled to pay to the banker.*

This was an appeal from a judgment of the senior judge of the High Court, Southern Rhodesia, in an action brought by the appellants, the Rhodesia Consolidated, Ltd., against the respondent, to recover a sum of £200 in respect of an advance made under a contract to supply mealies and Kafir corn to the Nellie Mine.

The plaintiffs' declaration was as follows:—

1. The plaintiffs are a Joint Stock Company duly incorporated and registered under the British South Africa Company's Companies Act of 1895, and having an office at Salisbury, and carrying on business in Southern Rhodesia. The defendant is a farmer, residing at Fort Rixon, in the district of Bulawayo.

2. On the 3rd July, 1905, the plaintiffs advanced to the defendant the sum of £200 in consideration whereof the defendant undertook and agreed to deliver 220 bags of mealies and 80 bags of Kafir corn at the Nellie Mine, in the district of Bulawayo, on or before the 31st December, 1905.

3. The defendant failed and refused to deliver the said mealies and Kafir corn, or any part thereof, in terms of the said agreement, and has refused, and still refuses, to repay the said advance of £200 or any part thereof.

4. All times have elapsed and all things have happened entitling the plaintiffs to claim payment of the said sum of £200.

Wherefore the plaintiffs claim:

- (a) Payment of the sum of £200.
- (b) Interest from the 3rd July, 1905.
- (c) General relief.
- (d) Costs of suit.

To this declaration the defendant pleaded as follows:

1. The defendant admits paragraph 1 of the declaration.

2. As to paragraphs 2 and 3 thereof the defendant says that previous to the said 3rd July, 1905, he had had similar contracts with the plaintiff company, and in consideration of his depositing with the plaintiff company promissory notes to cover all advances made by the plaintiff company in connection with such contracts the plaintiff company from time to time made him advance as aforesaid.

3. It was a condition of all such agreements that the plaintiff company would hold the said promissory notes as security only in case the defendant died or was otherwise unable to fulfil such contracts, and that under no circumstances would the plaintiff company negotiate or discount the said notes.

4. Shortly before the said date mentioned in paragraph 2 of the declara-



tion, one Walter Howard, who was then the local representative, manager and secretary of the plaintiff company, which had then its head office at Bulawayo, approached the defendant, and requested the defendant to enter into another contract with the plaintiff company to supply mealies and Kafir corn at the said mine, such grain to be delivered during the period from 1st October to 31st December, 1905, as the plaintiff company should require it.

5. The Defendant at first refused to enter into such contract on account of the time he would have to hold such grain and be without his money, whereupon the plaintiff company's said representative offered, on behalf of the plaintiff company, that if the defendant would enter into such a contract the plaintiff company would, as before, advance him the sum of £200 on account of such contract, provided defendant would, as on the said previous occasions deposit as security with the plaintiff company his promissory note for that amount on the same terms and conditions as before.

6. The defendant thereupon entered into the said contract, and the plaintiff's said representative made out a promissory note for the said amount, which the defendant signed and left with the said representative on behalf of the plaintiff company as agreed, subsequently the plaintiff company's said representative paid the defendant £200, in accordance with the said contract.

7. In or about the month of September, 1905, the defendant learnt that contrary to the terms and conditions of the said contract, and in breach of the same, the said promissory note, which the defendant had deposited with the plaintiff company as security aforesaid, had been negotiated and discounted at the African Banking Corporation, Ltd., Bulawayo.

8. The defendant thereupon wrote to the plaintiff company's, then representative, and informed him that unless the plaintiff company recovered possession of the said note and held it as agreed, he would retire the said note at maturity, and consider the said contract as terminated by the said breach, and the defendant also called and saw the said representative to the same effect.

9. The plaintiff company failed to recover possession of the said note, and the defendant was obliged to retire the same at maturity, viz.: 31st December, 1905, and paid the said Bank the said amount of £200, less the sum of £16 18s. 10d., which amount he has tendered the plaintiff company.

10. The defendant was always willing and ready to deliver the said grain at the said mine in accordance with the terms of the said contract and otherwise perform the same provided the plaintiff company had fulfilled their part of the said contract.

11. Save as aforesaid the defendant denies the allegations in paragraphs 2 and 3 of the declaration and the defendant also denies those in paragraph 4 thereof.

12. Alternatively (should this honourable Court hold that notwithstanding the breach as aforesaid by the plaintiff company the defendant was bound to carry out the said contract to deliver the said grain if called upon the plaintiff company to do so and not otherwise) the defendant says that the contract was to deliver the said grain between the period from the 1st October, 1905, to the 31st December, 1905, when the plaintiff company should require same and up to and including the 31st December, 1905, the plaintiff company never called on the defendant for delivery of the said grain and on the said date defendant had to retire the said note as aforesaid less the said sum of £16 18s. 10d. which he again tenders the plaintiff company.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication was general.

The Court below gave judgment for plaintiff for £16 18s. 10d. amount tendered with costs to date of tender. All costs after such tender to be paid by plaintiff—defendant expenses as witness allowed.

The Judge's reasons for judgment were as follows:—

In this case the first question to be determined was what was the actual nature of the transactions which took place between Howard and Rixon with regard to the promissory note of £200. The position taken up by the plaintiff company was that as the note was made payable to Walter Howard or order and not to the company and with no indication on the note itself showing it was for the company or someone acting for them the transaction was a private one. Howard in evidence stated that the note had no relation to the company's business, his version to my mind was inconsistent, for at one time he said that the note was given to him by way of a private security as he had no authority from his company to make cash advances on their behalf and that he wished to secure himself in case the company repudiated the advance. He later stated that the note was given to him as an act of friendship for his private purposes and had no connection whatever with the advance made by him on behalf of the company to Rixon. To my mind the evidence of Rixon was clear and straight forward and I accepted without hesitation his version as to what occurred between him and Howard with regard to above matter. The conduct of Rixon on discovery of the fact that Howard had negotiated the note prior to the date it fell due seemed to me to strongly corroborate

Rixon's version. I found as a fact that Rixon signed the note drawn up by Howard on the distinct understanding that it should only be negotiated in the event of his failing to carry out the terms of the contract for the supply of grain. In other words that it was given to the company as security for the repayment of the advance of £200 in the event of a breach of the contract. I believe Rixon's statement that he did not notice when signing the note that it was made out payable to Walter Howard or order.

It was argued by the plaintiff company that inasmuch as the note was made payable to Walter Howard or order the onus of proving that Howard had authority to act in the way he did was thrown on Rixon. I was of opinion that as the company sued upon an arrangement entered into between Rixon and their own agent Howard it was not within their power to say that Howard had no authority to make this advance. And in these circumstances I was of opinion that Howard must be considered to have had power to take on behalf of the company, security for repayment of the advance in the event of Rixon's failure to carry out the terms of his contract. This seemed to me nothing more than an ordinary business-like proceeding and the company might well, had Howard failed to take security, have had very serious cause for complaint against him. I consider that the fact of the note being made payable to Howard or order did not absolve the company from liability, it seemed to me the form of security was a matter entirely in the discretion of Howard, and that even if he acted in a foolish or fraudulent manner my view was that the company and not Rixon should be the sufferer. In the above circumstances I held that the defendants' contention was good and I accordingly gave judgment for plaintiffs to the amount of the tender with costs up to date of such tender. All costs subsequent to the date of tender to be paid by plaintiff.

Mr. Schreiner, K.C. (for appellant): The declaration shows that it is common cause that certain advances were in pursuance of the following contract:—

Bulawayo, June 23rd, 1905.

Walter Howard, Esq., Rhodesia Consolidated Limited, Bulawayo.

Dear Sir,—I beg to confirm our conversation this morning, by which in consideration of an advance of £200, to be paid in ten days from date, I undertake to deliver to the Nelly Mine, 220 bags of mealies at 18s. and 80 bags of kafir corn at 15s. delivery not to be before the 1st September and not later than the 31st December.—Yours faithfully.

(Sd.) T. M. RIXON.

In May, 1904, the defendant gave a promissory note to Howard, and had

received an advance from the company of £225. Howard took this note, indorsed it, and placed it to his own credit. The company had nothing to do with it. In June, 1905, a second promissory note for £200 was given to Howard. Paragraph 5 of the plea implies that this note was payable to the company, but it was payable to Howard. This is not denied in the plea, but the inference is that it was not so. On November 20th defendant repudiated the contract until his promissory note should be handed back to him, but the company had nothing to do with that.

[De Villiers, C.J.: Had Howard authority to deal with Rixon?]

Yes, but he had no authority to make advances and take a promissory note in his own name.

[Buchanan, J.: But do you not adopt the advance?]

Yes, because it is our money. Howard had no right to advance it, but it is ours. Rixon's case is that the note was made payable to Howard *per incuriam*. If it had been made payable to the company that would have been a different matter.

[De Villiers, C.J.: Was it not the fault of the company that Howard was in a position to commit a fraud? He was their manager.]

He had no express authority to hand the money over to Rixon. It is only a question of implied authority. If the company had discharged him they could still have sued Rixon for the money.

[De Villiers, C.J.: You cannot follow up money. The moment Rixon got it it was his property.]

Howard wanted to get hold of Rixon's paper for his own accommodation and not for the company. The note was given on the 23rd of June, but post-dated the 30th.

[De Villiers, C.J.: Was Rixon bound to ascertain Howard's relations with the company?]

Certainly; and if Rixon was negligent it is for him and not for the company to bear the loss.

[De Villiers, C.J.: If the company were so negligent as to employ a dishonest agent, why should they not bear the loss? The whole question is whether Howard had authority to take the promissory note?]

Exactly, and the case must be decided on the same grounds as if Rixon were suing the company for money paid to Howard.

[Buchanan, J.: If Howard had authority to advance the money he had authority to take a promissory note for it.]

The note ought to have been made payable to the company. In his evidence Rixon says that "he was astonished by the letter of the Bank Manager; still he takes no steps in the matter. After the second letter he sees Derry, the then manager. He says:

"I then went to see Derry, and said I would not fulfil contract until they obtained possession of my promissory note. He said that Howard had not accounted for several matters and moneys. Derry said he must do the best for his company, and said did not think I was right. I said I would not fulfil contract until bill was returned. My solicitor then wrote letter (put in) to plaintiff. Bill was not met at maturity, and I had to provide for it. I had to pay £180 odd." If this had been an ordinary contract transaction he would have refused to sign the note, and would not have acted as he did when he found that he could not get back his note from Howard.

[De Villiers, C.J.: What is the drift of your argument?]

I want to separate the question of the contract from Rixon's action.

[De Villiers, C.J.: You, by your action, admit that Howard had authority to make advances. If he made advances, we must assume both that he had authority to do so, and that he had authority to take what security he pleased.]

But see *Hogarth v. Wheley* (32 L.T. 800, and 10 L. Rep., C.P., 630).

[De Villiers, C.J.: Was it not held that a promissory note payable to an agent as security was binding on the principal?]

Not unless the principal has by his previous course of dealing led the debtor to believe that the agent had authority to accept such note.

[De Villiers, C.J.: If Howard had been an honest man he would have put that note to the credit of the company. Did not the company hold him out as an honest man?]

The note was no security. The company had Rixon's receipt of July 3, 1905, for the £200. The note was given ten days before this advance was made. The company could not have negotiated the note, so it did not secure them. Rixon ought to have seen that Howard was using that note for his own benefit. It was understood that the company were not to negotiate it. What use then was it to the company? In point of fact the company knew nothing about it. In *Hogarth v. Wheley* authority was given to an agent to take a bill in favour of his principal. The bill was given in blank: the agent filled in his own name, and the payment was held to be bad. In the letter of June 23, nothing is said as to promissory notes. A collateral agreement between an agent and a third person cannot bind a principal, who has no knowledge of it. See also *Bowstead on Agency* (p. 65, 2nd Edit.), and cases there brought up, also pages 70 and 75 where, see illustration 4), citing *Edmonds v. Bushell* (Law Rep. Vol. I. of 1897).

[De Villiers, C.J.: The defendant's case is that the company did not fulfil

their part of the contract. He did not get his advance of £200, and had to retire his own bill?]

If Rixon had retired the bill, Howard could not have refused to repay the £200.

[De Villiers, C.J.: I am not sure of that.]

Then he would have enriched himself at the loss of the company.

[Maasdorp, J.: Rixon says, "I will give you the mealies when you give me the £200. Is not that a good defence?]

The re-delivery of the promissory note was not a condition precedent to the delivery of the mealies. They were to be delivered in November, and the note did not fall due till December. He should have delivered the grain and then sued for the return of the note. *Bowstead* (p. 76), citing *Davis v. Stauden*. Also *Faure v. Louw* (1 Juta, 3), *Standard Bank v. Union Boating Co.* (7 Juta, 257), *Pope v. Devenish* (2 Menz., 60), *Hind Bros. v. Steamship Co.* (72 L.T., 79), *Williams v. Evans* (Law Rep., 1, Q.B., 352), *Mackey v. Commercial Bank of North Brunswick* (30 L.T., 180), *McGowan v. Dyer* (L.R. 8, Q.B., 141), *Bowstead* (p. 256), and *Story on Agency* (p. 98).

Mr. Searle was not called upon.

*Postea* (July 2).

Having intimated that it would not now be necessary to hear Mr. Searle for respondent.

De Villiers, C.J.: This is an appeal from the High Court of Southern Rhodesia in an action whereby the plaintiff company claimed from the defendant the repayment of an advance of £200 alleged to have been made by the company in consideration of the defendant undertaking to deliver 220 bags of mealies and 80 bags of Kafir corn at the Nellie Mine on or before the 1st of December, 1905. The defendant having failed to deliver the articles within the specified time, the company claimed repayment of the money advanced. The defendant, by his plea, admitted the undertaking and failure to deliver the articles, but he alleged that such undertaking formed part of a wider contract, one of the terms of which was that he should deposit as security with the company his promissory note for £200, which the company should not, however, be at liberty to negotiate or discount. The plea further alleged that the defendant did give such a promissory note, which was discounted with the African Banking Corporation, but not met at maturity, and that he, as the maker, was compelled to pay the sum of £183 1s. 2d., and he accordingly tendered the sum of £16 18s. 10d. in full discharge of the company's claim. The evidence showed that on the 23rd of June, 1905, the following letter was sent by the defendant to one Howard, who was then the manager of the plaintiff company: "Dear Sir,—I beg to

confirm the conversation of this morning, by which, in consideration of an advance of £200, to be paid in ten days from this date, I undertake to deliver to the Nellie Mine 220 bags of mealies at 18s. and 80 bags of Kafir corn at 15s., delivery not to be before the 1st September, and not later than the 31st December." The defendant's evidence, which was accepted by the Court below as correct, and which this Court has no reason to doubt, further showed that while the defendant was signing the letter, which had been written at Howard's dictation, Howard handed him a promissory note in his (Howard's) favour, and requested him to sign it. The defendant said, "I did not know I had to sign note." Howard said, "Oh, yes; in same way as you signed last year to secure fulfilment of the contract." The defendant said, "Where is that note." Howard said, "When you fulfilled your contract I tore it up." The defendant said, "If I sign note, it will, I suppose be held by the company as security against contract and advance of £200." Howard said, "Of course, it will be the same as one you gave last year. It will be held and kept in safe as the last one was, and will be held simply as security for fulfilment of contract and against advance, and, of course, will only be used if you die or break contract." Thereupon defendant agreed to the terms, and signed the note. The evidence of the manager of the bank showed that Howard had an overdraft in the bank, and that in the previous year he had given the bank as security against such overdraft the defendant's promissory note in favour of Howard personally for £225. This was the promissory note to which the parties referred in the conversation just mentioned. In June, 1905, the bank pressed Howard for settlement, whereupon he lodged with the Bank the promissory note of the defendant in his favour for £200. On the 6th September the bank called upon the defendant for payment of Howard's then overdraft, which the defendant duly paid. His defence accordingly at the trial was in substance that as the advance to him had been reduced by the payment thus made by him he was not liable for more than the balance. The Court below, by its judgment, sustained that defence, and against that judgment the company now appeals. The plaintiff's replication to the plea did not raise any question as to Howard's authority to take the defendant's note in his (Howard's) favour as security, but in the Court below and in this Court the contention of the plaintiff company's counsel was that the defendant could not derive any benefit from the payment made by him to the bank, inasmuch as Howard had no authority from the company to take a promissory note in his own favour. I must say at once that I quite concur in the view that, as the

company is not proved to have known that its manager had on a previous occasion taken the defendant's note in favour of the manager personally, the company cannot be held to have given the manager any authority to take such notes again from the defendant. But the importance of the evidence relating to the previous note transaction lies in this, that it fixed the exact terms on which the contract of June, 1905, purported to be entered into. I am satisfied that those terms have been correctly stated by the defendant, and I am also satisfied that Howard had no authority from the company to enter into any contract with those terms annexed. The company would accordingly have been perfectly justified in repudiating the contract. If there was collusion between Howard and the defendant the company could, after repudiating the contract, claim repayment of the money as having been advanced in fraud of the company. But the company has not repudiated the contract. The case for the company is that it has ratified the contract so far as it is in writing, and that so far as it rests upon an oral agreement between the parties, the company is not bound, because its agent had no authority to take a promissory note made in his own favour. But the contract must stand or fall as a whole. There is no inconsistency between the written and the oral part of the contract, for the latter is only supplementary of the former. The oral part of the contract was that the note for £200 should be the same as the one given in the previous year, and, therefore, the giving of a note by the defendant in favour of Howard was a compliance with the oral part of the contract. Howard may have had no authority to take such a note as security, but the company cannot ratify a transaction of this kind in part, and repudiate it as to the rest. It may not have been bound by the contract, but having elected to take the benefit of a part it must be held to have ratified the whole of the contract. The bringing of this very action was a ratification by the company of the contract made by its manager with the defendant. The company, by its replication, denied that the terms of such contract were as alleged by the defendant, but when once the truth of the allegation was established, the plaintiff company's right to recover more than the balance tendered by the defendant failed altogether. The action is founded upon a failure of consideration for such advance, and as that advance was really reduced by the sum of £183 1s. 2d., which the defendant was compelled to pay contrary to the terms of the contract, he was properly held liable only for the balance. The appeal must, therefore, be dismissed, with costs.

Buchanan, J.: I concur on the ground of ratification.

Maasdorp, J.: I concur.



## APPENDIX.

Judgment of the Lords of the Judicial Committee of Privy Council on the Consolidated Appeal and Cross-Appeal of the Commissioner of Public Works, and, as such, representing the Colonial Government v. Hills; and of Hills v. The Commissioner of Public Works, and, as such, representing the Colonial Government, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 24th May, 1906.

Present at the hearing: The Lord Chancellor, Lord Davey, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson.

(Delivered by Lord Dunedin.)

The present appeals arise out of three contracts which were made between the Government of the Cape of Good Hope and the Thames Ironworks and Shipbuilding Company, Limited. Arnold Frank Hills, the respondent in the principal appeal and appellant in the cross-appeal, has been assigned into the rights of the said company.

These three contracts were all made on the same day, 4th July, 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appear as Schedules G, H, and I of Act 19 of 1900. They had to do with the construction of three railways, viz.: No. 1, Oudtshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudtshoorn. The first two were contracts for the construction of the lines of the company and the handing over of them to the Government. They were constructed and handed over, and no question, in one sense, arises on them. But moneys payable under them are partly the subject of this litigation, for the following reason. In each of them there was a clause providing that 10 per cent. should be retained by the Government from the payments falling due as the lines were constructed, and each of them contained clauses dealing with the ultimate fate of the 10 per cent. so retained. By these clauses the 10 per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then "the guarantee fund or the balance thereof shall be dealt with in terms of the agreement entered in to for the construction of the Mossel Bay-Oudtshoorn line."

Under these clauses sums amounting *in cumulo* to £61,233 16s. 2d. have been retained.

The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but in respect of their

engaging to construct the line the Government was to pay them a subsidy at the rate of £2,000 per mile of completed railway, not to exceed £150,000 in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of 10 per cent. of it by the Government.

A sum of £50,000 had been lodged as security by the company in the hands of the Cape Agent-General, and Section 15 of Schedule 1 provides that this sum and the sums retained by way of 10 per cent. of the instalments out of the payments on lines (1) and (2) should be handed over to the company as follows, viz., one-third when the Mossel Bay line had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion.

Then comes Section 17 on which the controversies in these appeals directly turn. It is in the following terms:

"17. The concessionary undertakes to push forward the construction of the line with all possible speed and to complete the same within two years of the date of the approval of this agreement by Parliament. In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the Act of God, war, insurrection, rebellion, strikes, lock-outs, or combinations of workmen, or other extraordinary or unforeseen circumstances beyond the control of the concessionary, or from or on the part of the Railway Department, the security referred to in this agreement to wit:

"The ten per cent. (10%) retention money under this agreement, together with the ten per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town Lines, dated 4th July, 1900, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said line, and thereupon the agreement between the Government and the said concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the Government shall thereafter as soon as the amount of the actual cost of such incomplete line shall have been ascertained to pay to the said concessionary the amount as shall have been paid on account of subsidy and less the amount of retention money and security hereinbefore referred to."

The company failed to complete the line within two years, or within a period to which the two years had been by mutual consent extended. They did not



even advance with it so far as to be able to claim any of the partial payments under Section 15. Accordingly, on 15th June, 1903, the Government applied to the Court to get a declaration of the failure of the Company to complete the line, and for leave to enter upon and take possession of the line in terms of Section 17. The Court gave judgment accordingly. Against the judgment an appeal was taken, but subsequently abandoned, and the judgment now stands as final between the parties.

The company, who by this time were represented by the present appellant Hills, then brought the present action against the Government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of £50,000 above mentioned, as also of a sum of £4,913 2s. 5d., being 10 per cent. of the instalments of the subsidy retained on railway No. 3. The Court gave judgment in favour of the plaintiff for a sum of £73,500 12s. 7d., being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of £4,913 2s. 5d., and also gave judgment for the plaintiff for the sums of £66,146 18s. 7d. (made up of the said sums of £4,913 2s. 5d. and £61,233 16s. 2d.) and £50,000.

The parties in the principal appeal do not raise any question as to the sum of £73,500 12s. 7d. but in the cross-appeal the appellant Hill prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned Chief Justice. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended to make them. To add something more in the name of interest would be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor. That "actual cost" in this contract is used in no such fanciful sense is clearly shown by the use of the words in Section 7 of Schedule 1, where provision is made for its ascertainment as regards each instalment by the certificate of an engineer.

This disposes of the cross-appeal. In the principal appeal the Government has complained of the judgment in so far as it gives the respondent Hills the sums of £66,146 18s. 7d. and £50,000, and claims these in terms of Section 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time.

Their Lordships have no doubt that the case of the non-completion of a rail-

way would be a natural and proper case in which to make such a stipulation. But the question arises in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter. Indeed the form of expression here "forfeited as and for liquidated damages," if literally taken, may be said to be self contradictory, the word "forfeited" being particularly appropriate to penalty and not to liquidated damages.

The House of Lords had occasion to review the law in the matter in the recent case of *The Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda* (1905 A.C., p. 6). It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where contract law is based directly on the Civil Law and where no complications in the matter of pleading had ever been introduced by the separation of Common Law and Equity.

The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Applying this principle to the present case their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money under Contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of Section 17 of this contract could not in any way be estimated as a fixed sum.

Their Lordships therefore hold that the sums are not liquidated damages under Section 17.

So far as a claim is made under Section 16 for £10,000, there seems no ground for argument that the sum is liquidated damages, as the expression used points to forfeiture pure and simple.

Their Lordships are not, however, satisfied that the Government has been given a proper opportunity to prove such damages, not exceeding the sums in the penalties, as they can make out. In the Court below the whole contention seems to have turned upon the question of liquidated damages, yea or or nay. The judgment of the learned Chief Justice which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view. That the Government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact that they were content to pay a subsidy of £2,000 a mile. They have not got that line completed, but, on

the contrary, have got on their hands an incomplete line, incapable of yielding profit in its present state, but for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money.

Their Lordships will therefore humbly advise His Majesty to declare that before the plaintiff (the respondent in the principal appeal) obtains judgment for the sums of £66,146 18s. 7d., and £50,000 awarded to him by the judgment of the Supreme Court, dated the 29th February, 1904, the defendant (the principal appellant) is entitled to prove such damage as he may have actually suffered through the plaintiff's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the judgment of the Supreme Court, and that subject to such declaration the defendant's appeal ought to be dismissed, and, further, that the plaintiff's cross-appeal ought to be dismissed.

The parties will pay their own costs of the appeal and cross-appeal respectively.



# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN,  
the Hon. Mr. Justice MAASDORP, and  
the Hon. Mr. Justice HOPLEY.]

AFRICAN REALTY TRUST, { 1906.  
LTD. V. COMMISSIONER { July 2nd.  
OF INCOME TAX. " 9th.

Land Development Co.—Income  
—Act 36 of 1904.

*A land development Company had sold for a large amount portion of its land on a system of deferred payments running over a term of ten years, upon agreements of purchase and sale, which it was optional to the purchasers to carry out or to suffer them to become void by making default, under penalty of forfeiting, as liquidated damages, any amounts already paid by them. The company had placed the whole amount received by them on the sales against the cost of the land and had not received sufficient to pay off the capital invested.*

*Held, that the Company was not liable to be assessed for Income Tax for the current year upon the amount of the deferred payments, as such unpaid portions of the purchase price were not income derived or received by the Company during the current year within*

*the meaning of Act 36 of 1904.*

This matter came up on review of certain proceedings of the Court of Review appointed under the Income Tax Act. No. 36, 1904.

It appeared that the applicant company is a land company registered in the Transvaal, and that the transaction in respect of which they have been held liable to pay income tax in this colony for the year ended the 30th June, 1904, are the sales of certain land in an estate known as Mount Pleasant, at Port Elizabeth. The company bought this ground some few years ago, and proceeded to have it surveyed and cut up into lots for the purpose of sale. The company paid £2,000 for the block of ground, and they also incurred survey and other sundry expenses amounting to £2,915 8s. 10d. The terms on which they sold the lots were that the instalments should be extended over ten years of such per year, transfer to be given at the completion of purchase price. Purchasers also had the option, if they so desired, to complete the purchase at a shorter period. In the period in question the company disposed of about four-sevenths of their property. The Income Tax Commissioner made the usual demand for taxation purposes, and certain figures were supplied, which, however, he did not consider satisfactory as a basis of taxation. Eventually he assessed the company at £30,000, taking the total purchase represented by the sales, viz., £32,500, and holding that £30,000 of that sum was profit. The matter was taken before the Court of Review, and the assessment was reduced by that Court to £10,467. The company, however, was still dissatisfied, and accordingly carried the matter to the Supreme Court, on a question as to whether the basis adopted by the Court of Review was correct. The company said that of the sales which were made, about 60

to 75 per cent. lapsed through the failure of buyers to pay the instalments, and of these, about one-third to one-fourth were resold. Their contention was that their income from the estate during the year, upon the figures put in and accepted, was less than £1,000. and that, therefore, they were not liable to pay income tax.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), was for the applicants; Sir H. Juta, K.C. (with him Mr. Howel Jones), was for the respondent.

Buchanan, J. asked upon what basis the amount of the Commissioner's assessment was reduced by the Court of Review from £30,000 to £10,467?

Mr. Schreiner said that that information had not been vouchsafed to them.

Buchanan, J. said he supposed the Court of Review had taken into consideration that probably a lot of the sales would not go through.

Mr. Schreiner submitted that the basis of taxation adopted in this case was absolutely untenable. Supposing not another soul paid a single penny more, and threw up their deeds, and it was perfectly lawful for them to do so, could it be said there was any profit? Taxes were put upon gains and profits, and not upon the price. If no profit was made, no tax could be enforced.

Sir H. Juta said he would try and show the difference between a person who bought a thing and simply got his capital back, and between a trading company like this, carrying on business in land. The only appeal to their lordships could be on a question of law, and therefore there could be no discussion as to figures. The question of law was this: What was the taxable income this company received during 1903-4? As was pointed out by the Court of Review, the question really was upon what basis were they to proceed. Were they going to proceed upon an ordinary profit and loss account, or, as was done in other trading businesses, were they going to proceed upon a cash basis on the difference between the revenue and expenditure, or were they going to proceed upon the extraordinary basis put forward by the appellants that you must have a cash basis on the one side and a profit and loss basis on the other?

[Buchanan, J.: What do you say were the profits received during the year?]

Sir H. Juta: It is not "received"; it is "derived." Supposing you had a mercantile firm, its income is accrued and its profit derived. It does not mean actual cash received. The words are "income accrued" and "profit derived." It does not mean money received. Sir H. Juta went on to urge that if the assessment were to be taken on the basis of a cash system, then only a proportionate amount of the expenses and not the whole should be deducted in respect of

the lots sold during the year. If they took a profit and loss basis, then they must take the profits of the ten instalments.

Hopley, J. pointed out that a portion of the lots were sold before June, 1903, when the financial year commenced, and said that surely those lots were deducted from the taxable income.

Sir H. Juta: In respect of sales that took place before June, 1903, they cannot have to pay. But at the 1st July, 1903, they must say that they had so many lots, and at the 1st July, 1904 they had so many lots, and they must pay on the profits on the difference between those lots. Their account does not show what their stock was on the 1st July, 1903, and one cannot tell from the account what lots they sold between the time when their returns begin in February, 1903, and July 1, 1903.

Mr. Schreiner, in reply, submitted that they had to apply the same law to a company as they would apply to a private individual. His learned friend's argument that a trading company must be treated on a different footing fell away entirely. Touching on the illustration of an annuity used by Sir Henry Juta, counsel said that an annuity was a much more certain thing than the source of the company's income from this ground. True, they received £3,750 in the period to the 1st July, 1904, but they had expended over £5,000, and it did not appear that any of those purchasers had paid any further instalments. Admittedly, they would have a piece of land, but the company had laid out money in surveys, advertising, etc., for which they might thus get no return, except the sum received on sales which had lapsed. Counsel contended that the high-water mark of the company's profits in the year 1903-4 was the sum of £1,131 5s. 5d., and that, deducting £1,000 for exemption, they had £131 5s. 5d. as taxable income.

*Cur. Adv. Vult.*

*Postea* (July 9th).

Buchanan, J.: The appellant company, *inter alia*, carries on business in dealings in land. The only transaction they had in the Colony was the purchase for £2,000 of the estate Mount Pleasant at Port Elizabeth in 1903, before the imposition of the income tax. On the 30th of June, 1903, this property stood in the company's books at £1,618 2s. 5d. During the year following the company spent £2,915 18s. 10d. in developing, survey, and other expenses, making a total outlay on capital account of £4,533 11s. 3d. They wished to add to this amount a charge for interest and for salaries, but these were disallowed, and do not now come under consideration. The company laid out a township, and sold a number of lots, the payment of the purchase price

being spread over a period of ten years, transfer not to be given until the full purchase price had been paid. The contract with the purchasers was conditioned that unless the instalments were duly paid the contract was to become null and void, the sale cancelled, and any amounts paid to be retained by the sellers as liquidated damages. The company made sales on these terms during the year ending 30th of June, 1904, to the extent of £32,000. A very large proportion of the purchasers, however, never took up the lots bought, and made no payments thereon. Some of these lots were resold. On the whole, the company received during the year only the sum of £3,750. Upon these figures the company contended that they had not yet made any profits, and were not liable to be assessed for income tax for the year ending 30th of June, 1904. The Commissioner for Taxes, however, made an assessment on the company under section 67 of Act No. 30, 1904, for the sum of £30,000 as the income of the company, arrived at by deducting the original purchase price of £2,000 of the property from the gross amount of the reported sales made during the year, and claimed £1,412 10s. as income tax thereon. The company, under section 72, objected to the assessment, when the Court of Review reduced the assessment to £435 17s., as income tax on £10,467, which the Court held to be a fair estimate of the income during the year. No information is given how these figures were arrived at, but it is submitted that the Court should settle the basis or principle on which the return was to be framed, and then the details could afterwards be settled. The contentions of the parties may be briefly summarised from the special case, and from the arguments of counsel as follows: For the Commissioner it was contended that the profits of a land company should be arrived at in the same way as the profits of any ordinary commercial trading business, and that in such a business the only accurate mode of arriving at income is by an account on a profit and loss, and not on a cash basis; that in such account the total sales should be brought up as a credit irrespective of whether or not the amount is paid in that period or not; and that the Act does not limit the word "income" to receipts. The Commissioner offered to allow a reasonable amount in respect of contracts which might possibly lapse, but claimed the right himself to fix what was reasonable. The applicants on the other hand contend that until they have covered their outlay they could not be said to have made any profits; and if they attempted to distribute to their shareholders any of the money received during the year they would be paying dividends out of capital, which was not

allowable. If, however, they apportioned their whole outlay between property sold and that remaining unsold, then the cost of the lots sold would be £3,122, as against £3,750 received, which left a balance of £628, an amount under the taxable limit. The only statutory provisions to which we have been referred as bearing on this case are to be found in sections 42, 50, and 64 of Act No. 36, 1904. The 42nd section, which is the interpretation clause on this part of the Act, defines "income" to mean "any gains or profits derived or received by any company or person in any year, by any means from any source within this colony, and includes profits, gains, rents, interest, salaries, wages, allowances, pensions, stipends, charges, annuities, and all profits derived from mining or quarrying." Section 50, sub-section 5, enacts that "income shall be deemed to have accrued to a person within the meaning of this Act, though the same be not actually paid over to such person, but be credited in account or reinvested, or accumulated, or capitalised, or otherwise dealt with in his name, or on his behalf." Section 64, sub-section 9, provides that no deduction shall be made from the taxable amount in respect of "any debts owed to the taxpayer, except such as shall be proved to the satisfaction of the Commissioner to be bad or doubtful, and deductions for doubtful debts shall be made according to the value at which the Commissioner shall estimate same." Section 50 does not appear to me to bear on this case. It simply means that a person shall be taxed on all the income he makes in any one year, whether or not he receives and spends the whole of such income or reinvests any portion thereof. Section 64 was probably in the first instance intended to apply to traders and such-like, and to require that in making up their accounts they should include book debts or other outstanding claims among their assets. This was evidently the view originally taken by the Commissioner, for his first contention before the Court of Review was that the profits of a land company should be arrived at in the same way as the profits of any ordinary commercial trading business. The Court of Review, however, did not support this contention, but ruled, and in my opinion properly, that the question of the basis on which a return must be framed depends on the particular trade from which the income is derived. At any rate, this ruling is not now disputed on appeal. Taking this to be sound, looking at the special manner in which this company carries on its particular business, I think they are justified in not inserting in their account for 1903-1904 the amounts the payment of which is altogether contingent on the determina-



tion of purchasers of the several lots, and which amounts do not, on the contract of sale, appear to be immediately recoverable at law. As to the definition clause, these amounts have certainly not been "received" during the year, and whether or not they ever will be received in full the company cannot ascertain for ten years to come. Nor can I see how it can be said that these contingent amounts can be said to have been "derived" in the year 1903-1904. There may not be another pound paid to the company on these sales at all, and at any rate the total amount cannot be received for years, and it seems to me highly inequitable to assess the company now on the supposition that they have made large profits in this one year on their venture. When those profits are realised, then it will be time enough to assess them. The English Income Tax Statute is much more elaborate than is our Act, and contains more detailed rules for the guidance of the Commissioner; but I cannot find any rule or decision under the English Act which affords any assistance to this Court in deciding the question now raised. In Murray and Carter's carefully prepared treatise—"A Guide to Income Tax Practice"—a work which has reached the fourth edition, most cases have been discussed. The only one that I can find mentioned at all bearing on the subject is the Caledonian Copper Syndicate's case, which was heard in the Scottish Court of Session. There the company had acquired copper-bearing land in California for £24,000. They sold the same to a limited liability company for £300,000 in fully paid up shares. The profit was agreed to be £30,000, but the company contended that they had simply substituted capital in shares for capital in land, and that any benefit was a growth of capital and not of income, and that in any case tax was not payable till the shares had been realised. The company was held liable. We have no means of referring to the report of the case, but it would seem that the basis of the decision was that the company in its inception was formed with the object of making profits from the sale of its property, that it had sold its property, and that a profit had been made. Discussing a company of the same class as the appellant company, the writers of the treatise say: "A difficult question arises as to the liability to tax of a land development company. It is submitted that such a company must, at least, be bound by their own accounts, and if they allocate a portion of the proceeds of sales to profit and loss account, it must be paid upon, even though not distributed. We believe that in some cases nothing is taken to profit and loss account until as much is realised as the entire cost of the land. It is uncertain whether the Crown

would consider themselves bound by such an account, but apparently there need not be any objection from their point of view, for, even if they allowed it, they would get tax on all proceeds after that time." In theory, of course, the tax is one levied only for the year, and it does not necessarily follow that it will be reimposed on every succeeding year. But, on the other hand, if that be the case, the tax should be limited to the profits ascertained in that year, and not levied on profits which can only be ascertained and realised in subsequent years. Moreover, the fundamental rule of construction of taxing measures is that in cases of reasonable doubt the construction most beneficial to the subject is to be adopted. A Statute which imposes a tax is always to be construed strictly. To use the words of Maxwell on the Interpretation of Statutes, the subject is not to be taxed unless the language of the Statute clearly imposes the obligation. A construction, for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject matter would not be adopted, unless the words were very clear and precise to that effect. That is one of the objections which appellants' counsel take to the method sought to be enforced by the Commissioner. Guided by these considerations, the conclusion I have arrived at is, that our Act does not justify the levying of any income tax upon the dealings of the appellant company, so far as they have gone, up to June, 1904. Land is a commodity which fluctuates in marketable value to an extraordinary extent, and until realisation takes place, it is impossible to arrive at what profits or what losses will result. When the profits are ascertained, if the tax is then still in existence, that will be the period to enforce payment. The Court will declare that the principle upon which the appellants have framed their statement of the 28th January, 1905 (Annexure B to statement of case) is correct, and, therefore, that they are not to be assessed for income tax during the year ending June 30, 1904, upon the amounts set forth in the various contracts of sale not received by the appellants within that year. The appellants will be entitled to their costs of appeal.

His Lordship added that Mr. Justice Maasdorp and Mr. Justice Hopley, who also sat in the appeal, concurred in the judgment.

[Applicants' Attorneys: Van Zyl and Buissinnè. Respondent's Attorneys: Reid and Nephew.]

DAY V. DAY.

Mr. Molteno asked leave to mention the matter of Day v. Day. Leave was

granted to sue the defendant by edictal citation, and counsel produced an affidavit of plaintiff's attorney, which set out that the citation had been served. The plaintiff had proceeded to England to meet the defendant to endeavour to arrange the differences between the parties. Counsel applied to have the return day extended until the 1st November. Application granted.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WOODHEAD, PLANT AND CO. { 1906.  
V. CAPE TOWN TOWN { July 3rd.  
COUNCIL. " 6th.

New street—Town Council regulations—Acts 26 of 1893 and 25 of 1897—*Ultra vires*.

*The applicants had acquired certain contiguous lots of land within the Municipality of C., abutting on a street 20 feet wide, which had been laid out by the then owner of the property when he divided the land into lots in 1852, but had never been taken over by the Municipality. The applicants now wished to build on certain of these lots, but the respondents refused to sanction the building plans, on the ground that under the Council's regulations framed under Act 26 of 1893 the said street, being a "new street," must be at least 40 feet wide.*

*Held, that in terms of Act 25 of 1897, Sec. 1, the street was not a "new street," and that in so far as the Council's regulations went beyond the Act in defining a "new street," they were ultra vires, and hence that the Council had no power to insist on the widening of*

*the street to 40 feet as a condition for passing the plans.*

This was an application upon notice to the Town Council of Cape Town to show cause why the plan submitted for the erection of a certain store by the applicants on lots 21 and 22 of the original garden, Rustenberg, should not be passed, and why applicants should not be allowed to proceed with the erection of the proposed store, costs of this application to be paid by respondents.

From the affidavits it appeared that applicants had had plans prepared of a store to be erected in the vicinity of Hope-street and Roeland-street. Their ground consisted of a corner block, the road leading to which were about 20 feet wide, the thoroughfare in question being Percy-street and Glyn-street. The plans were submitted to the Town Council, but before this a letter was sent by the City Engineer to Messrs. Parker and Forsyth (the applicant's architects) to the effect that he regretted that he was unable to supply the desired information as to levels of the proposed streets, as no sub-division of the estate had been approved by the Council. Mr. Jeffreys (the Assistant City Engineer), in returning the plans to Messrs. Parker and Forsyth, said that he was unable to approve of the plans, as the only streets shown on the block plans were not in accordance with the municipal regulations as regarded width. Mr. Jeffreys called the architect's attention to regulation No. 4, which states that every new street intended for vehicular traffic shall be laid out, and formed so that the width shall be 40 ft. at least. The Town Clerk, in his affidavit, referred to certain tracings produced by Mr. W. Spivey Woodhead (one of the applicants), when he was a member of the Council, and he (the Town Clerk) denied that there had been any roads laid down, reserved, or set apart on the said estate, and, if the applicants now desired to have and maintain roads there, they must comply with the regulations of the Council. Mr. Woodhead, in an answering affidavit, said that the road shown upon the plan submitted by his firm to the Town Council in connection with the proposed building on lots 21 and 22 was laid out long before the Act of 1893 was passed and the building regulations promulgated pursuant to the powers contained therein. In the affidavits, it was stated that the original grant of the Rustenberg dated back to the seventeenth century, and that after certain deductions had been made, the garden Rustenberg remained.

Sir H. Juta, K.C., was for applicants; Mr. Schreiner, K.C. (with him Mr. McGregor) was for respondents.

Sir H. Juta said that the regulations in question were promulgated in 1896, pursuant to the Act of 1893, and applicant's case was that these streets were laid out as far back as 1852, and then there were other streets which went to show that it was physically impossible for applicants, unless they bought up certain buildings, to make those streets 40 feet wide.

Mr. Schreiner, in argument, said that the application was to force the Council to approve of a street with a width of only twenty feet. The Council said that a 40 ft. street should be shown, and the applicants asked the Court to say that a 20 ft. width would be enough. The applicants wanted the Council to bear the whole expense of making and maintaining the street. The idea never occurred to anyone, as had been suggested, that Woodhead, Plant and Co. should widen the road outside their own property. In 1889 an Act was passed which required that the sanction of the Council should be given to plans before land was sold in plots, but that Act had not been proclaimed in Cape Town. The Town Council was not bound by documents which were not in its own possession. If the Town Council were obliged in any case to follow old documents which were not in its possession, but in the Deeds Office, such a decision would have far-reaching results for the Council. The old road was fenced in by a wall, and there was nothing to show that there was a street except the old document which was in the Deeds Office. Again, it had not been shown that it had been used as a public road. There had never been any dedication of this road as a street. The applicants really wanted to get this order, and then to cause the Council to take over 20 ft. streets, and maintain them for vehicular traffic, and then applicants could drain in what would to them, no doubt, a very convenient way. Why the applicants should be granted a privilege that no one else in the Municipality was allowed and be permitted to override the regulations of the Council, he was unable to discover. He thought the Council were to be commended upon the position they had taken up in this matter.

Sir H. Juta, in reply, said that all the questions raised in the cases cited by his learned friend were dealt with in the recent case of *Oranjezicht Estate v. Town Council* (16, C.T.R., 388). What was laid down in that case was, he submitted, very sound law, and it was this, that provided your plans in all other respects complied with the Town Council regulations, the Council could not refuse to pass those plans in order to get some advantage which they were not legally entitled to insist upon, in other words, the Council could not refuse to allow the applicants' building plans to pass, because they wanted a

40 ft. road where they were not entitled to get a 40 ft. road. The whole question was whether the applicants were proposing to lay out a new street. They did not propose to lay out any streets; they said that there were streets shown on the sub-divisional plans. The Council's object really was to compel the applicants to pave and sewer these two streets. Take that away, and there was the applicants' offer of 40 ft., provided they were not to make up, pave, and gutter and sewer this street. The mere giving of 20 ft. of their property by the applicants would not satisfy the Council; they wanted Woodhead, Plant, and Co. to do all the kerbing and guttering and sewerage. That was the rock upon which the parties had split. The applicants said that this was an existing road or street. The Town Council could not at present show any subdivision of property put in since 1897, so that they could not fall back upon the Act of 1897 as yet, but the moment they could get a plan showing the streets laid down, and the regulation No. 4 made applicable thereto, then they said that, according to the judgment of the Court, this was a new street, it was not an existing street, and the Court ordered them to make this street 40 feet wide. If it were not an existing street at the present time, then it would only be shown as a street the moment there was some plan put in, and then the Council would fall back upon the Act of 1897, and say, "Now, then, you pave and gutter and sewer this street." That was the mode under which the Town Council wished to act in this case, and that, he submitted, was borne out by the affidavits, because the applicants were willing to give up 20 feet, but they were not willing to pave and sewer the street.

*Cur. Adv. Vult.*

*Postea* (July 6th).

Maasdorp, J.: It is desirable in this case in the first instance to ascertain what power the Council possess under Act 26 of 1893 and Act 25 of 1897, in respect of the streets in the City, without reference to the regulations made by them in pursuance of those Acts. Under section 110 of the earlier Act, the property in streets to which the inhabitants of the Municipality have a common right is vested in the Council. These streets it is the duty of the Council, under section 129, to keep in good repair, and they are empowered to make such new streets as may be necessary for the public use. For the purpose of making and improving streets certain powers of expropriation are conferred on the Council under section 175. In the first section of Act 25 of 1897, definitions are given of a "new street" and a "private street." The former is declared to mean any street hereafter shown on

any plan of sub-division of a property, or any street hereafter sanctioned by the Council. And a "private street" is defined as meaning any street or road which has not been duly paved, and the maintenance of the carriage-way and foot-way whereof had not previously to this date been taken into charge and assumed by the Council. So far we find the Act dealing with public streets and private streets. New streets, laid out by private persons, and private streets, may also vest in the Council under section 6 of the Act, if dealt with under the provisions of sections 2, 3, and 4. We have, therefore, streets which were public streets when the Act was passed. New streets and private streets, which have become public streets by virtue of the Act, and new streets and public streets which are not public streets. Under section 170, sub-section 10, the Council may make rules for regulating the deposit for the Council's approval of plans by persons intending to lay out streets, and under sub-section 2 the Council may regulate the width and direction of new streets made by owners of private property. As the law now stands, no person can sub-divide his property and lay down new streets without the sanction of the Council, but the law does not in this respect interfere with private property, where no sub-division or new road is in contemplation. Under their regulations, however, the Council give a definition of the words "new street" which go far beyond the terms of the Act, and include existing streets. If this definition is only acted upon where the Council make use of their power of expropriation, then perhaps no fault can be found with it, but where it is resorted to for the purpose of extending the powers conferred on them by the law in respect of new streets as defined by the Acts, the action of the Council would be *ultra vires*. If a "new street" is defined, as is done in the rules, as a street, the maintenance of the footways or roadways which had not previously to the approval of these regulations been taken into charge by the Council, then such definition might include the road in question, but in that case I am of opinion that the definition, unless given in contemplation of expropriation, would be *ultra vires*. This contention was not raised by counsel on behalf of the respondents, but it seems to me that the point does arise, and requires to be disposed of. The question arises, under what description does the street in question fall? It appears from the affidavits that in the year 1852 the owner of the land in question divided it into lots, abutting upon a street laid out for the use of the purchasers of the lots, and sold the lots to various buyers. Only one or two of these lots were built upon, and after passing through the hands of different

persons, all of them were ultimately bought up by the applicant, who now proposes to build upon some of the lots. He has submitted his building plans to the respondents, who refuse to pass them upon the ground that the applicant is contemplating the construction of a new road, and that until he has obtained the approval of the Council to the construction of such road, he cannot proceed. The respondent's claim that under their 4th regulation this road shall be of the width of forty feet. The applicant replies that the street was laid out in 1852, and does not fall under the definition of a "new street" as defined in the Acts, or even in the first portion of the definition as given in the regulations. He says he is not contemplating the sub-division of his property, and laying down a new street, seeing that he merely claims to act as the owner of lots abutting upon a street, to which he makes no claim as owner, and that he has no land to sub-divide. If this is correct, then, in my opinion, the street is not such a new street as is contemplated by the Acts. The respondents, however, contend that it was always within the power of the owners of the lots in question, and of the applicant as the holder of all the lots, to appropriate the street, and so extinguish the right of way over it. It is said on their behalf that the street was never really used as such, and cannot be said now to exist as a street. But it seems to me it must be taken to be a street for the use of the owners of lots, until it is proved they have in some way lost their right. The mere non-user of the street, which has not been proved in this case, without any adverse user by others, cannot deprive the owners of the lots of their rights, and the applicant, who has become the owner of all the lots in common, is now entitled to the use of the street. Nothing has been done since 1852 to deprive the street of its character as a street. The street is not a new street, in my opinion, and the respondents cannot claim, without expropriation, to have it widened to forty feet. It is not necessary for me to decide whether it is an old "public street" or an old "private street," because in either case, if the Council desire to widen it, expropriation would be necessary. I should be inclined to hold that it is the latter rather than the former, but a decision upon that point, which was not directly raised in this case, might involve issues going beyond the present application. It is only necessary to declare that the respondents are not entitled to withhold their consent to the passing of the building plans submitted by the applicant upon the ground that the street is a new street, which they can oblige the applicant to lay out and form so that the width thereof shall be forty feet at the least. Armed with this declaration,



the applicant will be in a position to submit his plans to the Council for further consideration. The respondents must pay the costs.

[Applicants' Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

### TRIAL CAUSE.

OHLSSON'S CAPE BREWERIES. ) 1906.  
LTD. V. VAN SCHOOR. ) July 3rd.

This was an action brought by the plaintiffs to recover from the defendant £66 10s. 6d., the cost of a certain amount of beer supplied.

The declaration set that between May and September, 1905, plaintiff supplied quantities of beer, the cost of which amounted to £150 9s. The defendant paid sums of money on account, and, further, he was entitled to be credited with certain discounts. The payments and discounts amounted to £83 19s. 6d., leaving a balance due of £66 10s. The defendant, the plea set out, was a butcher, baker, and general dealer, trading at Malmesbury. He admitted purchasing and receiving beer from the plaintiffs to the value of £8 8s. 6d., but denied that he received the other consignments.

Mr. W. P. Buchanan was for the plaintiffs, and Mr. Burton was for the defendant.

Samuel Helm, hotel-keeper, who formerly kept the Commercial Hotel, but subsequently bought the Central Hotel at Malmesbury, stated that in February, 1904, he went insolvent, and Ohlssons were creditors. In May witness asked defendant to give his name in order that he might get liquors to carry on the business. One of the orders included one to the plaintiffs for beer. The order was signed by the defendant, and witness paid for the first consignment. About a month later the defendant gave witness authority to get more beer, but requested witness to alter the address, so that the letters would be sent to the manager of the Central Hotel, in order that the letters would not reach defendant's house. The defendant was aware that witness was ordering further consignments in his (defendant's) name. The letters were always addressed to Van Schoor, although witness opened the majority of them. The defendant only took up the position that he was not liable when he got the letter of demand.

Samuel Helm, son of the last witness, stated that he remembered the defendant asking his father to have the letters and invoice addressed to the manager of the Central Hotel, as he did not wish his wife to see them. He never heard the defendant say that he was not liable.

Cecil White Harry, manager of Ohlsson's Cape Breweries, stated that the firm had an order from Van Schoor, which, however, he could not trace. The firm never had any intimation from the defendant that he was not liable.

Cross-examined by Mr. Burton: He took it in the ordinary course of business that Van Schoor was running the hotel.

Mr. Buchanan closed his case.

Melck Jacobus van Schoor, the defendant, stated that, at the request of Helm, he wrote three letters to Ohlssons, White, Ryan and Co., and Bosman, Powis and Co., ordering certain goods. He denied that he requested Helm to have the letters addressed to the Central Hotel. He had his own accounts from White, Ryan and Co. and Bosman, Powis and Co., and he noticed embodied there an account for goods supplied to the Central Hotel, and he wrote telling them not to continue doing so. Witness did not settle these accounts. He did not give Helm any authority to use his name.

Cross-examined by Mr. Burton: If Helm used witness's name, with the exception of the first order, he did it wrongly. He never saw the first account, nor did he trouble about it.

Having heard Mr. Buchanan on the facts,

Without calling upon Mr. Burton,

Hopley, J.: I do not think with the view I take of the facts of the case it is necessary to call upon Mr. Burton to argue for the defendant. Not because I think that the plaintiffs have not proved absolutely their *bona fides* in the case, for they have proved that they have delivered these goods at the Central Hotel, Malmesbury, and the sum they are now suing for is due by somebody. There is nothing unnatural in the defendant going to Helm and saying he would start him with a batch of supplies. Under the circumstances, and the conflict of evidence between the defendant and Helm, it seems to me the judgment should be one of absolution from the instance, with costs.

[Plaintiffs' Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorney: C. Bernard.]



# SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

SHEPPY V. BARRY BROTHERS. { 1906.  
July 4th.

This was an argument upon an exception taken by defendants to plaintiff's declaration. Mr. Benjamin was for ex-cipients (defendants in the action); Dr. Greer was for respondent (plaintiff in the action).

The plaintiff (Walter Henry Sheppy) in his declaration said that he was a commercial traveller and agent, residing presently at Cape Town. Defendants were Barry Brothers, carrying on business at Robertson. Plaintiff came to this country from England in or about February, 1905, on account of his health, and to act for certain four English firms in furniture and allied trades. In addition, and while acting as representative of those firms, he was also in the employment of one Fritz Boldt, a waterworks contractor, of Robertson, as his book-keeper and cashier. On December 15, 1905, he received from Boldt £3 14s. 2d., with instructions to pay the same to the defendants in settlement of an account due to them from Boldt. The defendant duly paid the said sum on December 16, and he received a receipt therefor, which was subsequently mislaid. Defendants thereafter, on January 24, 1906, furnished to Boldt an account containing the item which plaintiff had already paid on behalf of his employers. Although the defendants well knew that their cash register on December 16 showed an almost similar amount, viz., £3 14s. 6d., to have been paid, they declared that it had been paid on December 14. The said Boldt subsequently paid the account in full. In consequence of the defendants' wrongful and malicious denial of receipt of the aforesaid sum, the said Boldt instituted criminal proceedings against plaintiff for theft by means of conversion of the sum of £3 14s. 2d. Plaintiff was placed under arrest, and a preliminary examination was held before the R.M. of the district of Robertson in February, 1906. As a result of the preparatory examination the Attorney-General declined to prosecute. Plaintiff had since found the receipt given to him by defendants or their agents in acknowledgment of the payment of the said sum, to which receipt he craved leave to refer at the trial. He claimed against the defendants damages in the sum of £500.

Defendants excepted to the declaration that it was vague, uncertain, and embarrassing, and disclosed no ground of action.

Mr. Benjamin said he took it that what was meant by the words "wrongful arrest" in the declaration was false imprisonment. To take, first of all, the case of false imprisonment and malicious prosecution. In order to found an action for false imprisonment or malicious prosecution, the person against whom an action was instituted must be the person who put either the executive or judicial functionaries in motion. The mere making a statement to a person who may institute proceedings did not render that person liable. There must be, he submitted, an act on the part of the defendant, whereby he put either the executive or the judicial functionaries in operation. There was a mistake, and, surely, the shopkeepers could not be held liable for having stated that to the best of their knowledge the amount had not been paid. Barry Bros. could not be held liable for damages for false imprisonment or malicious prosecution, but he submitted that they were much less liable under the alternative prayer for damages, for having subjected the plaintiff to prosecution owing to the gross neglect or carelessness of defendants or their servants.

Dr. Greer submitted that the defendants were clearly liable. This prosecution of plaintiff was the direct result of the defendants' denial that the payment had been made to them; it was in consequence of that denial plaintiff was subjected to false imprisonment and malicious prosecution. It did not matter whether they were directly the persons who instituted a prosecution or whether they acted through an agent. It was clear in this case that the employer, Boldt, acted in a perfectly *bona fide* manner throughout the transaction. There must be a remedy for the injury the plaintiff had sustained, and there were only two parties who could possibly be responsible. The employer, it was clear, was not liable. It was the natural and inevitable outcome of the act of the defendants that this prosecution took place, and they were responsible. Even if the first prayer of the declaration was not a good prayer, counsel contended that the second prayer was sufficiently wide to cover this particular case.

Buchanan, J.: The defendants in this case carry on business at Robertson. One Boldt was a customer of theirs, and bought certain things from the defendants' shop. Boldt gave the plaintiff the sum of £3 14s. 2d. to pay to the defendants in this case. The plaintiff said that he paid this amount, and obtained a receipt for it, which was mislaid. The defendants, however, did not seem to have had in their books any record of this payment, although their cash register showed that an amount nearly similar was paid in on this date. Not find-

ing anything to connect this amount with the actual amount, which was alleged to have been paid, they denied that they had received the money. They sent Boldt an account for these and other items, and Boldt then paid the defendants the full amount of the account. Thereafter, Boldt, not the defendants—without any instigation on the part of the defendants, without any request on the part of the defendants, without any mandate or agency on the part of the defendants—Boldt afterwards went and laid a criminal charge against the plaintiff in this case, and had him arrested and subjected to criminal prosecution for not having paid over this sum of £3 14s. 2d. This prosecution was not persisted in, the case fell through, and the plaintiff now wishes to sue the defendants for damages for wrongful arrest and prosecution. Now, I cannot see how the defendants in this case can possibly be held liable for the wrongful arrest and malicious prosecution by Boldt of the plaintiff in this case. It seems, according to the declaration, to have been quite a spontaneous act by Boldt, not an act instigated in any way by defendants, and, therefore, it is impossible to hold them liable in an action of this kind. But it is said there is an alternative prayer for damages for the plaintiff having been subjected to arrest and criminal prosecution owing to the gross neglect and carelessness of the defendants or their employees. Well, as to the question of neglect, it appears that the plaintiff received the receipt from the defendants' employees for this money, and it is as much neglect on his part to have mislaid the receipt, and not produced it, which would have shown at once that the money had been paid. There is no cause of action disclosed in this case, and the exception must be allowed, with costs.

#### ESTATE CASTLES V. SOUTHERN LIFE ASSOCIATION.

This was an argument on an exception taken by the defendant company to the plaintiff's declaration. Mr. Upington was for excipiens (defendants in the action); Mr. W. Porter Buchanan was for respondent (plaintiff in the action).

The declaration stated that the plaintiff is the widow and executrix testamentary of the late Joseph William Castles, in his lifetime residing at Montagu, and the defendant company carries on in Cape Town and elsewhere the business of mutual life, sickness, and accident insurance. Deceased was insured with the company against bodily injury by violent, accidental, external, and visible means. It was stipulated in the policy that in case such injury should within three calendar months of injury directly cause death the company would pay to

the representative of the insured a sum of £1,000. On the 5th February, 1904, while the policy was of full force and effect, the late J. W. Castles was injured by a bite from a poisonous insect, and died on March 5, 1904, his death being directly caused by the said bite. This being within the meaning of the policy, she claimed payment of £1,000.

To this declaration the defendant company excepted as follows: "Before pleading to the declaration, the defendant company excepts thereto on the ground that the same discloses no cause of action (1) that even assuming the facts alleged in paragraph 5 as to the injury and the death of the insured are correct, the said facts do not constitute a cause within the meaning of the policy as set forth in paragraph 4, so as to render the defendant company liable; (2) furthermore, and even if any cause of action did accrue to the plaintiff, she is now prevented and barred from bringing the same by virtue of the provisions of clauses 7 and 8 of the conditions endorsed on the policy, to which the defendant company crave leave to refer."

Buchanan, J., said that the Court could not possibly hear the second part of the exception. It was not really an exception, but a plea in bar, and the only way in which it could be brought before the Court was by the plaintiff pleading it in bar.

Mr. Upington pointed out that the parties were desirous of saving expense as far as possible, and of having the matter determined in this way.

Buchanan, J., said that it was an irregular mode of procedure on exception.

After hearing counsel further,

Buchanan, J., said that, by consent, the policy would be considered to be annexed to the declaration, but the exception would be limited to the question as to whether the declaration disclosed a cause of action.

Mr. Upington said that in the first place he took the objection that by the terms of the policy the insured was indemnified against any bodily injury caused by violent, accidental, external, and visible means, with certain provisos. The plaintiff's husband was injured by the bite of a poisonous insect. Clearly such an injury was never contemplated in an accident policy of this kind. The main objection, however, that he had to take was that the plaintiff had not complied with the conditions 7 and 8, endorsed on the policy. It appeared from the declaration that the insured had the accident relied upon on the 5th February, 1904, and that he died on the 5th March, 1904. Summons was only issued in May of this year. Under condition No. 8 it was necessary for the plaintiff to either proceed to arbitration, if she made demand within six months, or to proceed to action within twelve months. He submitted that that was the proper construction of the clause

in question. Now, it did not appear that plaintiff had made demand for arbitration, and what did appear was that she had not proceeded with her action or taken steps to have a settlement agreed upon or ascertained in terms of condition 8.

Mr. Buchanan submitted that, on the authority of *Marsdorf v. the Accident Company* (88 Law Times Reports, 330), the cause of death in this case clearly brought the claim within the meaning of the policy.

Buchanan, J., said that counsel need not dwell on that part of the exception.

Mr. Buchanan submitted that the conditions 7 and 8 were by no means clearly drawn, so as to be comprehensible to the ordinary individual. The company did not tell the insured in clear words to make a demand for arbitration, but they made him labour under the impression that if he sent a demand for the claim they could insist upon arbitration if they liked, and oust him from coming to the Court, and then they said if he did not claim an arbitration within six months then they were to go scot free. It was a most unheard of condition. He thought if it were brought to the notice of the public very few people would insure in a company like this. It was unconscionable that a company should hold such a condition in *terrorem* over the heads of their clients. He submitted that this was a case in which equitable relief should be granted, inasmuch as the defendants were seeking to enforce an unconscionable bargain.

Buchanan, J.: The late Mr. Castles was insured with the Southern Life Insurance Company against injury caused by violent, accidental, external and visible means. While this policy was still in force, the declaration alleges, on the 5th February, 1904. Mr. Castles was injured by the bite of a poisonous insect, the bite caused disease, and from this bite and disease he died on the 5th March, 1904, and this death was practically caused by the bite, and they allege that it is within the meaning of the policy. Defendants took exception to this allegation on the ground that the injury and cause of death are not within the meaning of the policy. On this point, as far as the exception stands, I take it that the exception is bad. Injuries by bite of a poisonous insect, or a poisonous reptile, or a poisonous animal, would all be within the meaning of "violent, accidental, and external injury," and, had the exception rested on the declaration alone, it would have had to be overruled. But the parties have agreed to annex the policy to the declaration so that the conditions on which it was granted should be considered part of the declaration, and could be relied on as supporting the exception that no cause of action was disclosed on the declaration. In effect, the second part of the exception founded on the conditions

is that the right of recovery on this policy, by the conditions under which it was issued, expired twelve months from the date of the occurrence of the accident. It is a condition of the policy which I think is a fair and reasonable condition put in an accident policy, that if a person who is injured allows twelve months to go without taking proceedings against the company, then he is supposed to have forfeited his right. It is true the declaration alleges that all things have happened, all conditions have been performed, and all times have elapsed necessary to entitle the plaintiff to demand payment of the sum insured, but, in face of the express wording of this condition, there must be something more than a general allegation of that kind to show that the plaintiff is still entitled to take an action against the defendant company. The second part of the exception, founded upon the 7th condition, will, therefore, be sustained, and the declaration, as it stands, will be held not to disclose a cause of action, but leave will be granted to the plaintiff to amend her declaration by adding anything to show why the 7th condition of this policy should not apply to this case. It may be the conduct of the insurance company would be such as to justify the Court in holding that they cannot now rely upon this condition.

Mr. Buchanan: Would it not be possible to put it in the replication?

[Buchanan, J.: I cannot go beyond the declaration. I hold there is nothing in the declaration at present to show why this condition should not apply. What about costs?]

Mr. Uppington: I understand that it has been arranged that there should be no order as to costs.

[Buchanan, J.: I think that is only fair, because if the exception had been tried as it stood, without any consent on the part of the respondent, the matter would have been overruled. No order as to costs.]

## GENERAL MOTIONS.

BULAWAYO MUNICIPALITY { 1906.  
V. BULAWAYO WATER- { July 4th.  
WORKS CO., LTD.

Mr. W. Porter Buchanan moved, on the petition of both parties, for leave to appeal from a judgment of Mr. Justice Vincent in the High Court of Southern Rhodesia. Owing to the length of the record, it had been impossible to get the same ready within the time required by the Rules of Court, and an extension of time was sought.

The time for lodging the appeal was extended to three months from this date, costs of application to be costs in appeal.

## AFRICAN HOMES TRUST V. GLASGOW.

Mr. W. Porter Buchanan applied for an extension of the order granted by the Court in this matter on last provisional day. He said that provisional sentence was granted on a mortgage bond, and the property was declared executable, but plaintiff omitted to ask to have the rents accruing attached by the Sheriff.

[Buchanan, J.: You can add to the other order that when the property is attached the rents accruing be attached.]

*Ex parte GUSE.*

Mr. Douglas Buchanan moved for a certain *rule nisi* to be made absolute, calling upon Johan Carel Winterbach to show cause why petitioner should not sue him *in forma pauperis* to recover £115 16s. 2d., with interest, being the amount due to petitioner out of the estate of the late Johanna Guse, held on trust by him.

Mr. Gutsche (for respondent) appeared to show cause, and read an affidavit by respondent, who said that petitioner was one of four minor children, of whom he was tutor testamentary. He did not deny that the money was owing to the petitioner, but he said that he was unable to pay it at present, as certain moneys owing to him by another person were still unpaid. He added that he had made an arrangement with the petitioner as to payment of the money, but that another party had exercised influence over her, with the result that the present proceedings had been commenced.

Buchanan, J.: The rule will be made absolute. There is no defence. On summons being taken out, the respondent ought to allow judgment by default. Leave to sue will be granted Mr. Buchanan to be counsel, and Mr. P. M. Cloete attorney for the plaintiff.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

	1006.
PAARL MUNICIPALITY V.	July 4th.
COLONIAL GOVERNMENT.	" 5th.
	" 6th.
	" 11th.
	" 30th.
	Aug. 27th.

Outspan—Municipality—Prescription—Occupation *pro domino*  
—Occupation *ex mandato et pro bono publico*.

*The Municipality of P. claimed to have acquired by prescrip-*

*tion a certain piece of land situated within the said Municipality. This land had been in 1817 set apart as a public outspan and grazing ground, and the defendant now claimed to resume control over it under Act 41 of 1902. In 1840 the then village of Paarl was constituted a municipality, and there was evidence that, at all events from 1859, the Municipal Council has exercised control over the said land and made certain profits therefrom by sales of manure and of trees and timber either sown by others, or, in later years, by themselves. In 1882 a certain firm received from the Municipality leave to lay a private railway line across a portion of the land in question.*

*Held, that (1) the Municipal Council were acting intra vires in assuming control over the said land for municipal purposes; (2) That their conduct did not necessarily shew that they claimed it pro domino and that the presumption was that they were controlling it only pro bono publico; (3) That a duly constituted outspan cannot be alienated by the Crown, and (semble) that it cannot be acquired by prescription; (4) That even if it were capable of prescription, there had been no adverse user for the period of prescription so as to deprive the public of their rights; (5) That the Municipality, having treated the land as an outspan, having acknowledged it as such on more than one occasion, and having acknowledged that the Crown was the owner thereof, they had never possessed it pro domino for the requisite period of prescription.*

This was an action brought by the plaintiffs for a declaration of rights with regard to a certain piece of ground falling within the boundary of the municipality.

The plaintiff's declaration was as follows: (1) The plaintiff is the Municipal Council of the Paarl, which was con-



stituted a municipality in 1840, under the provisions of Ordinance 9 of 1836, and is now governed by Act No. 45 of 1882. (2) Within the limits of the said municipality is a piece of land, which is cut into two parts by the main line of railway running from Cape Town to Wellington, and is bounded on the north and west by land originally granted to P. Roux in 1817, part of which is now owned by A. J. Louw and others, and the remainder by the Paarl Spirit Distillery Co., under an amended grant of May, 1901; on the south by the farm De Zoeti Inval, granted to J. R. Louw in 1827, and on the east by land granted to C. H. Paulsen in 1817, and the aforesaid land granted to the said P. Roux. Various parts of the said land have been called and known as the outspan, the pasturage of the outspan, and the race-course.

3. For a period longer than the period of prescription the inhabitants of the said municipality by themselves, and through their duly constituted Municipal Council, have uninterruptedly and as of right enjoyed the use of and occupied the said land as their property and exercised full rights of ownership and control over the said land as against all persons, including the Divisional Council of the Paarl.

4. By virtue of the premises the said land is land the property in which the inhabitants of the Paarl Municipality have, and have acquired, a common right, and is vested in the plaintiff Council, and on the 17th August, 1905, the plaintiff Council applied to the Government of the Cape Colony for formal title to the said land.

5. On the 18th of October, 1905, the said Government, without any previous notice to the plaintiff Council, gave notice to the latter that the Governor in Council had been pleased to sanction, in terms of sub-section 1 of section 3 of Act No. 41 of 1902, the resumption of certain land, which includes the aforesaid piece of land, as outspan ground, as being ground no longer used or required for outspan purposes, and the said Government now refuses to grant the aforesaid title, and claims that the said land is the property of the said Government, and that the plaintiff Council and the inhabitants of the Paarl Municipality have no rights to the said piece of land other than can be claimed by the public generally by virtue of the land being a public outspan, and that the control can be resumed by the said Government, and that the latter can dispose of the same as it pleases under the laws for the time being regulating the disposal of Crown Lands, and the said Government does claim to dispose of it and to exercise acts of ownership thereover.

6. For a period longer than the period of prescription, and for the period as far as the records of the said Paarl Divisional Council go, the said piece of

land has never been under the control of the said Divisional Council, but has been under the control of the plaintiff Council, and used and owned as alleged in paragraph 3 hereof, and the plaintiff Council contends that by reason of the premises the alleged resumption under Act 41 of 1902 is *ultra vires* and illegal, and that the said piece of land is vested in it.

Wherefore the plaintiff Council prays:

(a) For a declaration that the said piece of land is vested in it; (b) that it is entitled to have formal title issued to the said land; (c) that the resumption of the said land under Act 41 of 1902 is illegal and of no force or effect; (d) alternate relief; (e) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, and 5 of the declaration, save that he denies that no notice of intention to resume the land referred to was given to the plaintiff Council previous to the 18th October, 1905.

2. The said land is Crown land, which, prior to the 1st July, 1817, was set apart by the Government as and for a public outspan and grazing-ground in connexion therewith, and was, at the said date and thereafter, until the date of the resumption referred to in paragraph 5 aforesaid, a public outspan-ground, and used as such by those of the public who required the same for that purpose. Save as aforesaid, the defendant denies paragraph 3.

3. He admits that the plaintiff Council applied for a title to the said land on the 17th August, 1905, but otherwise denies paragraph 4.

4. He denies paragraph 6, and says specially that the control of the said land has been vested by statute in the Divisional Council of the Paarl since the 13th August, 1889.

5. On the 29th June, 1905, notice of the intention of the Governor to resume the said outspan-ground in terms of section 3, sub-section 1, of Act 41 of 1902, was published in the "Government Gazette," and on the 30th September, 1905, the provisions of the said section having been duly complied with, the said ground was resumed by the Governor in terms thereof.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

Sir H. Juta, K.C. (with him Mr. Burton), was for the plaintiffs; and Mr. Schreiner, K.C. (with him Mr. Howel Jones), was for the defendants.

Mr. Schreiner pointed out at this stage that he would contend that the claim of the Municipality was a bad one, and that the ground could not be claimed legally by prescription.

Sir H. Juta: It is a pity the point was not raised on the pleadings.

[Hopley, J.: Many things come into this Court that are a pity.]



Mr. Schreiner: It is a pity the time of the Court should be wasted in hearing evidence when it may ultimately be found out that in law there is no claim at all. The Government, I contend, has the right of resumption, and the Municipality cannot set up a claim of prescription.

Hopley, J., thought it would be better to go on with the evidence.

For the plaintiffs,

Chas. John Pritchard, land surveyor, who surveyed the land first of all on behalf of the Government, stated that he framed the diagram of the various lots for which the plaintiffs applied to the Government for title.

Cross-examined by Mr. Schreiner: He was called in to survey the ground because the railway wanted the ground for maintenance and employees houses.

Hans Heese, Secretary of the Divisional Council of the Paarl since November, 1900, stated the records of the Council went back to 1858. The Government sent a Mr. Brinck down to inspect the records, which did not show that the Divisional Council ever exercised any rights over this ground. Since he was secretary the Council never treated the ground as an outspan over which they had any control.

Cross-examined by Mr. Schreiner: His Council, as far as he knew, never exercised any control over any outspan within the municipality. The impression the Council had was that an outspan within the municipal area was not their business. He did not remember seeing the notice in the "Gazette" in June, 1905, of the intention of the Government to resume the piece of ground in question, as it was no longer required for outspan purposes.

Septimus P. H. de Villiers, Mayor of the Paarl, stated he had lived there since 1892, but he had known the Paarl for fourteen years. In 1899 there was a fire and the minutes of the Council prior to 1859 destroyed. From 1859 the records it would appear showed that the Council exercised control over this ground. All the minutes referring to people cutting wood referred to this particular portion of the racecourse. During his time the municipality exercised all control over the ground. Public sales were held of the wood by the municipality. The outspan of the Divisional Council was about a mile from this place. In 1902 the municipality gave permission to the Post Office to remove certain trees on the west side of the land in question, which tended to interfere with the telegraph wires. The Council also gave permission to hold picnics in the forest. During the time he was a councillor he never knew of this piece of ground being used as an outspan.

Cross-examined by Mr. Schreiner: The municipality had a commonage, which was granted in 1838. Until 1902 there

was no power given the Government to resume a public outspan. The first time there was reference in the minutes to the planting of trees on the racecourse was in 1878. He did not know that the railway Department wanted a couple of small pieces of land long before August, 1905. He did not see the notice in the "Government Gazette" of June, 1905, of the Government's intention to resume the ground. In his opinion the control exercised over the ground gave the municipality the right to it. He never knew that the municipality did anything adverse to the Government's rights.

Re-examined by Sir H. Juta: As a municipality they controlled only things that were municipal. Witness was not prepared to argue the legal question, and he agreed that that was what counsel was briefed for. The council all along dealt with this land as if it was their own.

Peter Christian le Roux, 66 years of age, and born in the Paarl, stated he was a member of the Divisional Council from 1873 to 1891. The Divisional Council never had anything to do with ground, but looked upon it as under municipal control. The proper outspan was outside this piece of ground. It was some time in the fifties that the last races were held. The grazing was bad on the piece of ground in question. In 1877 witness became a member of the municipality, and continued in office until 1883 or 1884. In the early seventies sales of the wood from this ground was quite a usual thing. The municipality dealt with the wood as they pleased.

Mr. Le Roux, in re-examination, said that after he became a councillor they had sales of wood. The minutes would show when the sales were arranged. To the best of his recollection they had sales, publicly, even before he became a councillor. There were also private sales.

Gideon Joshua Malherbe, aged 73 years, and Byers Johannes Louw, aged 56, gave evidence to the effect that the ground was always under the control of the Municipality.

In re-examination Louw said that Mr. Louw owned the land to the east of that claimed, and Mr. Conroy owned that to the south. Witness did not know much about the sale of wood.

In reply to Sir H. Juta, the witness said the racecourse had no water on it. He was living in the Municipality, and by virtue of his right grazed his cattle on this land. Witness never understood it to be an outspan. He always believed that his property was bounded by the racecourse.

[Hopley, J.: According to a letter here, your father called his an outspan?] —I do not know of it.

Jacob I. de Villiers, 61 years of age, stated he had been a Commissioner of the Paarl Municipality, and was Mayor for a considerable period. He was born

in and had always lived at the Paarl. He had always known the place in dispute as the Paarl Racecourse, and as a boy attended race meetings there. Shortly before the railway came the races stopped.

[Hopley, J.: Did the railway coming stop the races?]

Witness: It was partly the railway and partly clerical feeling.

[Hopley, J.: But if you wanted to hold your races there after the railway came, you could have done so, because you had another 44 morgen.]

Witness: It was not altogether clerical feeling, because races were afterwards held at a place between Lady Grey Bridge and the Paarl, and they are now held at Klappmuts. Witness (continuing) said that when he first became a councillor there were trees planted. The municipality claimed the land, and used to sell the trees, and in that way exercised their proprietary rights. During the time he was a councillor it was found that the Klein Drakenstein people sent their cattle on the land for grazing, and a man was appointed by the Municipal Council to look after the place. A good deal of tree pilfering went on as well, and those who were caught were fined by the municipality. The cattle owned in the municipality were grazed on this place, but that stopped when the trees grew up that were planted in 1877. Witness did not know this place as an outspan.

In cross-examination, witness said he was first of all Mayor in 1892. Witness at that time took a close interest in the work of the Council, and signed the minute-book. If witness signed the minutes they were correct. He would not have signed them unless they were correct. Therefore if he signed the minutes containing the following resolution it must be correct: "The secretary is requested to ascertain whether the racecourse has been granted to anybody by the Government, and, if not, to make application to the Government for the ground to plant trees on." The object of that resolution was to see if the Council had any formal claim to the ground.

[Hopley, J.: That resolution speaks for itself.]

Witness (continuing) said that in 1879 he saw old trees on this place, trees that appeared to have been planted by the hand of man. The trees that were cut by the Fir Bush Syndicate appeared to have been wind sown.

Mr. J. C. Krige stated that when a boy he herded cattle on the ground in question. They were his father's cattle. Police employed by the Municipal Council took charge of the place and prevented people from pilfering the timber. Witness purchased timber from the Municipal authorities in 1872, and paid them for it.

In cross-examination, the witness stated that there were not many trees in 1872, when he picked out the plantation. The trees that he cut were not planted trees. Witness was about 12 or 14 years of age at the time he herded cattle, which was 1854. Witness's father was a carrier, and was allowed to keep cattle on the place. Witness, when herding the cattle, saw convicts planting near Louw's boundary. There was no railway in those days. The last race meeting was held about 1855. Witness remembered it, because his father kept horses. In those days the Magistrate was Mr. Breda. He was very fond of tree-planting, and had the high road planted. Mr. Breda controlled the prisoners.

Mr. Schreiner: These convicts were all short service men, were they not? The long sentence men would be on the Breakwater?

[Hopley, J.: Was there a Breakwater then?]

Mr. Schreiner: I mean they were not long service men, and they would be engaged on the making of paths and passes.

In reply to His Lordship, the witness said he was asked by the councillors to pick up the fir seeds.

[Hopley, J.: Who were they?]

Witness: I cannot remember. They're all dead.

[Hopley, J.: But your memory is not dead.]

Witness: I forget them all.

[Hopley, J.: Are you sure it was not the constable who asked you to collect them?]

Witness: No, my lord. It was the commissioners.

Mr. Schreiner: How do you know it was the commissioners when you don't remember their names?

Witness: I know it was the commissioners. Continuing, witness said that in 1872 he bought 100 trees at 7s. 6d. for three. He applied to the commissioners, and paid for them as he cut them down. He attended the meeting of the Council to get permission.

Mr. Schreiner: Are you quite sure that this was in 1872?

Witness: It may have been in 1875. Continuing, he said the books of the Council would show that he purchased wood.

Mr. Schreiner: It is very peculiar that your name is not mentioned in the Council books as having purchased wood either in 1872 or 1875?—I got receipts from them.

Mr. Schreiner: But might it not have been in 1876 or 1878?—No, it was about 1875.

In reply to Sir H. Juta, the witness said that if the cash book of the Council showed that he paid 30s. for wood in 1875 it would refer to the trees in question.

Mr. Enslin, who was secretary of the Paarl Municipality from 1882 to 1889, stated that before that period he was a clerk in the office. He knew the ground in question in the 'sixties. In the late 'fifties he went through the country with his father as a trader. Witness remembered the railway being constructed. Witness had never seen people outspanning on the racecourse, but he had seen cattle rested on the spot where the trees were growing. He did not see any cattle grazing there. Witness always understood the Municipal Council controlled this land. The trees were trimmed by direction of the Municipal Council, and the trimmings were sold by auction. Witness, in his capacity as secretary to the Municipality, looked after the place the same as he would have looked after his own property. During the time witness was secretary, there might have been prosecutions for cutting the trees. There were overseers on the place to look after it. He did not think the Municipality had a right to fine these people. Witness often told them that.

Sir H. Juta: But they did not agree with you?

Witness: No. If they did not pay the fine, they would be taken to the Magistrate's Court.

Sir H. Juta: This was under the regulations?

Witness: No, there were no regulations.

Mr. Schreiner: The fact of the matter is, this fining was a sort of compromise to prevent their being brought before the Magistrate?—Yes.

In cross-examination, witness said Sir Pieter Faure was secretary of the Municipality before he was. From all appearances he kept his minutes correctly. Witness always described the point running out from the race course as an outspan. In witness's time the Municipal Council went in a good deal for tree-planting. If any trees were sold it should have appeared on the minutes.

Septimus de Villiers (recalled) produced a minute of 1868 of a meeting of the Municipality, in which a letter was read from an employee named Nicholls, asking for an increase of salary. The cash-book showed the amount received for wood sold. The minute-book showed applications for wood and the appointment of a committee to deal with the intending purchasers.

A resident (74 years of age) stated that he had lived at the Paarl all his life. From his childhood he had known the ground in question as the racecourse. He never knew it was an outspan. During all the time he had known the ground, it was under the control of the Municipality.

Hans Heese (recalled) stated there was nothing in the minutes of the Divisional Council to show that they exer-

cised any control over the outspans within the Municipality.

Counsel for the plaintiffs put in the Municipal Regulations for 1840 and 1865, and this concluded the case for the plaintiffs.

Chas. Shaw Nicholson, Civil Commissioner and Resident Magistrate of the Paarl, and in that capacity chairman of the Divisional Council, produced the plan which belonged to the Divisional Council. The plan, he stated, was hung up for the information of the Divisional Council. The plan was compiled in the office of the Surveyor-General. There was no public outspan at Klipheuvel. There was an outspan outside the Paarl, but it was not within the control of the Municipality. As Civil Commissioner, he received notice of resumption from the Government, and he brought it before the Council.

Cross-examined by Sir H. Juta: The general impression was that the outspan at Klipheuvel was a public one.

Henry van Reenen, of the Surveyor-General's Department, stated that outspans were constituted by proclamation. There was a reservation on the map for an outspan. There was a great difference between old grants and new grants. The owner of the land, as a rule, appointed his own surveyor.

A. Hall Cornish Bowden, Surveyor-General of the Cape Colony, stated that since a formal claim was made he had taken the matter in hand. The claim against the Government began through the Railway Department making a claim for land in February, 1904. There was no trace in his office of this piece of land as an outspan before 1817. Then there was no trace of the land being granted as a racecourse. The Municipality, as far as he knew, made no claim for compensation. There was no trace of a grant of the ground as a racecourse.

Cross-examined by Sir H. Juta: In issuing an amended title under the Act of 1879, he insisted upon getting the consent of surrounding owners.

Abraham Stepleton, chief clerk in the office of the Surveyor-General, produced a return of compensation required to be paid to individuals in connection with the Wellington Railway.

James Fleming, second assistant draughtsman in the Surveyor-General's office, stated that, from the records in the office, he could not find that the line of railway touched any municipal commonage except the land in question.

Cross-examined by Sir H. Juta: The railway passed through land left open to the inhabitants of the Paarl, but not within municipal limits.

A. Hall Cornish Bowden, Surveyor-General of the Cape Colony (recalled by Mr. Schreiner), stated he had caused a

search to be made for the record of the original application for the land surrounding the piece in dispute. A "Government Gazette" of 1813 published a notice establishing regulations for the conduct of all persons applying for the grants of land. In one notice His Excellency, it was stated, "expects the respective Commissioners to preserve inviolate the roads and outspans to the public."

The original Executive Minute, giving notice of resumption of the land by the Government, having been put in, the case for the defendants closed.

Sir Henry Juta, in argument, cited the case of the *French Hoek Municipality v. Hugo* (2 Juta, p. 248), for the proposition that prescription in this Colony did run against the Crown in respect of property capable of alienation by the Crown, and quoted *Voet* (44, 3, 11). In *Town Council of Cape Town v. Mossop* (August, 1880), a public street was held capable of being acquired by prescription; and *Blankenberg v. Colonial Government* 11 S.C., p. 90), was cited for the same principle. In *Jones v. Town Council of Cape Town* (12 S.C., p. 19), it was decided that prescription ran against the Town Council in respect of land forming part of a public square, such land being alienable with the consent of the Governor. There the late Mr. Jones had actually acquired a piece of Church-square, on which he had a stoep, by prescription. *Voet* (13, 7, 7) held that a public road could be acquired by prescription. In Natal the same principle had been accepted. The only Crown land which could not be acquired by prescription was land pertaining to the Majesty of the State, such as fortifications, etc. The land in suit in this case had always been capable of alienation by the Crown. The user might have been in the public, but the dominium was in the Crown. There were various kinds of outspans—some on private land and some on public land; but an outspan was always a servitude, whether on private or public land, and this servitude could be lost by non-user for the period of prescription. The occupation here had always been *nec vi, nec clam, nec precario*. Public outspans were always created by some document; there had to be some document to show that the land had been set aside as an outspan. Here there was no evidence that the piece of land in question had ever been dedicated or set aside as an outspan. It was true that the grants of the surrounding properties described them as being bounded by outspan pasturage, but there was nothing to show what this outspan pasturage was. There should be something of a definite nature to show what it was, and not merely the description of an adjoining property that it extended towards the outspan

or towards the grazing of the outspan place. It seemed that a part was reserved as an outspan for persons who could not cross the Berg River in winter, but people who resided beyond the river had no right to use it. There was no grant of an outspan. It would be a very serious thing for the municipality of Paarl to be now deprived of this land which they had so long used, and the Court would, therefore, closely scrutinise the evidence upon which it was sought to have it declared that this piece of land was an outspan. Land granted for outspans was generally dealt with in some proclamation, but here there was no proclamation or Government notice. It was a funny place for an outspan where there was no water. All the evidence went to show that it was a racecourse, and the Government had not produced one tittle of evidence to show that anybody had ever used it as an outspan. In 1878 the municipality looked upon the piece of land as municipal land, and again in 1881 they dealt with it as municipal land. In the amended grant of 1901 of an adjoining piece of land to the Spirit Company, this piece of land was described by the Government as municipal commonage.

Mr. Schreiner said that the prayer that the resumption was illegal had not been touched upon. When the Act of 1889 (vesting outspans in the Divisional Council) was passed the prescription was interrupted and the municipality had to start prescribing afresh. The municipality could not, in the circumstances, prescribe against the Crown. The old plan in the Paarl Divisional Council office showed that the piece of land was a public outspan. In 1866 a return of outspans was made, and this piece of land was the first outspan in the return for Paarl. The use in 1862, by the Governor, in refusing an application by the municipality to be allowed to sell a portion of this land, of the words "municipal commonage" did not make it so. In 1901, when the amended title was granted to the Spirit Company, it was by mistake that this piece of land was called "municipal common." A public outspan like a public road could not be prescribed. This land was Crown land, within a municipality, and a public outspan. The occupation of the municipality could only be *precario*, not *pro domino*. The cases cited only applied where the land was alienable and where the adverse user was continuous. In this case, except from 1860 to 1887, the land was inalienable and had not been alienable for 30 years.

I wish to call special attention to the fact that a public outspan, once constituted, is not a property over which a municipality can acquire rights by prescription. Now (1) this was a public outspan, and (2) it could not be alienated unless under certain special circum-



stances. The municipality did not hold the land *pro domino*, and therefore there was no adverse prescription. In 1889 these outspans were placed under the Divisional Council and no previous rights of Town Councils were provided for. If the Town Council wanted to prescribe they could do so only from 1889. The Court is now asked to declare that the action of the Government under Act 41 of 1902 is illegal. We are quite willing to give the municipality compensation for all improvements, but they do not even claim ownership. If a man says that he has prescribed he must show all that he has prescribed, he cannot prescribe land piecemeal. The municipality never fenced this ground, and therefore did not give the Government and the outspan people notice of adverse possession. No cattle were ever impounded for trespassing on this alleged municipal land. They claim a portion of land "at the racecourse" indefinitely, but do not define their boundaries. The minutes of the Town Council down to 1866 are very interesting: they call for tenders for the manure on the outspan, but they never claimed the outspan as against the Government. After the railway passed through in 1862 the tenders for the manure fell off; showing that the outspan was less used than formerly. After March, 1866, no attempt was made to raise revenue from the outspan, as no satisfactory tender had been received. The minutes from 1876 to 1878 do not show that the municipality made any profit out of the outspan. In 1878 they began to entertain the idea of planting trees on it and proposed to enclose the old racecourse, but never did so. In that year they tried to find out to whom the land belonged, and about the same time Act 14 of 1878 was passed. In 1879 they asked for a grant of the ground. They did not claim it as a right in virtue of adverse user *pro domino*. All they can show is that from 1879 they may have been planting trees on this land; but the planting of trees does not amount to a claim to hold *pro domino*. I admit that prescription runs against the Crown, but the property said to be prescribed must be well defined. *Blankenberg's case* (11 S.C.R., 92). Their whole case is (1) that they planted trees on some part or other of this land. (2) The selling of manure on the outspan; and (3) the permission granted to Mossop to construct a railway across the land.

[Hopley, J.: Their case is that they found it convenient to plant trees only on a certain portion of the land, but they might have planted on any other portion.]

The municipality and the Government could not be adverse to each other, they were working together for the benefit of the public. Prescription must

be *nec vi, nec clam, nec precario*. Their possession was purely *precario*.

[Counsel proceeded to argue further on facts.]

The municipality now ask for a title to this land on the ground of prescription, but what kind of title; quit-rent, freehold, or what? And then should they obtain this and we should hereafter wish to take a railway across the land we shall have to pay for it. See *Swellendam v. Surveyor-General* (3 Menz., 578). That referred to grazing ground and this case does not. *Aberdeen Municipality v. Aberdeen Church* (15 C.T.R., 661), where see especially the claim in reconvention and the plea thereto. *Tarkastad D.R. Church v. Tarkastad Municipality* (15 S.C.R., 371), and specially the judgment (p. 374). The Court must be satisfied that the whole of the property claimed has been prescribed.

Sir H. Juta (in reply): The real question is did the municipality acquire this land by prescription before 1902. If they did then their rights are not affected by the Act of that year. The land had ceased to be Government ground. It has been argued that because the Crown could have alienated the land if the municipality had asked for it, therefore the municipality could not claim *pro domino*. I confess that I cannot follow this reasoning. Then again it is said that after 1887 there was no power to alienate. But under the common law both a public road and a public outspan can be acquired by prescription. It has been contended that the Act of 1889 vested the control of this land in the Divisional Council. There was a *usurpatio*, but if adverse user is continued I do not see how giving management of property to a person can interrupt the prescription. A man's prescription is running when he dies, and an executor dative is appointed, but that does not interrupt the prescription. Again, in case of insolvency, prescription by the insolvent runs in favour of the trustee. But under Section 27 of Ordinance 16 of 1847 (the Pounds Ordinance) persons were appointed to look after outspans. This land was for years used merely as a grazing ground. It has been argued from Section 33 of Act 5 of 1855 that in this case there was no such adverse user as I have contended for, but Act 14 of 1856 shows that Section 33 of the Act of the previous year was framed in error.

Then as to our claim by prescription: Are we asked to prove that we planted trees over every foot of this land? We planted them where none were growing before. Where trees were growing we pruned them, sold the wood, and exercised general control; surely that is adverse user. No Council minutes previous to 1858 are extant, but ever since that date the municipality has exercised



control *pro domino* over this land; and surely it cannot be said that because a small corner of the land was not planted the public retained possession of the whole of it. It is true that we cannot show any prosecutions for trespass, but there is no evidence to show that anybody ever attempted to trespass. Then again, there is no proof of the dedication of this land as an outspan. Even at the corner where no trees were planted the Municipality still exercised adverse rights. As to the manure, I would say that the sales refer to the outspan upon the small corner of which I have already spoken. The fact that in 1866 this manure was of no appreciable value shows that at that time even this small corner had ceased to be an outspan. Trees were planted on both sides of the line before 1874. The minutes of 1879 show that at that time nobody thought of the place as an outspan. About that time the Municipality decided to fence the ground, which shows that they were claiming it *pro domino*. True, they did not fence, and we do not know why. They subsequently ask the Government if the land had been granted to anybody? That shows that they did not regard the land as an outspan, but they wished to get a legal title to property which they regarded as equitably their own. In point of fact, they never applied for a title, but continued to exercise the rights of *dominium*. As to the railway. The Railway Department clearly considered that this was Municipal and not Government land; the whole correspondence between the Department and the Municipality shows that. Here, then, the exercise of proprietorship as of right is acquiesced in by the Crown. Take the case of grazing grounds; they cannot be alienated without the consent of the Crown, and for various reasons it will not give its consent, but these grazing lands do not on that account cease to be public property.

Lastly, it has been argued that the Crown and the Municipality worked harmoniously and that the Municipality had only precarious tenure of this land; but there is no evidence as to that. In 1862, and again in 1882, when we wanted to sell the Crown never objected that our title was precarious.

*Cur. Adv. Vult.*

*Postea* (August 27th).

Hopley, J.: The matter in dispute between the parties to this suit is a certain piece of ground about sixty-three morgen in extent, lying immediately to the south of the Paarl Railway Station, of which the plaintiffs claim the ownership by prescriptive right, and about which the defendants assert that it still is Government ground, the dominium of which has never passed from the Crown. The defendants, in their plea, set forth that the said ground was before

July 1, 1817, Crown land set apart by Government as a public outspan and grazing in connection with the said outspan, and that it remained such until it was resumed in due form under the provisions of Act 41 of 1902. The plaintiffs claim: (1) A declaration that the said piece of land is vested in them; (2) that they are entitled to have formal title issued to them of the said land; (3) that the resumption of the said land, under Act 41 of 1902 is illegal, and of no force or effect; (4) alternative relief; and (5) costs of suit. At the earliest date of which any evidence can now be produced, viz., the year 1815, the state of affairs was that there were existing grants of properties surrounding a piece of Crown land at the southern end of the growing village of the Paarl, then in the division of Stellenbosch. These old grants were of properties known as Picardie, to the north and west; Zandwyk, to the south-west; Zoet-  
 tin Inval, to the south and east, and the property of one C. H. Paulsen, to the north-east. In the year 1815, Pieter Roux, the owner of Picardie, and of another farm to the north, called Laborie, petitioned for a grant of a portion of the said Crown land adjoining his said farms. This petition was reported on August 7, 1815, by the Landdrost and Commissioners of Stellenbosch, and in their report it is stated that the adjoining Government lands are either measured for others or used as outspan places, and that "on a request from the Field-cornet Wagner and different inhabitants, there is a part left unmeasured at the lower end to serve as an outspan place for those persons who cannot pass the Berg River in the winter." In the same year Paulsen petitioned for a grant of a small piece of the said Crown land; and, on October 2, 1815, the same body reported upon his request that to the west of the ground applied for there was "the outspan place for public use." On July 2, 1821 the same body reported upon the petition of Johannes Louw, the owner of Zoeten Inval, who applied for some of the said Crown land adjoining his freehold, and stated in their report that "on the north side is Government land that is not supplied with water, and which is only for an outspan place when the Berg River is impassable." From these old documents it may be gathered that the Crown lands lying vacant at the locality in question had been used, probably for a considerable time, by the travelling public of those days as an emergency outspan place in winter seasons, when the Berg River could not be crossed, and that when applications were made for portions of such Crown lands, the local field-cornet and divers of the inhabitants suggested that a right to do so should be continued and safeguarded. The three petitions above set forth were all successful; and por-

tions of the said Crown land were granted as prayed according to diagrams which had been framed to accompany the petitions, and which were embodied in the grants that were made in response to the applications. Roux got title for his newly-acquired land on July 1, 1817, Paulsen got his on October 27, 1817, and Louw his on June 1, 1827. The boundaries of these three new grants and the defined and previously known boundaries of Picardie and Zandwyk practically surround the piece of land now in dispute, which it is, therefore, a simple matter, by a process of compilation, to define and measure, as has been done: and there is no dispute as to the identity, boundaries, or size of the ground, both parties being agreed that it is correctly indicated by the plan annexed to the declaration. When the new grants were made in 1817 and 1827, as above stated, this piece of remaining Crown land was described in Roux's and Paulsen's grants as "Weide der Uitspan Plaats" (grazing of the outspan place), and in Louw's as "Weide von de Uitspan Plaats" (grazing for the outspan place). Roux's and Paulsen's grants state that their ground extends on their S.E. and W. sides respectively, "aan de weide der uitspan plaats." The grants are bilingual, and the English in these two grants is respectively "Towards the outspan place" and "To the pasturage of the outspan." Louw's grant states that his northern boundary extends "Aan de weide der uitspan plaats," and in English, "To the pasturage of the outspan place." On the true reading of these documents, there is no doubt in my mind that in the year 1817 the then Governor (Lord Charles Somerset) either acknowledged a previous grant, or then formally set aside and dedicated the ground now in dispute as an outspan and grazing for an outspan, for the benefit of the public generally; and that in 1827 the then Lieutenant-Governor (Sir Richard Bourke) looked upon this ground as pasturage of the outspan place, and acknowledged it as such upon a formal title-deed. I am satisfied that this ground was a duly-constituted outspan, of which any member of the public might make use, and there is no reason to suppose that this privilege was not exercised, though in all probability not very extensive use was for the greater part of each year made of it, owing to the fact that, except when the Berg River was in flood, there were other more convenient outspans available. It would, however, appear, that before many years had elapsed, the ground was being used for the purpose of holding race meetings, whenever that form of sport was pursued by its local votaries. The evidence is that such meetings were not frequent, nor at regular intervals—there being sometimes a series of years in which no meeting was held—and one

may from the evidence safely come to the conclusion that in the years when they did occur, there would probably not be more than one or two of such meetings. These would naturally be fixed during the clement seasons of the year, when they could not possibly interfere with the rights of the travelling public, and I see nothing in such occasional meetings incompatible with the uses to which this land was then dedicated. In consequence, however, it became known as the "Racecourse," and continued to be used as such whenever a meeting could be arranged, until about the year 1860, when the line of railway was eventually laid in such a position as to cut the ground in two, and spoil it for racing. For some years before that date, however, the meetings had become difficult to arrange, and had begun to flag and fall into desuetude, owing to the influence of a minister of religion who disapproved of that form of recreation. As far as this ground was concerned, however, the position of the railway settled the matter, and no racing has taken place upon it since "the late fifties." Having acquired the name of the "Racecourse," as time went on, it gradually came to be called "The Old Racecourse." During all this period, however, there is nothing to show that the privilege of using the ground as an outspan and outspan-grazing were not exercised by travellers whenever they felt so disposed. Meanwhile, in 1838, the growing community of the Paarl received a grant of land of large extent, chiefly consisting of mountain veld, remote from the disputed ground, to serve as a commonage for the grazing of their cattle; and they had previously, in 1818, received a grant of the Wateruintjes Valley as a communal pasturage. In the year 1840 their village was formed into a separate municipality, and from that date the existence of the plaintiff Council dates. The limits or jurisdiction assigned to them include the disputed ground, which was then in use, as far as I can gather from the evidence, both as an outspan and, on rare occasions, as a racecourse; and it seems to have been assumed at the time by the newly-constituted Council that, because of its situation within the area of their jurisdiction, it fell under their control. I think that, in a certain sense, and to a large, though limited, extent, they were right in this assumption; for, as far as all matters touching municipal good government and general management for municipal purposes were concerned, they were the proper body to see that all their rules touching such matters were carried out in this, as in all other areas, to whomsoever they might belong, falling within the limits over which they had been set for the purposes of local government. Unfortunately, the earliest minutes of the Council's meetings have been destroyed by

fire, and we have nothing to show us what that body in the early years of its existence did with regard to this ground; but since the beginning of the year 1859 there are minutes, upon the effect of which, and of the acts chronicled in them, the plaintiffs largely rely for the establishment of their claims in this case. According to such minutes, supported as far as there is available parol testimony at this date, it appears that from the year 1859 and until about the year 1866 or 1867, the Council used to make a small amount of revenue by selling the manure on what is throughout the minutes dealing with such matters called "the outspan at the Racecourse," and this is one of the acts relied upon as evincing an intention of holding such ground in full ownership; but I cannot see that any such inference need be drawn from such acts. Rather, I should feel inclined to say, do such acts prove that the Councillors of those days (and probably if the earlier minutes were extant we should find that their predecessors had acted in precisely the same way) were simply doing their duty in clearing the outspan—which was on, or alongside of, the main road within their municipality—of an accumulation of manure which, unless removed, would have been a source of unpleasantness, and possibly of illness to the neighbouring inhabitants of the village. Had manure been of no value to anyone in those parts, the Council would probably have been forced to spend money in carting it away; but since it is, in such a community, a valuable product, they were able, on the contrary, to derive some income from the performance of their plain duty. But the plaintiffs do not rely upon their dealings with manure alone, for there are other matters in which they assumed control and enjoyment of the locality. It appears that originally the area was of a sandy nature, with only sparse native bush and herbs upon the pasturage reserved for the outspan; but Mr. Van Breda, who was landdrost about 1840 and onwards, was an energetic arboriculturist, and there is evidence that about 1845 he planted fir trees along the main road, which runs to the west of the pasturage in question, by the side of which anyone wishing to halt there would naturally outspan. These soon grew up, and their seeds, self sown, began to form thickets of fir saplings upon the pasturage reserve. Mr. Van Breda was also a sportsman, who trained his horses and raced them at the race meetings; and it is quite likely that, to improve the "racecourse," or to indulge himself in his pet hobby of tree-planting, he may have planted some fir-seeds upon a portion of the area in question. There is no evidence that he actually did so, but there is some evidence that there were some trees as early as the fifties, which were

not self-sown, and there is no evidence to show who planted them. There certainly is no more to support the idea that the Council planted them than that Mr. Van Breda did so. Be that as it may, the soil was well adapted for the growth and spread of the fir-tree, and there was soon a sufficient quantity of that class of timber to demand attention, for a number of years certainly not sufficient to render the pasturage unfit for the purposes to which it had been dedicated, but gradually spreading, and at the beginning of the Council's minuted records we find that they had, by the year 1859, assumed control of this wood, and were utilising it for purposes of revenue. Something of the same sort as I have already said about the manure might be said about these young fir-trees, since a neglected growth of a young fir-bush is in some ways a public danger, because of the possibility of fires starting there, and very likely the earliest acts of the Council may have been the necessary pruning and thinning out of the young saplings. Here again, however, it was obvious that this duty might be made lucrative, and the Council were not slow to avail themselves of such advantages as might be derived therefrom. Without going into details, it is clear that throughout the time which has elapsed since 1859, the plaintiffs or their predecessors have exercised the function of dealing with the wood growing upon the outspan pasture. They cut it, or allowed it to be cut; they sold it both publicly and privately, and they fined persons who took or appropriated any of it without their permission. Somewhere between 1870 and 1880—I am inclined to think very near to the latter date—they began to plant trees systematically upon considerable portions of the ground; and their efforts in this direction, combined with the natural spread of the trees by the process of self-sowing, have had the effect of converting nearly all of the land originally reserved as pasturage for the outspan into a small forest of fir-trees. It is natural that the unquestioned and unrestricted exercise of such privileges would, as time went on, give a feeling of security of tenure to the Council, which might ripen into an idea of absolute ownership, and there is little doubt that such a feeling did eventually possess the minds of individual councillors, and possibly of that body as a whole. Persons and corporations are apt to accept the prevailing and actual situation as the proper and legal one without inquiring or looking below the surface to ascertain by what right the situation exists; and because actual control was exercised, rangers employed, picnic parties regulated, and wood sold or protected, it was assumed by the public, and strenuously argued by

counsel for the plaintiffs, that the Council had controlled and possessed this fir-forest *animo sibi habendi* in their corporate capacity; but I find among their bye-laws promulgated in 1865, with the assent of the Governor, one which deals with such matters, No. 42, in the following terms: "No one shall wilfully or carelessly break, throw down, ride over, or injure in any way whatsoever any tree or trees growing in any public place within the municipality, under a penalty of not less than two nor exceeding five pounds sterling, and no person shall be allowed to cut or prune any trees in the public streets, squares, or on public lands within the municipality, without the consent of the commissioners, and under such regulations as they shall deem necessary; and the commissioners shall dispose of the wood to be cut, and acorns, in such manner as will be most advantageous to the municipal treasury." A piece of ground which has been reserved for the use of the public as an outspan and falling within the limits of the municipality must surely come under the designation of "public lands within the municipality." No argument upon the bye-law was addressed to me, and it seems to have escaped attention; but it is difficult to think that it was not framed with the object of continuing and legalising the system which the minutes show was growing up of selling the wood on the outspan. I am of opinion that this bye-law applies to the outspan and the wood upon it, and, if so all the acts relied upon as showing the assumption of absolute ownership, and an *animus domini* would have been done under and by virtue of its provisions, and not in the mind and spirit which the plaintiffs contend must be attributed to them. The other acts with regard to the fir-bush, such as regulating picnics, and so on, seem to me to fall fairly enough within the scope of the duties of the Council. Evidence was also given that, about 1881 or 1882, a firm of Frater and Mossop treated with the Council, and obtained leave from them to lay a short line of railway, a siding to the main line, over the eastern portion of the outspan (lot A), and that in consequence of such licence that firm did lay such railway to their establishment for wool washing, paying a small sum for the privilege to the plaintiffs: but this again I do not think was an act necessarily *ultra vires* of the Council. For municipal purposes they had control of the ground in question, and they might fairly hold that they had therefore the right to refuse or grant the privilege of laying a temporary railway. Generally I would say that though all the acts I have enumerated singly and collectively are undoubtedly of importance, still the first question that arises out of them is whether,

after all, they were not such as might have been expected of a body appointed to control and manage from a municipal point of view, such a place as a public outspan, which, as far as its grazing ground was concerned, was very little used by the public; and though they probably went too far in utilising the ground for tree-planting, they had considerable excuse for their conduct in the circumstances. There may have been other functionaries or bodies who had the duty of seeing that the outspan was not misused or trespassed upon, and such individuals or bodies may or may not have done their duty; but, as far as municipal matters went, the plaintiffs were the controlling body, and I see nothing incompatible with the due exercise of their proper functions in the acts set forth, nor do I think that such acts necessarily indicated more than a desire duly to discharge their duties. In considering this branch of the case, I cannot lose sight of the fact that it is unlike the ordinary claims which are made for the ownership of property by prescription; for the plaintiffs came upon the ground and took possession of it *ex mandato*, and in a fiduciary capacity, as managers and local governors thereof for municipal purposes, and it is difficult to conceive that they could ever, in fact, have looked upon themselves as the possessors of the land in any other capacity or by any other title, while legally it should have been impossible for them to do so, the maxim of the law on this point being perfectly clear and unambiguous: "*Nemo potest sibi mutare causam possessionis.*" Now, if that be the correct view to take of their position, and of their intentions, it follows that in considering dealings by them with the property so intrusted to them, where such dealings are of doubtful character, in justice to themselves it is right to take the view that such acts were done in the execution of their proper functions as managers of the property, and not for the purpose of asserting ownership in the property itself. It may be, in the present case, that the plaintiffs assumed, *ab initio* a somewhat fuller control over this outspan than the various ordinances and Acts of the Legislature warranted; but still they were only controlling and not owning the land. They knew when they first came into existence that this land falling within their area was an outspan, and, rightly or wrongly, began and continued to manage it; nor is their position strengthened by the fact that the Divisional Council, who might have asserted some authority at a certain stage and for certain purposes, allowed them to have full control over it. But it is argued for the plaintiffs that because the land fell within their area it was assumed by all parties that it became "municipal land," the property if the



municipality, and that their *animus sibi possidendi* arose from such assumption. This is perhaps the highest point to which the case in their favour can be stretched. But it was clearly an *error juris*, because the outspan, though within their area, remained an outspan dedicated to the public, and did not come to them by any sort of justifiable title as municipal property. If they assumed possession, and thought, *errore juris*, that they owned this land for the Municipality, can they found a claim to prescriptive title upon such erroneous idea, and upon such illegal tenure? Voet (41, 3, 3, and 5) is clear that for the purpose of usucaption the possessor of land by error of law could not rely upon such tenure to establish his claim, and the case of *De Jager v. Scheepers* (Foord, 120) is an authority that continuous undisturbed possession of property burdened by a *fidei commissum* gives no right to prescriptive title, even though the possessor acquired by purchase from the fiduciary. Here the plaintiffs contend that they assumed ownership because the outspan fell within their boundaries; but they admit that everything that fell within their boundaries did not necessarily become their property, and it is clear that any land burdened with a public right and vested in the Crown did not become their property. There was indeed nothing which invested them with any proprietary title to the land, for they had received it *pro bono publico*, and retained it by that and by no other title. In such a case the rule, "*Rem acceptam usu non capimus, quia pro alieno possidemus*," must surely apply. Another point which the consideration of this case brings forward is whether an "outspan" is capable of being acquired by prescription. Such a piece of ground, though dedicated to public use, remains in the ownership of the Crown; and though prescription does run against the Crown, its operation is confined to things capable of alienation by the Crown; so that it comes as far as this point is concerned, to the solution of the question whether the Crown could alienate an outspan while it remained dedicated to the public use. The earliest laws to which I have been referred are the Proclamation of Sir John Cra-dock, of October 16, 1812 (in which it is absolutely forbidden and made punishable to encroach upon any Crown land), and the advertisement by Government, July 23, 1813, of regulations for persons applying for grants of land, which is interesting in this respect, that there is an emphatic injunction to Land Commissions to preserve inviolate rights of roads and outspan places to the public. It will be seen that the privilege granted to the public to outspan at certain places is here spoken of as a "right." For the purposes of the present case, I may pass on to the

Crown Lands Act No 2, 1860, which regulated the methods by which Crown lands might be disposed of. Section 1 of the schedule of conditions and regulations lays down that for the future all "waste and unappropriated Crown lands" will be sold, etc., etc. Section 14 lays down that lands required for public outspans shall not be considered waste lands of the Crown for the purposes of these regulations, and that such lands may be disposed of by the Governor for special public purposes, but only after the Legislative Council and House of Assembly shall have communicated to the Governor their concurrence in the grant. (See section 10.) It would, therefore, seem that while Act No. 2, 1860, was in force there was a very limited power of disposal by the Crown of outspan lands, and that only for special public purposes. As the suffering of usucaption is looked upon in law as a species of alienation, it would seem logically that an unrestricted alienation of such land by prescription was not legal. The Act, however, was repealed by Act 14 of 1878, and even that mode of granting or alienating an outspan was done away with, while nothing was put into its place. Section 2 of that statute enacted that all waste and unappropriated Crown lands shall be disposed of on perpetual quitrent by public auction. But I think that an outspan could not be considered waste or unappropriated ground; it was, on the contrary, ground appropriated to public use, and over which the public had a right, quite as much as pasture lands, as to which see Act 14, 1878, section 13. So that, apparently, after 1878, no way of alienating an outspan existed. It was still Crown land, but Crown land which the Crown could not alienate. It is true that by Act 15 of 1887, section 10, grants by the Governor were authorised for the benefit of the inhabitants of municipalities of any Crown lands within the limits of such municipality, provided that the lands so granted or their proceeds shall be used or applied for the benefit of the inhabitants in a way approved of by the Governor. But it seems to me that under the 12th section of that Act, an outspan would be excluded from the operation of the Act as being land claimed under a promise or order of a Government officer duly authorised at the time to make such promise or give such order. But even if that section only applies to conditional occupation of a different kind, that Act was passed less than 20 years ago, and prescriptive user cannot have been completed by virtue of any power of alienation continued in it. The next Act dealing with outspans was the Divisional Council Act of 1889, section 207 of which gives management and control of all outspans to Divisional Councils, and neither to them nor to anyone else was any right



of alienating such outspans given. In fact, the only right of partial alienation was to lease for the purpose of getting accommodation for travellers, not more than one morgen of any outspan, with consent of the Governor, after due advertisement, and for a period not exceeding seven years. Such lands were, in my opinion, in view of such a Statute, clearly inalienable by the Crown or by anyone else. This was also evidently the view taken by the Legislature of the country when by Act 41 of 1902 it altered the law so as to give the Governor the power to deal with outspans, to alienate them under certain conditions, to resume them if they were not longer required for outspan purposes, and in such latter case to dispose of them under the laws regulating the disposal of Crown lands. The mere fact of such legislation being necessary is a proof, or very strong argument, that before that date no powers of sale or resumption of such lands were vested in the Crown. In my opinion, outspans, properly dedicated to the public, were inalienable until the Act of 1902, and such rights could not be prescribed: "*Quae per principem aliis communicari et in alios transferri possunt, etiam proscribi, possunt; quae vero communicari nequeunt etiam respuunt proscriptionem*" (Voet 44, 3, 11). If, however, I hold too strong a view on this point, and if as was argued, an outspan is in no better or more protected position than a public road under common law, which, on the authority of Voet, may be lost to the public by continual adverse user, suffered without protest for the period of prescription (Voet 13, 7, 7), still in that very passage he shows what strong adverse measures are necessary to exclude the public from its right, and I am strongly of opinion, as I shall presently show, that no adverse acts of such a nature ever took place with regard to this particular public right. Finally, it is instructive to test the matter and the intention of the plaintiff Council from time to time by the actual history attaching to this piece of ground since the year 1817, at which date we know that it was formally dedicated or acknowledged as an outspan. From that year until the year 1840 there is no reason to doubt that use was made of it for the purpose to which it was dedicated; and though in 1840 it fell within the limits of the newly-constituted Municipal Council, and though that body assumed entire control over it, still it is clear that its use was not changed, even though it was also utilised as a racecourse. People continued to outspan there to a considerable extent, as is evidenced by the prices paid until the year 1867 or thereabouts for the accumulation of manure on the "outspan at the Racecourse," as it is always described in the minutes which deal with the tenders and sales of such manure. In 1861 and 1862, the railway having

come across the ground and cut it in two, dividing lot A from the rest, the Council, seeing that this portion would become valuable for building upon, on account of its nearness to the railway station, made an attempt to sell it in building lots for the benefit of the Municipality. They caused lot A to be surveyed into such lots, and gave notice, under section 2 of Ordinance 8 of 1848, of their intention to dispose in that way of the land. Objections were, however, promptly made by a considerable number of the inhabitants, on the ground that the place was a public outspan, indispensable to the inhabitants. In controverting these objections, the Council pointed out that the ground in question had for a long time not been used as an outspan, that it had been cut off by the railway, and that the remaining extent (i.e., lots B and C of the plan annexed to the declaration), would be amply sufficient for the purposes of an outspan. In December, 1862, the answer of the Governor was conveyed to the Council's letter "relative to a desire on the part of the municipality to alienate a portion of the common lands with a view to applying the proceeds to certain municipal improvements," stating that in the face of the numerously signed petition against the proposed alienation His Excellency could not sanction the sale. Two things are observable from this correspondence, viz., that the Council attempted to treat the land as if it were common municipal pasture land, and that the Governor did not look into the matter to see by what kind of a title they claimed it. He seems to have assumed that they were right, as it is natural that he would do when we consider that he was being approached by a public body about a matter of which they might be presumed to have special knowledge. But, as a matter of fact, they could not at that date have thought that they had acquired a prescriptive right to the land, and, unless it was a *mala fide* attempt to get the proceeds of such sale for the benefit of the municipality, of which there is no reason to suppose the councillors of those days were guilty, they must have acted under the erroneous impression that the property had been made over to them; but they did not, when they were checked, assert this position, and, on the contrary, they acquiesced in the statement that it was an outspan, only stating that this portion had become disused as such, and that the rest was sufficient for public purposes. The other fact which stands out clearly is that the public then, both in 1861 and in 1862, asserted its right in each year by lodging objections and claiming even the disused Lot A as an outspan, and that they gained their point. It was thus forcibly brought to the notice of the Council that this was not municipal land, but

an outspan, and they did not at that date contest the matter. In 1866 the Civil Commissioner of the Paarl, on the instruction of the House of Assembly, asked the plaintiff Council (as apparently all municipalities were asked at the time) for a return of all outspans falling within the municipal limits, and, in reply, the Council sent an answer enumerating outspans in the municipality, and among others, "the former racecourse now intersected by the railway." During this time, as I have already pointed out, the plaintiffs were advertising for tenders for the purchase of the manure on the "outspan at the racecourse," and people were, as a matter of fact, outspanning there. The actual outspan place was on Lot C, near its southern end, by the side of the main road, and there is not a single act recorded or spoken to in evidence of an adverse nature to this public right, except the gradual extension of the fir-bush upon the ground; no person was ever told that he might not outspan there, and no animal belonging to a traveller was ever turned off or impounded, though it is impossible to believe that such animals did not use the "pasture of the outspan" times without number. Up to the time of the resumption of the outspan by the Government in 1905, and even thereafter, people have occasionally outspanned at the usual place on Lot C, as is admitted by Mr. De Villiers, the present Mayor of the Paarl, and by other witnesses for the plaintiffs. All these facts indicate conclusively that the plaintiffs, though making considerable use of the ground, knew perfectly well that they were there only as managers, and not as owners. There is an interesting minute recorded of a resolution at the meeting of May, 1878. "Commissioners resolve that fir-seeds shall, without delay, be planted on the Old Racecourse, and that the secretary buy wire to enclose the Racecourse." But for some reason or other the wire was never bought, and it is probable, in the face of such an emphatic resolution, that something must have taken place, which gave them pause, and that wiser, more prudent and more legal counsels prevailed; and this is the more probable, as we find that on February 4, 1879, the following was minuted: "The secretary is requested to ascertain whether the racecourse has been granted to anyone by the Government, and, if not, to make application to the Government for the ground in order to plant trees thereon." It is said, I believe correctly, that no steps were taken in connection with, or in consequence of, such instruction, but no information is forthcoming as to why no action was taken. The minute is nevertheless important as indicating very strongly what was in the mind of the Council in those days. Such an

instruction could never have emanated from a body which considered that they were the owners of that land; on the contrary, they knew clearly that it was Crown land, and they were prepared to petition for a grant of it for tree planting purposes. Again, in 1905, when someone had cut and removed a large number of trees from the wood in Lot B, and the Council wished to prosecute criminally, they appealed to the Government to assist them, as the ground "was Crown land," "an old outspan," which had been "for many years under the charge of the Municipality," and which was "considered Municipal land." It is true that when the Government, through the Agricultural Department, had replied that the land being Crown land, reserved as an outspan, the Municipality had nothing to do with it, the plaintiffs changed their tone, and claimed prescriptive rights; but that claim has very much the appearance of an after-thought when the Council discovered that they were likely to lose the enjoyments of rights which they had for so long a time exercised, and from which they were annually drawing considerable profits. Their acts and their admissions during their long tenure seem to me to be wholly inconsistent with the requirements of the law to establish a claim to the prescription of this outspan, even if such a piece of land could be obtained by the process of prescription. The tests are succinctly and clearly stated by Voet (44, 3, 9) to be whether the claimant by prescription has been for the necessary period in continuous and quiet possession, and that during the whole of such time he has suffered no interference at the hands of the true owner, and that he has not by any act acknowledged such a one as the owner. In view of the facts above stated, the plaintiffs cannot maintain that they have ever had a continuous possession of 30 years without interference by the Crown, or without acknowledging the Crown as the owner of the land; nor, as I have already stated, was there ever a period of 30 years during which the Council possessed the land as *domini*, with the intention of holding it as their own property for the Municipality. It is, perhaps, advisable not to pass over in silence a fact on which some argument was addressed to the Court, as tending to prove absolute ownership by the plaintiffs of the outspan, and a recognition of their claim by the Government. It appears that about 1901 the present owners of the property to the west of Lot B—"The Paarl Wine and Spirit Co."—applied for a fresh title under the Land Beacons Act, and that they employed Mr. Moll, a duly qualified land surveyor, to carry out the requirements of the Act. Mr. Moll, in the ordinary course of such a proceeding, called upon the owners of the adjoining properties to consent to the position of the beacons of

his employers, and forwarded such consents after the said owners had inspected the beacons to the Surveyor-General's Department, together with the diagram on which the new title was to be issued. There seems to have been no dispute as to the beacons, and the land itself remained bounded as it was in the time of Roux, the original grantee, in 1817; but the point of this incident, and the reason of its introduction is that Mr. Moll treated the Municipality as the owner of the outspan, that he called upon the Mayor to consent to the beacons, that the Mayor did so consent, and that the diagram, which he forwarded with the various consent papers, described the land adjacent to the company's property on the east side as municipal land. The Examiner of Diagrams passed the plans as correct, and made no remark as to the description of the land to the east as municipal land, such land being portion of the property now in dispute. Thereupon a fresh title was issued showing the company's land to be adjacent to municipal land, and bounded on the east by land so described. I am not at all impressed by this, for I do not see how the defendants are in any way compromised by such a description, which the Surveyor-General and Mr. Van Renen describe as a palpable error which should have been detected in their office. The surveyor, Mr. Moll, no doubt was led astray by the common error which prevailed as regards this land, as no doubt was the Mayor himself; and the fact that the Examiner of Diagrams, whose chief function it is to certify to the correctness of the sides and angles and general calculations shown on the plan, did not discover that the description did not correspond with the description upon the older grants, and that title was granted with such new description upon it, does not in any way help to settle the matter in favour of the plaintiffs. I am of opinion that the disputed ground never ceased to be in law an outspan (as indeed it is shown in the maps of the Divisional Council district to this day), that the plaintiffs never acquired proprietary rights over it, and that the defendants were fully within their rights in resuming such outspan under the provisions of Act 41 of 1902. The plaintiffs' claims, therefore, fail, and there must be judgment for the defendants, with costs.

[Plaintiffs' Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Reid and Nephew.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon Sir JOHN BUCHANAN.]

ADMISSION. } 1906.  
} July 5th.

Mr. De Waal moved for the admission of Jacobus Benjamin Hugo as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Victoria West.

### PROVISIONAL ROLL.

#### ESTATE STANFORD V. COHEN.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### HOLTZ AND LEWIN V. WARE.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### SANDERS AND SONS V. RICE.

Mr. Howes moved for provisional sentence for £82, balance of a notarial bond, with interest, the bond having become due by reason of the non-payment of interest.

Order granted.

#### BURNET V. GREEN.

Mr. Sutton moved for provisional sentence for £600, balance of a mortgage bond, with interest, the bond having become due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### DUNCAN V. LOMBARD.

Mr. Douglas Buchanan moved for provisional sentence for £13 2s., balance due on a promissory note.

Order granted.

#### HAYLETT V. CURRY.

Mr. Sutton moved for provisional sentence on a mortgage bond for £450, with interest, the bond having become

due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

KARIE V. SYDOW. { 1906.  
July 5th.

Mr. Rowson moved for judgment, under Rule 329d, for £80, balance of account for rent of certain premises in Sir Lowry-road.

Order granted.

### REHABILITATION.

Mr. Upington applied, on behalf of Martin Johannes Cloete, for his discharge from insolvency.

Granted.

### GENERAL MOTIONS.

*Ex parte* GREENSHIELDS. { 1906.  
July 5th.

Mr. Gutsche moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

### *Ex parte* MCNAMARA.

Mr. Burton moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

### *Ex parte* COMBRINCK.

Mr. Roux moved for a certain rule *nisi* to be made absolute, calling upon the Colonial Government to show cause why petitioner should not sue respondents *in forma pauperis* for damages. The rule had been served on the secretary of the Commissioner of Public Works, and no appearance had been entered for respondents.

Rule made absolute, Mr. Roux to be counsel and Mr. Rufus McLeod attorney for the plaintiff.

### *Ex parte* GERICKE.

Mr. De Waal moved on the petition of S. J. Gericke, of Elliot, for leave to sue one A. S. J. Marais, of Germiston, Transvaal, by edictal citation, and to attach a certain erf at Elliot *ad fundandam jurisdictionem*.

Property attached, and leave to sue granted, citation to be returnable on the 15th August, and to be served personally, if possible, failing which one publication in the "Government Gazette" and once in the "Star" (Johannesburg).

### *Ex parte* INSOLVENT ESTATE COHEN.

Mr. Alexander moved for a certain rule *nisi* to be made absolute, authorising payment to the provisional trustee in the estate Cohen of certain money standing to the credit of Max Crut, in the P.O. Savings Bank.

Rule made absolute.

### *Ex parte* ESTATE COETZER.

Mr. Watermeyer moved for an order authorising the sale of certain property in which minors were interested.

Order granted in terms of Master's report, Mr. Alfred Metcalfe to be trustee.

### *Ex parte* ROSS.

Mr. Gutsche moved for an order authorising the Master to assume the death of petitioner's brother, Edward Wm. Ross, and to take the usual steps for the appointment of an executor *dativo*. Deceased, a single man of about 25 years of age, was believed to have been drowned as a result of a boat capsizing off Hoetjes Bay. His body had not been recovered, but his coat had been washed up.

Order granted as prayed.

### *Ex parte* WATSON.

Mr. Watermeyer moved on behalf of petitioner, who resides at Colesberg, for her release from curatorship, and payment of such moneys as may be due to her. The curator consented to the application.

Order granted as prayed.

### MULDER AND ANOTHER V. OLIVIER AND OTHERS.

Mr. Howes moved as a matter of urgency for leave to take the evidence on commission of a certain witness at Oudtshoorn, who is ill.

Order granted, the commissioner to be the R.M. of Oudtshoorn, or an officer acting as such.

### *Ex parte* DE SMIDT.

Mr. Gutsche moved on the petition of Lily de Smidt for leave to sue her husband, Geoffrey Wm. Henry de Smidt, by

edictal citation for restitution of conjugal rights, or, in the alternative, for a divorce. Petitioner said that she was married to defendant at Humansdorp in 1893, and afterwards they resided together in several parts of the Colony. There was issue of the marriage—one child. On or about the 22nd October, 1897, while they were residing at Port Elizabeth, defendant, without reasonable or lawful cause, deserted petitioner and her child, and, except for an allowance of £4 10s. per month, which she had received since defendant had joined the South African Constabulary, stationed at Rustenburg, Transvaal, he had not contributed towards her support. This allowance, which was forwarded to her according to the rules of the force affecting married men, was inadequate for the support of petitioner and her child and the latter's education.

Leave to sue granted, citation to be returnable on the 1st August, personal service to be effected.

#### EXLEY AND CO. V. WASKAMSKY AND HILL.

Mr. W. Porter Buchanan moved, as a matter of urgency, for an interdict restraining the respondents and others from removing or dealing with certain 29 casks of oil, purchased at the sale of cargo salvaged from the wrecked steamer Oakburn. Petitioners said that they bought the whole of the casks, they agreed to let Waskamsky have half, and the latter was proceeding to take the whole lot.

Rule *nisi* granted, to operate as a temporary interdict, attaching 29 casks of oil in the hands of either respondent or of the Railway Department, rule to be returnable on the 12th July, action to be instituted by applicant forthwith, and costs to be costs in the cause.

#### *Ex parte* NASH AND ANOTHER.

Mr. Lourens moved, as a matter of urgency, on the petition of Maynard Nash, as representing in Cape Town John Deane Simmons, the interim inspector of Reiners, Von Laer and Co., of Port Elizabeth, and Cecil Govey, manager of Govey and Co., of Cape Town, for the discharge of a certain interdict granted in this court restraining certain steamship companies from handing over to persons other than the Table Bay Harbour Board goods consigned to or intended for Govey and Co. Petitioners said that they were now advised by cable that the creditors of Reiners, Von Laer and Co., including the persons who claimed the right to impose "stop" orders on the goods consigned as aforesaid, had consented and agreed to an arrangement

and compromise with the African Merchants, Ltd., a company formed and registered in London on the 23rd June, 1906, as indicated in the original petition, for the purpose of carrying on the business of Reiners, Von Laer and Co. Petitioners were advised that the interdict obtained from the Eastern Districts Court had been discharged, and instructions had now been received to apply for an order discharging the interdict granted by the Supreme Court on the 15th May, and amended on the 23rd May.

Interdict discharged as prayed.

#### *Ex parte* BOTHA.

Mr. Payne moved, on the petition of Susanna Maria Botha, widow and executrix testamentary of the late J. A. C. Botha, for an order authorising the adoption of certain agreement in reference to the sale of a farm in the estate in the division of Molteno.

Order granted as prayed.

#### SPENCER AND CO., LTD. V. POLICANSKY BROS.

Trade mark—Colourable imitation.

This was an application upon notice calling upon respondents to show cause why their trade mark, commonly known as "Saladin," should not be expunged from the register of trade marks.

Petitioners alleged that the trade mark registered by Policansky Bros. is a colourable imitation of Spencer and Co.'s, is calculated to deceive Spencer and Co.'s customers, and consequently will damage their sales. Plaintiff's mark was registered two years before that of the respondents. The main feature of each mark is a horse with a human figure on it, whilst the word "Saladin" is prominently displayed. The applicant alleged that the Registrar of Deeds in the Transvaal, where his mark was registered, had refused to entertain respondent's mark for the very reason that it was now sought to expunge respondent's registration of the mark in the Cape Colony.

Philip Policansky, in an affidavit, denied that there was any colourable imitation, or that his firm's mark could deceive intending purchasers of the applicant's goods. The marks spoke for themselves, and it was denied that the applicant had the sole right to the use of a horse, with a man on it, as his trade mark.

Mr. M. Bisset for applicant. Mr. D. Buchanan for respondent.

Counsel having been heard in argument on the facts,

Buchanan, J., said that in these cases one had to look at the trades' marks



themselves, and form a judgment, as a juror would have to do from the appearance of the different labels. The essential part of the applicant's labels was a combination of devices, which presented a significant, clear, and defined picture. But the trade mark of the respondent was quite different. His lordship outlined the main features that went to make up this difference, and said that the only similarity between the two labels was that in each there was a man on horseback. In the applicant's case the man was an Indian soldier in uniform on a brown horse, and on the respondent's label he was an Arab riding a white horse. Of course, there was no monopoly of colour, and even if the same colours had been introduced into the two labels the two figures would have been quite dissimilar. There was such an absence of similarity of design that he did not think it required anything like a careful inspection, for the most casual inspection would show that the two designs did not represent the same article. There was no attempt to pass off Polincansky's goods as those of Spencer and Co., of Madras. He failed to see how there was a colourable imitation or that the respondents' trade mark was calculated to deceive any person, whether that person was able to read or not, by the pretended similarity to the applicant's trade mark. He failed to see how the horse could be taken as symbolical of the goods, it might be taken as symbolical of Saladin, who, in romance, was represented as riding a very fine Arab steed, but generally there was no similarity between the two labels. In these cases the similarity must be such as to be likely to lead to deception, and he failed to see how anybody could be supposed to be taken in by the respondent's trade mark. There was no ground for the application, which would be dismissed, with costs.

#### LAWRENCE V. CAPE DIVISIONAL COUNCIL.

This was an application upon notice to the Cape Divisional Council for leave to sue the respondents and for an order for costs.

The affidavit of James Lawrence, of Kimberley, stated that during December and January last he was staying at Muizenberg, and on the 1st January he was out driving with Mrs. Lawrence. While returning from Constantia to Muizenberg along the Tokai-road, owing to the dangerous condition of the road at that time, he met with an accident. The road was under the Divisional Council's control. On the 2nd January a letter was written by Mr. C. W. Lawrence to the secretary

of the Divisional Council informing him that a serious accident had occurred owing to the bridge having no protection whatever on one side, and asking the Council to have the bridge examined and the matter investigated. A letter was written on January 4 by the secretary in reply stating that the matter was receiving attention. On January 10 the secretary wrote again: "I am instructed by my Council to convey to yourself and Mrs. Lawrence their sincerest sympathy, and trust that you will have a speedy and complete recovery."

From the petitioner's affidavit it appeared that some question had arisen as to the notice which is required by the second section of Act 27 of 1894, to be given within fourteen days to the Council concerned in regard to actions for damages. Thinking to remedy the matter, petitioner said he caused a further letter to be written to the secretary of the Divisional Council on March 21, in which it was stated that he had then sufficiently recovered to go into the matter. Mrs. Lawrence had sustained a very severe shock to the system. Mr. Lawrence had both his arms broken, his skull fractured, and his nervous system generally had been shattered. Mr. Lawrence proposed to institute an action for £3,000 damages, sustained by himself and Mrs. Lawrence, to whom he was married in community. Petitioner went on to say that he had been advised that the notice, not being in accordance with the second section of the Act, this Court should be petitioned for leave to sue. The Council had left the matter in an ambiguous state, and had refused to give a definite reply one way or the other. He submitted that the Council had not been prejudiced by not having been supplied with full particulars of the accident within the time stipulated. He added that they took steps shortly after the accident to have the road repaired where his cart had capsized.

The answering affidavit of the secretary of the Divisional Council (who annexed copies of correspondence between the attorneys of the respective parties), stated that the Council did not refuse, and never had refused, consent to the petitioner suing them, but they did object to that portion of the petitioner's application which asked that the costs thereof may be made costs in the cause.

Buchanan, J., said that leave to sue would be granted to the petitioner.

Mr. Burton was for petitioner; Mr. Benjamin was for respondent, Council.

Counsel having been heard on the question of costs,

Buchanan, J.: The object of this short Act of 1894 was evidently that persons who intended to sue the Divisional Council or similar bodies for damages resulting from any

neglect of duty in keeping roads or bridges or streets under their control in repair should give proper notice to such Council. The object is evident. If no notice is given, the Divisional Council, which is a public body, has no opportunity of seeing or knowing that an accident has occurred. In this case an unfortunate accident did occur on January 1, and notice of the accident was promptly given on January 2. True, the notice does not follow the words of the Act, and does not give all the particulars required by the section, and so, perhaps technically, the plaintiff was forced to come into court to get an order, giving him leave to sue under the proviso of the section, but he has substantially complied with the Act, and if the Divisional Council had not said that they would not agree to the notice being received, but would not consent to such a course, and at once forced the plaintiff into court, I think no further costs need have been incurred by them. However, as further costs have been incurred, I think they may very well abide the result of the proceedings in this case. Leave to sue will be granted, costs to be costs in the cause.

#### DU TOIT V. RENKEN AND OTHERS.

This was an application to have certain two writs of arrest granted by the Resident Magistrate of Oudtshoorn set aside. Mr. Lourens was for applicant, Johannes du Toit; Mr. Howes was for the second respondent, J. H. Schwemmer, the attorney of the first respondent, Jacoba Renken.

Mr. Lourens said that the applicant had intended to go with Royston's Horse to Natal on the 14th June. Before his departure, the respondent Renken lodged an affidavit with the Magistrate to the effect that applicant had seduced her some time previously, and that she was now entitled to recover from him damages in the sum of £100. This writ, which was granted under Rule 8, was handed to the Deputy-Sheriff on the 14th June, but by that time the applicant had left for Natal, and consequently the Sheriff could not execute this writ. Royston's Horse were ordered back, and consequently, about a week later, on the 22nd June, on the day after his return to Oudtshoorn, the respondents Renken and Schwemmer obtained this writ, which the Deputy-Sheriff had, in consequence of non-execution, returned to the Magistrate, from the Magistrate's Office, and arrested the applicant. The reason given for his arrest was that he was said to be about to leave the Colony. The Magistrate returned on the Monday morning. He discovered that this arrest was quite illegal, but he kept the applicant in gaol the whole

of Monday, and in the meantime applicant had to wait for certain further documents to be prepared for his re-arrest. At 3.30 in the afternoon he was released, to be re-arrested on another affidavit, sworn by the respondent Renken, who again stated that she had been informed that Du Toit was about to leave the Colony.

From the affidavits, it appeared that the applicant denied any liability under the claim alleged by Renken, and he declared that she was a woman of loose character. The respondent Renken denied this, and said that she had been courted by the applicant, and that he had promised to marry her. Attorney Schwemmer said that he acted *bona fide* upon instructions received from Jacoba Renken, who said that she had a claim of £100 against applicant, and that she desired to hold him to bail at the next Circuit Court. It was stated that Renken did not appear, as she had no funds to employ counsel.

Applicant, in the course of his affidavit, said that he was a harness-maker at Oudtshoorn, that he had been out of employment for some time, and that he volunteered for service in Natal to enable him to support his mother. Jacoba Renken, however, took another view, and said that he went away with the intention of defeating her just claim. Du Toit had been released on furnishing security for his appearance at the ensuing Circuit Court.

Mr. Lourens submitted that the writs were irregular.

Without hearing Mr. Howes,

Buchanan, J., said that, by the conduct of the parties, the first writ had been set aside. The second writ, he considered, did not comply with the Rules of the Court, and it would be discharged, with costs against the first respondent, Renken, applicant to pay costs incurred by appearance of Schwemmer.

ADAMS V. MOFFAT, HUT- § 1906.  
CHINS AND CO. ( July 5th.

#### Rule 333D—Discovery—Privilege.

*It is in the discretion of the Court to grant or refuse discovery orders. As a general rule, communications between an agent and his principal are not privileged unless they refer to matters to be brought forward in evidence in impending legal proceedings.*

This was an application upon notice to respondents calling upon them to show cause why they should not make disclosure of certain documents and pay

costs of application. Mr. Burton was for applicant (defendant in the action); Mr. Searle, K.C., was for respondents (plaintiffs in the action).

Mr. Burton said that an action had been commenced by respondents against applicant to recover a sum of £2,703 upon a contract to supply certain joinery work, the oak, teak, and pine, required in connection with the erection of the new offices of the South African Mutual Insurance Association in Darling-street, Cape Town, of which the defendant was contractor. The matter related to certain material which had been rejected. Plaintiffs objected to produce documents set forth in schedules 4, 5, and 7, of Thomas Mofat's affidavit on the ground that the schedules embodied correspondence between themselves and their manufacturers in Canada (the Globe Furniture Company), between whom and defendant there was no privity of contract, and that much of the said correspondence was of a confidential character, and dealt with differences which had arisen between defendant and plaintiffs, and in regard to which it was evident at the outset that litigation would ensue.

Affidavits having been read on both sides,

Mr. Burton submitted that the documents were clearly liable to discovery. The ground on which he made this claim was Rule of Court 333 (sub-section d). Counsel quoted a number of authorities, mentioning *Van der Horst v. Colonial Government* (13 C.T.R., 911), *Brill v. New York Mutual* (15 C.T.R., 643), *Chesier and Another v. Big Ben G.M. Co.* (4 H.C., 374), *Compagnie Financiers v. Peruvian Guano Co.* (48 L.T. 22), and *Buyskes v. White* (34 L.T., 365).

Mr. Searle contended that there was no direct authority in our courts for such an application. It would be most unfair and contrary to all the doctrines of equity that a man should be compelled to disclose documents such as were referred to in this matter. It seemed to him that defendant wanted to make a case at the plaintiff's expense. Surely defendant ought to know whether the material was according to contract. He could not have the right to go and inspect the reports of experts in plaintiff's possession made in view of pending litigation. The defendant had not even yet filed his plea.

Mr. Burton, in reply, referred to the practice in England as to the time or stage at which discovery of documents should be made. There seemed, he remarked, to be no hard and fast rule in such matters. Counsel went on to contend that when the matter came to trial the documents in question could be required from plaintiff in cross-examination unless he could claim exemption on the ground that the documents came into existence in view of pending

litigation. It was very significant indeed that the respondents made so much fuss about these documents. On every ground of law and every rule of equity defendant was entitled to inspection of documents which did not come into existence for the purpose of litigation.

Buchanan, J.: Our rules for discovery are founded, no doubt, on the English rules, but our rules are neither so explicit nor so full as the English rules. This application is brought under rule 333, which makes it lawful for the Court or Judge at any time during pendency of an action to order the production by the parties to the action upon oath of such documents in their possession or power as relate to any matter at issue. The party upon whom an order is made of this kind to disclose the documents in his possession may state his reasons for refusing to produce them. Sub-section (d) of this rule, which is relied upon, is as follows: "Every party to an action or other proceeding shall be entitled at any time before or at the hearing thereof, by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any documents, to produce such documents for the inspection of the party giving such notice or his attorneys, and to permit him or them to take copies thereof." Now, that it will be seen on reference to sub-section (d) is not applicable to this case at all. The documents which the defendant in this case wishes to see are not documents which are referred to in the pleadings or the affidavits, and the section goes on to say that any party not complying with such notice shall not afterwards be at liberty to put in such documents in evidence on his behalf in such action or proceeding until he shall satisfy the Court that he is entitled not to comply with the notice. This seems to be the penalty which is imposed by the rule upon non-production of documents. I fail to see in our rules anything which goes further than this, but I think as the rules are founded on English practice, we may refer to the English practice for some assistance in deciding such an application as this. Our practice in regard to discovery is very limited; there have not been sufficient decisions on the point to have crystallised into any settled rules, but I think generally we have adopted the English rules, and I gather from the English rules that the principle which ought to guide the Court when discovery has been ordered, and objection is made to the production of documents, in the first place, the Court has a general discretion to decide whether or not documents should be produced. That is settled by the English rules of Court, but it is pointed out in England that if the Court or judge shall be of opinion that it is not necessary

either for disposing fairly of the cause or matter or for saving costs, it may refuse to allow the production of these documents. There are four different heads laid down under which such an order can be refused. The first is if the documents are criminatory or penal. That does not apply to this case. The second is, if they are privileged by reason of legal profession. That also does not apply. The third is, as disclosing the parties' evidence; and the fourth is, as being injurious to public interests. Now the only ground in this case that I need therefore consider is whether the application would disclose the plaintiff's evidence or not. Though there is no rule distinctly to that effect, I think it has been clearly indicated in the few decisions that the Court has given, and in one of the cases quoted which came before me, I think I stated the rule in clear and distinct terms. As a general rule, communications between an agent and his principal are not privileged, on the ground of being communications between an agent and his principal; but, where those communications refer to legal proceedings which are inevitable, where they refer to evidence that is likely to be produced at the trial by the suitor, then they are privileged. In this case an affidavit of discovery has been made by the plaintiffs in the action, and they object to the production of certain documents on the following grounds: "That documents and schedules 4, 5, and 7 embody correspondence between them and their manufacturers in Canada, between whom and the defendant there is no privity of contract." As I said before, I think this objection is not one that can be sustained on the ground merely that it was correspondence between themselves and their manufacturers in Canada. Then they go on: "(b) Much of the correspondence is of a confidential nature, and deals with differences which have arisen between defendant and plaintiffs, in regard to which it was evident from the outset that litigation would ensue between plaintiffs and defendant." Now, in so far as the correspondence refers to disputes which had arisen, and which may be the subject of litigation, and in so far as they refer to getting information of their correspondents and agents which would be in the nature of evidence, those documents certainly are privileged. The affidavit goes on to say that some of the correspondence which they object to disclose consists of experts' reports relating to material alleged to have been rejected. After the rejection of materials which the plaintiffs supplied to the defendant, they obtained the opinion of experts. This correspondence, it seems to me, on the affidavits, as far as I can gather, is correspondence directly entered into

with a third person for the purpose of obtaining evidence at the trial. But with the affidavits, as they stand before me, it is impossible to give a specific order as to what documents shall be produced and what documents shall not be produced. I think the plaintiff in this case must make a fresh affidavit of discovery, and state much more clearly which documents relate to matters concerning evidence in the case, and any such documents will not be disclosed, but any correspondence between themselves and their manufacturers in Canada which does not relate to the obtaining of evidence for the purposes of trial, will not be privileged. I think I have sufficiently indicated what I think the plaintiff ought to do—that he should distinguish between correspondence between himself and his agents carrying on business in Canada, and correspondence that relates simply to the obtaining of evidence of experts and others that ought to be protected, and need not be disclosed in this case. I think the plaintiff should make a more full affidavit of discovery, so that there will be no necessity, I think, to make another application to the Court. The order will be that the respondent specify distinctly which of the documents in his possession relate to the obtaining of evidence only, and which do not. These applications are in the nature of establishing principles which have not been settled, and I think it may fairly be that the costs of application be made costs in the cause.

[Applicant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Walker and Jacobsohn.]

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## SUPREME COURT

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### FIRST DIVISION.

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[Before the Hon. Mr. Justice MAASDORP.]

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BRUMMELL V. WHEELER. { 1906.  
July 6th.

This was an action brought by George Henry Brummell, late of Calvinia, against Thomas Henry Wheeler, of Maitland, to recover £35, balance of moneys lent and advanced, and interest.

Plaintiff, in his declaration, said that on June 10, 1904, he lent to defendant



£45, and defendant promised to pay interest until repayment of the capital. The said sum was paid to defendant's daughter, R. M. Wheeler. On August 25 1905, defendant repaid £8 on account, but he neglected and refused to pay the balance, and plaintiff claimed payment of the balance owing of £37, with interest.

Defendant, in his plea, said that the said sum of £45 was borrowed from plaintiff by his daughter, Ruby May Wheeler, between whom and defendant there had existed an engagement of marriage. It was borrowed on her own behalf, and not on behalf of the defendant, she being then of age. In or about October, 1904, the engagement was broken off. The sum of £8, paid on August 25, 1905, was paid by his daughter. Defendant had always repudiated any liability whatsoever in respect of the said debt. He prayed that the claim may be dismissed, with costs.

Plaintiff, in his replication, admitted that there had been an engagement of marriage, and that when the loan was advanced Miss Wheeler was over 21 years of age, but he denied the allegation that the money had been lent to her on her own behalf.

Mr. Roux was for plaintiff; Dr. Greer was for defendant.

Geo. Henry Brummell (plaintiff) said that he was a sergeant in the Cape Police, and he was at present stationed at Maraisburg in Cape Colony. He met defendant and his family in 1902, and he became engaged to the defendant's daughter. While he was away in Namaqualand he received telegrams from Miss Ruby signed "Ruby." At that time her father had certain schemes on hand, and one particularly was a tramway project. Witness received an application for a loan for Miss Wheeler on behalf of her father.

[Maasdorp, J.: Is Miss Wheeler here?]

Mr. Roux: Unfortunately, we have not been able to find her.

Dr. Greer said that Miss Wheeler had since been married, and was now Mrs. Payne.

[Maasdorp, J.: She is an important witness, whoever is responsible for her not being here.]

Witness (continuing) said that he sent a draft for £45, payable at the Standard Bank to Miss Wheeler, and in response he received a telegram acknowledging the draft with thanks. That telegram was signed "Wheeler." Witness subsequently received a letter from defendant, in which he spoke of certain of his projects, and added: "Your little amount will be sent forthwith." The sum of £45 was the only loan he had advanced to defendant. Witness repeatedly addressed letters of demand to Mr. Wheeler at Haven House, Maitland. He received several letters from

Mrs. Wheeler, who, he took it, was corresponding on behalf of her husband. After the payment of £8, he sent a receipt to Mrs. Wheeler.

Cross-examined: His engagement to Miss Wheeler began in November, 1902, and extended until June, 1904. The draft was payable to Miss Wheeler, and was sent to Miss Wheeler. If the telegram in reply had come from Miss Wheeler, it would have been signed "Ruby." He knew that Miss Wheeler wanted the money to assist her father to pay his rates and taxes. She was taking painting and singing lessons, and attending a millinery class. He did not say anything specially as to whether she should continue those lessons; he denied that the money was borrowed to enable her to continue the lessons. He did not consider that he was badly treated by the breaking off of the engagement. He did not make a legal demand for the loan from the family until after the engagement was broken off; he knew that they were hard up at that time. In April, 1905, witness married a lady at Calvinia, and he required the money for the payment of his insurance premium.

Re-examined: Witness made the advance in response to a letter from Miss Wheeler, in which she said that her father was hard up, and that he was very much worried because he could not meet his rates and taxes, and it would very much prejudice him in his schemes if he were to borrow the money from outside. The letter asked for £50. Witness withdrew his savings from the bank, and remitted £45.

Mrs. Wheeler (wife of the defendant) said that her daughter left her home and was married without witness's consent. The money advanced by plaintiff was lent to witness and her daughter, and not to Mr. Wheeler. The money was paid into witness's account at the Standard Bank. Witness admitted having written a letter to the plaintiff in which she referred to the loan as having been advanced to Mr. Wheeler. She was married to defendant out of community.

Cross-examined: None of the money went to Mr. Wheeler. Part of the money was utilised to pay for the lessons Miss Wheeler was receiving. Mr. Wheeler had objected to paying for these lessons. Witness said that she wrote as though she took up the position that the money was advanced to her daughter, and that witness held herself responsible for it. They were very much worried at that time about financial matters, and Mr. Wheeler had a good deal of worry about his tramway scheme.

Mr. Roux closed his case.

Thomas Wheeler (the defendant) said that he remembered hearing that his daughter had received a cheque from plaintiff, but he did not know the



amount. He had not received any portion of the proceeds of the cheque. He did not send a telegram to the plaintiff acknowledging the receipt of the cheque. At the time in question witness was not in want of money, and he did not authorise his daughter to apply to plaintiff for a loan. Witness objected to his daughter continuing her music and painting lessons, because she was 22 years of age, and he thought it was time her education ceased. He objected to Mr. Brummell; he never consented to the engagement, and they were always at loggerheads.

Cross-examined: Witness had not received several letters of demand from plaintiff for payment of the loan to his daughter. He admitted having written a letter to Brummell, in which he said, "Your little amount will be sent forthwith." He then meant that he would send the money on behalf of his wife.

By the Court: Witness's daughter was living with her husband at Observatory-road.

Dr. Greer closed his case.

Counsel having been heard in argument on the facts.

Maasdorp, J.: With the conflict of evidence in this case, I think the only straight course for the Court to adopt is to be guided by the documentary evidence that has been put in. It appears that a letter was written by the defendant to the plaintiff on October 23, 1904, in which the following passage appears: "My tram, I think, will go through on Tuesday next. Don't you think it nearly time? Eighteen months, about. If it does it will put me in funds, and your little amount will be sent forthwith." Now, the question arises, what is this little amount that is referred to? The plaintiff says that he has written to the defendant in respect of this alleged loan, and this was the only transaction that had ever taken place between them, so that the little amount can only be the amount of money lent by plaintiff to defendant. Upon referring to a letter written to plaintiff by Mrs. Wheeler on January 29, 1905, it seems that she writes to the following effect: "I am dreadfully sorry Mr. W. has not returned the amount you lent him." Now, it would seem from these two letters that there is an acknowledgment by the defendant that there is some little matter outstanding between him and plaintiff, and there is a clear allegation on the part of Mrs. Wheeler that a certain sum of money was lent by plaintiff to defendant. On this correspondence before me, I find no difficulty in coming to the conclusion that the telegram that has been put in dated June, 1904, is a telegram direct from defendant to plaintiff, and is a distinct acknowledgment of the receipt of £45 by him from plaintiff. Judg-

ment will be given for the amount claimed, with costs.

On the application of Mr. Roux, the plaintiff was declared a necessary witness.

VOSPER V. OSBURN BROS. { 1906.  
July 6th.

Bond—General clause.

*V. sold to O. Bros. a certain property, and as security for the purchase price accepted a "first mortgage bond upon the said property."*

*Held, that such bond was not to be construed as including the general clause.*

*Semle: had the parties merely agreed that a bond should be passed to secure the purchase price without specifying the property to be bonded, the vendor might have insisted upon the insertion of the general clause in accordance with the usual custom.*

This was an action brought by Walter Charles Vosper, retired tradesman, of Wynberg, against William Edwin Percival Osburn and Alfred George Howard Osburn, trading as Osburn Brothers, and carrying on business as brokers and commission agents at Wynberg.

Plaintiff, in his declaration, said that in or about July, 1904, he sold certain property at Wynberg, of which he was the registered proprietor, to one Jamlie Abrahams. Thereafter, on February 5, 1906, and at Wynberg, aforesaid, plaintiff and defendants entered into a certain agreement, to which the said Abrahams consented. This agreement provided, *inter alia*, that the sale to Abrahams should be cancelled, that the defendants should purchase the property for the sum of £1,000, that they should *simul ac semel* with transfer pass a first mortgage bond upon the said property for the whole of the purchase price, in favour of the plaintiff, who undertook not to call up the same within five years, interest was to be paid at the rate of 6 per cent. per annum, and defendants were to pay £50 per annum off the purchase price and Abrahams was to be released from the sale. Plaintiff went on to say that, by reason of the premises, he was entitled to claim as against transfer in due form of law of the said property to the defendants that the defendants pass a first mortgage bond as aforesaid, according to law, containing the usual and

customary clauses, and more particularly certain clauses known as the insurance and general clauses, as well as the special provisions hereinbefore set forth. The plaintiff claimed an order declaring that he is entitled to have a mortgage bond passed in his favour by defendants as set forth, an order compelling defendants to duly execute and register against transfer a first mortgage bond in terms of annexure, or, in the alternative, cancellation of the sale and payment of £400 as damages.

Defendant, in his plea, said that the bond referred to in the agreement was clearly understood by both parties as being for the hypothecation of the aforesaid property only, and that the insertion of the clause known as the general clause was not contemplated by the parties. A power of attorney to pass a bond containing the general clause was tendered to them for execution on or about the 12th February, 1906, at the offices of Friedlander and Du Toit, attorneys, and they at once refused to execute the same, and plaintiff thereupon agreed to have a new bond drawn up from which the general clause should be omitted. This agreement plaintiff had failed to carry out. Defendants had tendered, and hereby again tendered, to execute such bond, with the general clause omitted, and, subject to the tender, they prayed that the plaintiff's claim be dismissed with costs.

Mr. Upington (with him Mr. Bisset) for plaintiff. Dr. Greer for defendants.

Walter Charles Vosper (the plaintiff) said that he left the transaction practically in the hands of Mr. McLachlan Thomas, accountant. When he went to Friedlander and Du Toit's office, no mention was made to him of the general clause, though something was said to Mr. Thomas, as witness was leaving. The property, which was situate in Wolf-street, Wynberg, had depreciated in value, and would now be worth from £750 to £800. He cancelled the sale to Abrahams because he had some difficulty about getting his interest.

Cross-examined: When the agreement was entered into the general clause was not discussed. Witness did not even now know what the general clause was.

[Maasdorp, J.: You are quarrelling about something you don't understand. You want the sale to go through, you say, and you insist upon something the nature of which you do not know.]

Cross-examination continued: All that witness wanted was a bond the same as anybody else would get. He did not think anything at that time about any security beyond the property itself. At the attorney's offices he did not consent to the omission of the general clause from the bond.

E. W. McLachlan Thomas, incorporated accountant, Cape Town said that

he assisted plaintiff to put through the sale to Abrahams. The conditions of the sale were not carried out by Abrahams, and the property was subsequently taken over by Osburn Bros. Afterwards, he was seen by plaintiff in reference to the general clause, and witness went over with him to Friedlander, and Du Toit's office. Witness discussed the question of the general clause with Mr. Du Toit, who said that Osburn Bros. wanted the general clause left out. After discussion Mr. Du Toit said that he did not think there would be any difficulty. Witness had had considerable experience of these matters, and he had never seen any bond specially hypothecating the property, which did not contain the general clause.

Charles Adams, a partner in the firm of Stamper and Zoutendyk, auctioneers and appraisers, said he considered the value of the property to-day was £750. The property consisted of two semi-detached cottages and a small cottage.

Andries F. du Toit, attorney, formerly of the firm of Friedlander and Du Toit, and Wm. Molteno Bisset, of Tredgold, McIntyre, and Bisset, attorneys, also gave evidence. Mr. Bisset said that the general clause was always inserted in a mortgage unless a very special agreement was entered into.

Mr. Upington closed his case.

Alfred George Howard Osburn (one of the defendants) said that he went to Friedlander and Du Toit's office. Witness told Vosper that the bond must be without the general clause. Vosper said that he was agreeable. Mr. Du Toit called attention to the fact that this was unusual, and Vosper again said that he was agreeable to the omission of the general clause.

Cross-examined: They were particular about having the general clause excluded, because at that time his brother had property, and witness had none. He agreed that the value of the property to-day was about £750.

Mr. Edward Percival Osburn (the other defendant) said that when they went to Friedlander and Du Toit's office witness said that he did not want to sign a bond containing the general clause, and that it had been agreed to omit it. Mr. Du Toit came in and remarked that it was unusual, and he asked Vosper if he was agreeable. Vosper said that he was.

Cross-examined: It was agreed in their (defendant's) office at Wynberg that the general clause should be omitted.

Benjamin Straubus, articled clerk in Mr. Du Toit's employ, also spoke to the interview at Friedlander and Du Toit's office. Some discussion took place as to passing a bond without the general clause, and witness was sent out for a power of attorney. Witness obtained a power of attorney without the insurance clause, but not with-

out the general clause. He heard Mr. Du Toit afterwards speak to Mr. Vosper about the bond, but he did not hear anything said about the general clause. From what he saw, however, Mr. Vosper was agreeable to sign the bond without the general clause.

Dr. Greer closed his case.

Counsel having been heard in argument,

Maasdorp, J.: In this case the terms of the agreement between the parties have, unfortunately, been reduced to writing, and the Court has only now, in order to ascertain the rights of the parties, to construe the terms of this agreement. The clause which the Court is called upon to construe is number 3 of the agreement, in which it appears that the parties had agreed that "the purchase price remain on the bond of the above property" for the term of five years. Now, under ordinary circumstances, where the terms are unambiguous, the Court will take the ordinary and natural meaning of the words as expressing the intention of the parties. It seems to me that when the parties agreed that the purchase price should "remain a bond on the above property" they meant that a mortgage bond should be passed on the above property for the security of the purchase price, and they did not mean that a mortgage bond should be passed on such property, and also generally on such other property as the purchasers might be possessed of. That would be the plain construction of this clause. The plaintiff contends, however, that this clause must be read by the right usage in the execution of mortgage bonds, when parties have agreed to pass a mortgage bond for the security of the purchase price. Now, it seems to me that there may be cases when a wider construction may be put upon the words themselves—for instance, if the parties agreed generally that a bond should be passed for securing the purchase price, without specially mentioning the property which is to be bound in the bond then I could quite understand that the Court might take it that the parties intend that the bond should be drawn in the usual form, or the words may be that the usual bond should be passed. Now, it seems to me that the case which has been cited—*Smith v. Randall's Trustees* (2. Menzies, 385)—may be distinguished from the present case. There it appears that a power of attorney had actually been executed, in terms of which the bond had been drawn up, and the whole inquiry that the Court directed its mind to at that time was what was the usual construction to be put upon such power of attorney, and it was ascertained that when such powers of attorney were exhibited at the Deeds Office, a bond was allowed to be drawn under such power of attorney, including the general clause.

Now, in this case the parties have not proceeded so far as to execute the necessary power for drawing up this bond, and consequently this case does not apply. The conclusion I therefore come to is that that case ought not to be applied to the present one, and that the words of the third clause of this agreement ought to be strictly construed, and they amount to an agreement that the bond should be passed upon the property and nothing more. An attempt was made on the part of the defence to introduce evidence to prove on the other hand that there was an agreement that the general clause should be excluded. Now, it appears from the authorities which have been given that such an express agreement might be a very important clause in a contract of this kind, and that consequently, if it had been part of the contract of the parties, it should have been in the written agreement, and cannot now be introduced by parole testimony. I am glad to say that the construction that I have arrived at works no injustice to the plaintiff at all. The plaintiff himself never intended that any general clause should be introduced. I again say I do not construe this contract by the light of the parole evidence. The plaintiff was not aware of the nature of a general clause. He does not now know what a general clause means, and I am satisfied that he at the time was agreeable to the bond being passed upon the property itself, and nothing more, and that he had in contemplation nothing more. It was only when his legal advisers came upon the scene and advised him that he was taking a very great risk that he insisted upon introducing the general clause into the agreement. Judgment must be given for the defendants, with costs.

Mr. Upington: Your lordship finds there was a definite agreement?

[Maasdorp, J.: I am satisfied that when the parties met at the offices of Mr. Du Toit the matter was explained to the plaintiff, and the plaintiff was perfectly satisfied to take the property alone, and I think Mr. Du Toit acted very properly when he thought plaintiff might have made a mistake in advising him before he went any further to see his own legal adviser.]

NATIONAL BANK V. PEEL. { 1906.  
May 2nd.  
" 3rd.  
June 29th.  
July 6th.

Surety—Pledge of cargo—Freight and landing charges — *Res inter alios acta.*

*W. & Co. had applied to defendant for accommodation, and P. bound himself to plain-*

tiffs as W.'s surety in solidum and co-principal debtor for £10,000. This transaction was in respect of a certain cargo of timber of which W. & Co. wished to obtain delivery and which they had pledged to defendant as security. On the arrival of the cargo, W. & Co. could neither meet the bill which had been drawn upon them for the same nor pay the freight. The bills of lading, &c., had been handed over to plaintiffs, who claimed the right to sell the cargo for the benefit of all concerned, and the creditors of W. & Co. acquiesced. Thereafter the firm of W. & Co. was sequestered, and the trustee abandoned the cargo to plaintiffs, who sold it. Defendant alleged that, owing to plaintiffs' negligence, the cargo had become depreciated in value, and he now claimed compensation for this depreciation in the value of his security and claimed that, on paying the £10,000, he was entitled to receive the full value of the cargo apart from freight and charges which he contended the plaintiffs ought to pay in virtue of his agreement with W. & Co., and that their payment of freight, &c., was really a loan made by plaintiffs to W. & Co.

Held, that as no agreement between defendant and W. & Co. could bind plaintiffs, and as the evidence showed that plaintiffs had acted in the best interests of the creditors, and did not show that the payment of freight, &c., was in the nature of a loan to W. & Co., judgment must be given for plaintiffs as prayed, with costs.

This was an action brought by the National Bank of South Africa, Ltd., against Thomas Peel, of East London, to recover a sum of £6,601 18s. 5d., with interest *a tempore moræ*, alleged to be due from defendant as surety and joint principal debtor for Whitworth and Co., timber merchants.

Plaintiff's declaration was as follows:

1. The plaintiff is the National Bank

of South Africa, Limited, and carries on business at various places in this colony, including East London.

2. The defendant is Thomas Peel, who resides at East London.

3. On the 1st December, 1903, a certain firm, styled Whitworth and Co., carrying on business at East London, obtained there from the plaintiff a letter of credit in favour of Enhornung and Co., of Sundsvall, Sweden, authorising them to draw on the London office of the plaintiff to the extent of £10,000, for the purchase of timber, on account of Whitworth and Co., to be shipped to East London.

4. The said letter of credit was granted for the consideration set forth in an agreement, embodied in a letter dated the 1st December, 1903, whereof a true copy is annexed, and marked "A," which the plaintiff prays may be read as though here inserted. The said agreement was entered into between the plaintiff, on the one hand, and the said firm of Whitworth and Co. and the defendant on the other, and the defendant specially bound himself as surety in solidum and joint principal debtor to the plaintiff for the due fulfilment of the said agreement.

5. In accordance with the letter of credit, the London office of the plaintiff made advances of money amounting to £9,978 17s. 8d., for which amount, in accordance with the said agreement, the plaintiff drew a bill on Whitworth and Co., which was accepted, but thereafter dishonoured by that firm at the due date, of which dishonour the defendant had notice.

6. Meanwhile, the said firm of Whitworth and Co. and the defendant had failed, and neglected to pay or make provision as contemplated by the said agreement, for the payment of freight, demurrage, landing charges, duty, and insurance in respect of the cargo of timber purchased for their account, and paid for out of the moneys advanced as aforesaid, and shipped to East London in the Atbara, and the plaintiff, for and on account of Whitworth and Co. and the defendant, advanced and paid the freight, demurrage, landing charges, duty, and insurance in respect of the said cargo, and caused the same to be landed at East London, pursuant to the bills of lading and other documents, whereof the plaintiff was the legal holder, and received same for the account and risk of Whitworth and Co. and the defendant, and from time to time sold portions of the said cargo for cash, and finally disposed of the balance of the cargo by public auction, after full advertisement of all which the defendant had notice.

7. When called upon to pay the amount of the dishonoured bill aforesaid, to wit, £9,978 17s. 8d., the defendant wrongfully and unlawfully refused to pay the said sum unless the plaintiff would, in



exchange, hand to him documents enabling him to take delivery of the said cargo, and wrongfully and unlawfully failed and refused to pay the other sums advanced and paid by the plaintiff as aforesaid, including also amounts paid by the plaintiff, by way of expenses in connection with the realisation of the said cargo of timber.

8. In terms of the said agreement, the plaintiff became and is entitled to a commission of 2½ per cent. on the gross proceeds of the timber sold, as aforesaid.

9. The plaintiff annexes hereunto an account marked "B." showing in detail the amounts received and expended in respect of the matters aforesaid, the amount of interest due to the 16th December, 1905, in respect of the aforesaid dishonoured bill and the sums expended for freight, demurrage, landing, duty, and insurance, and the amount of commission due to the plaintiff as set forth in paragraph 8, and the defendant is at foot of the said account indebted to the plaintiff in the sum of £6,601 18s. 5d., together with interest *a tempore morae*.

10. All things have happened, all conditions have been performed, and all times have elapsed and passed necessary to entitle the plaintiff to demand payment of the said sum of £6,601 18s. 5d., with interest, as aforesaid; but the defendant wrongfully and unlawfully refuses to pay the said sum or any part thereof.

Wherefore the plaintiff prays for judgment for £6,601 18s. 5d. sterling, together with interest thereon *a tempore morae*, or for such other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

To the declaration the defendant pleaded as follows:

1. The defendant admits paragraphs 1, 2, 3, and 4 of the declaration, but refers this honourable Court to the terms of the agreement itself in question for greater certainty.

2. He says, in further reference to paragraph 4, that his said suretyship was only given on condition that the bills of lading, insurance policies, and other shipping documents in respect of the said timber, should be endorsed by the said firm of Whitworth and Co., and delivered to the plaintiff to be held by the latter for itself and the defendant until the whole of the said amount of £10,000 had been paid by Whitworth and Co., together with interest and charges. That Whitworth and Co. were to pay all freight, landing and other charges on the said cargo themselves, that the said cargo should remain in bond at East London in the name of the plaintiff, and that no part thereof should be released except upon the written order of the plaintiff, countersigned by the defendant, and that the amounts for which any of the goods should be sold through the said Whitworth and Co.

were to be placed to the credit of the said guaranteed liability of £10,000 in the plaintiff bank until the whole of the said amount had been paid. The above conditions were embodied in a written undertaking, dated the 1st of December, 1903, given by the said Whitworth and Co. to the defendant, with the full knowledge and consent of the plaintiff, who agreed to the terms thereof, it being clearly understood between the parties that all the cargo on board the said ship Atbara was to be made over to the defendant in security of his guarantee, and that, when £10,000 worth of timber had been sold, the defendant was to be freed from all further responsibility in the matter.

3. The defendant has no knowledge of the allegations in paragraph 5 of the declaration, save that he admits on the 7th day of April, 1904, he received notice from the plaintiff that a draft for £9,978 17s. 8d. on the said Whitworth and Co., said to be due on that date, had been dishonoured by non-payment, calling upon him for payment of the said amount with expenses in terms of his guarantee.

4. As to paragraph 6 the defendant does not admit that the said firm of Whitworth and Co. had failed to pay or make provision for the payment of freight, demurrage, landing and other charges as alleged in respect of the said cargo, but he says that, even if they had so failed, there was no obligation cast upon him under his suretyship to make such provision. He denies that the payment or provision of payment by him for the freight and other said charges was contemplated by the said agreement, and he also denies that any payment or advances in respect of the said charges which may have been made by the plaintiff (as to which the defendant has no knowledge) were made on his account, or that he is in any way liable therefor.

5. That defendant admits that the plaintiff caused the said cargo to be landed at East London, but he says that the plaintiff's action in so doing was premature, unjustifiable, without authority, and in excess of its rights under the said agreement, inasmuch as, at the time of such landing, the said draft had not yet matured, and there had not been any failure on the part of Whitworth and Co. or of the defendant to fulfil the conditions of the said agreement. He also admits that the plaintiff was the holder of the bills of lading and other documents, but says that these were held by the plaintiff in trust for the defendant, as well as for himself, in terms of the said undertaking by the said Whitworth and Co. referred to in paragraph 2 hereof, to which the plaintiff was a party, as aforesaid.

6. The defendant admits that the plaintiff received the said cargo, and subsequently sold the same as alleged, but



he says that, save that he consented to the release of certain timber on March 9, 1904, all the said sales, except that by public auction which was the last, were made without any notification to him, and that in making the said sales the plaintiff acted unlawfully and in defiance of the defendant's rights. He admits notice, on or about the 12th of October, 1905, of the sale by auction, with which he declined to interfere on the ground that he no longer had any responsibility in the matter.

7. He admits paragraph 7 of the declaration, save that he denies that his action as therein set forth was wrongful or unlawful. Immediately upon notice of dishonour of the said draft, to wit on the 8th of April, 1904, the defendant duly tendered to pay the same and the noting charges against delivery to him of the necessary papers to enable him to receive the said cargo, which tender was wrongfully and unlawfully refused by the plaintiff on the ground that he had a lien upon the cargo for freight, demurrage, and other charges. The defendant says that the plaintiff had no right as against him to detain the said cargo, but that, upon his tendering the amount of the said draft as aforesaid, it was bound, in terms of the said agreement and undertaking, to deliver up to him the cargo or the documents necessary to enable him to receive it. The defendant thereafter, on or about the 22nd of April, 1904, withdrew his said guarantee, as he was entitled to do by reason of the plaintiff's refusal of his said tender, and he contends that thereupon he was released from all further liability in the matter.

8. The defendant denies paragraph 8, and says that the plaintiff, having sold the said timber wrongfully and unjustifiably as aforesaid, is not entitled to any commission in respect of such sale.

9. As to paragraph 9, he does not admit the correctness of the said account, and he denies that he is liable to the plaintiff in the sum claimed or any part thereof. Even if he were still liable for the amount of the said draft, the sum shown in the said account to have been received by the plaintiff, as the proceeds of the said cargo, is in any case in excess of his guarantee under the said agreement, and he denies any liability for interest or advances in respect of freight, demurrage, or other charges.

10. The defendant says further that, even if the plaintiff was entitled to sell the said timber, the same suffered depreciation in value owing to exposure to the weather and otherwise through the negligence, default, and want of proper care on the part of the plaintiff in stacking it, and moreover, owing to the unnecessary delay of the plaintiff in selling it, the cost of storage and other expenses were unduly increased, while

the actual proceeds of the timber were far below what would have been obtained by prompt sales. If the said cargo had been properly dealt with by the plaintiff, the proceeds would have more than covered the amount of the plaintiff's claim against the said Whitworth and Co. under the said agreement, and the plaintiff is therefore not entitled to recover from the defendant any deficiency which may have arisen thereon.

11. The defendant denies paragraph 10 of the declaration.

12. He further says specially that the estate of the said Whitworth and Co. was placed under sequestration as insolvent on or about the 10th February, 1905. That the plaintiff proved upon the said estate a claim for £12,066 10s. in respect of the liability of the said firm under the said agreement. That the plaintiff in an affidavit of proof of the said debt, made in terms of paragraph 30 of Ordinance 6 of 1843, stated that for the said claim it held certain cargo ex Atbara, valued at £12,500 (which is the cargo herein referred to), and also a guarantee of the defendant for £10,000, and that it valued the said security at the amount of the said claim. Thereafter the said security was, under the provisions of the said section, abandoned by the trustee of the said estate to the plaintiff for his full benefit, and the plaintiff accepted the same and sold the said cargo, which realised more than the amount of the said claim. The defendant says that even if he was, prior to the date of sequestration of the said firm, liable to the plaintiff in any sum by virtue of his said suretyship, the plaintiff, by proving upon the said estate as aforesaid, and accepting in settlement of its claim the said security at the valuation placed upon the same by itself, released the defendant from any further liability to its under the said agreement, and is not now entitled to recover the sum claimed, or any part thereof from him.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

Plaintiffs, in their replication, denied the statements in the plea, except in so far as they were admitted in the declaration, and specially denied that the bank acted unlawfully and unjustifiably or that they had released defendant by making proof on the estate of Whitworth and Co.

Mr. Schreiner, K.C. (with him Mr. Upington), for plaintiffs. Mr. Burton (with him Dr. Rainsford) for defendant.

Mr. Schreiner, in opening the case, mentioned that the shortfall seemed to have been occasioned by the glut in the market and the falling off of building and other trades requiring timber.

Mr. Burton said that the essential point in the case was that plaintiffs in their declaration said the contract never contemplated the payment of freight by

Whitworths and the guarantor. Defendant said that the only possible claim plaintiffs had against him was for £10,000, that the question of freight and other charges which might arise never was contemplated under the agreement and of the subsequent charges could not be made against him under the guarantee.

Mr. Schreiner proceeded to lead evidence.

Richard Henry Friend, manager of the National Bank, East London, said that in the first instance Mr. Whitworth went to Pretoria and arranged with the general manager of the bank about a letter of credit being given. On Mr. Whitworth's return negotiations took place, and the agreement of December 1, 1903, was entered into. The agreement was embodied in a printed form, and was identical with all such agreements used by the banks. The draft became due in April and was dishonoured. The ship arrived in January, 1904. Whitworth's were unable to pay the freight, and had already met their creditors, Mr. Tickler (one of the partners) being appointed to work out the firm's affairs. Witness wrote to Mr. Peel on February 2 and posted the letter.

Mr. Burton: We strenuously deny receiving this letter.

Witness (continuing) said that he had not brought the press copybook into which the letter was copied. Witness afterwards had an interview with Mr. Peel on the subject. In the letter in question witness said that they had to request payment of £10,000, amount of guarantee on behalf of E. Whitworth and Co. that the freight was due and they were advancing the freight. The same, they added, was being paid in order to save demurrage. Witness was acting throughout with headquarters, and the bank paid all the freight, landing charges, and incidental expenses. Peel knew the bank paid the freight, and he raised no protest. The position of Whitworth and Co. was notorious to everybody in East London at the time, and was known, of course, to Peel. They appointed Whitworth and Co. as agents for the bank to see to the landing of the cargo. Every possible care was taken as regarded the stacking of the timber. The utmost tender that defendant made to the bank was that he would meet the draft, and plaintiffs must hand over the cargo or give him credit for such portions as were being sold against payment of £9,978.

The general impression at that time was that there would not be a shortage on the realisation of the cargo. When Whitworth's went into insolvency the bank proved for £12,500. The whole of the cargo had not then been sold. The account showed that there was a balance to the bank of £6,601, through Whitworth and Co. failing to perform

their obligations under the agreement. Witness believed that the market was glutted with timber at the time. The Standard Bank also were holders of another cargo in the hands of Whitworth and Co., who were thus disposing of timber for two banking institutions at one time. Witness denied that he had ever given an assurance to Mr. Peel or his attorney (Mr. Wakefield) that the former's liability would be limited to £10,000, or that he would have no liability as to the freight and other charges.

Cross-examined: The National Bank had only been opened at East London about twelve months when this matter came on. He knew that Whitworths had previously approached the Standard Bank in respect of this shipment; but he did not know that Whitworths had previously approached the Standard Bank in respect of this shipment; and he did not know that the bank had refused to go into it. Witness had not met Peel prior to the end of November, 1903. Peel, when asked if he would be willing to be surety, said that he should, but witness remembered no conditions, except that Peel said he wanted to countersign orders for timber. Witness expected that the freight would be paid by Whitworths when the vessel reached East London.

Argument was heard as to the right of Mr. Burton to cross-examine witness on certain correspondence which had been disclosed by plaintiffs.

Cross-examination continued: Witness admitted having received a letter from the general manager in Pretoria, dated early in February, 1904, in which he asked them not only to get Peel to pay the bill, but also to meet the expenses for freight and other purposes. Witness applied to Peel to sign a further guarantee. He subsequently informed the head office that the guarantor declined, stating that it was £10,000 in all. Whitworths said they were to arrange for freight, irrespective of guarantor, and that they could not pay freight without the bank's assistance. Witness advised the head office that he considered the best plan was to advance the freight, and thus have a lien on the cargo. A further letter, dated February 8, 1904, from the head office to the East London branch was put to witness, in which the head office complained that Whitworths had misled them, and that it was never intended that the freight should be paid from that end.

Maasdorp, J., observed that these discussions in the correspondence between principals and their agents would not affect the legal question in the least.

Cross-examination continued: Mr. Whitworth was no longer in the country; he left soon after the shipment arrived. Witness sent a demand for £10,000, both to Whitworths and defend-

ant. The total liability to the bank was really £9,978 odd. The cargo was excellent when it arrived, and was said to be worth about £25,000. It was one of the finest cargoes of Baltic timber shipped to East London. Witness was told that proper precautions were taken as regarded the stacking of the timber. He understood that, when the timber came to be sold, thousands of pieces had to be sawn from the ends because they were rotten. When Whitworths became insolvent the bank proved against the estate for £12,066. They valued the balance of the cargo at that time unsold at £12,500; he did not remember having had a special valuation made.

Alexander Richards Watson, formerly employed by the Standard Bank at East London, said that in December, 1903, he joined Whitworth and Co., upon an advantageous offer from the firm. Witness was at present a trustee of Whitworth and Co. During the liquidation he left their employ in July, 1904; from that time he had a sort of retaining fee from the creditors. Soon after he joined Whitworths he found that Peel got from them a sum of £500. He regarded Tickle, Whitworth's manager, as a competent and practical man in the timber trade. When the ship arrived in East London the Atbara's captain was very much agitated about the inability of Whitworths to pay the freight. Witness considered that the stacking of the cargo was the best that could be done under the circumstances.

Henry Judson, inspector of the National Bank, and acting manager of the East London branch during Mr. Friend's absence on leave in April, stated that the plaintiff bank granted to Whitworth and Co. a letter of credit authorising a Swedish firm to draw upon the plaintiffs' London office up to £10,000 for the purchase of timber, to be shipped to East London for Whitworth and Co. Defendant became the surety on behalf of Whitworth and Co. Advances were made up to £9,978, and a cargo of timber was brought to East London in January, 1904, in the Atbara. The bank drew a bill on Whitworths, but at the due date this was dishonoured. When the ship arrived Whitworths could not pay the freight. Whitworths subsequently went into liquidation. The bank paid the freight, and other charges, had the cargo landed, stacked, and sold, and they said that, after the sales had been taken into account there was a shortfall of £6,601 17s. 8d., for which they said Peel was liable under his guarantee. Defendant pleaded that his liability was limited to £10,000, the amount of his guarantee, and that after £10,000 had been realised by the sale of the timber, he was released from further responsibility.

Mr. Schreiner closed his case.

Thomas Peel, defendant, stated that in September or October, 1903, he was approached by Whitworth, who asked him to go as guarantor for certain facilities from the bank. The bank was aware of the terms of the document, which they agreed to. Before he signed the guarantee to the bank he got the document from Whitworth.

Mr. Schreiner objected to this evidence, which he said went to vary the written document between the bank and Mr. Peel.

Maasdorp, J., said that very often subsidiary matter was allowed in order to arrive at the intention between the parties. Anything varying the contract would not be taken as evidence.

Witness (continuing) said he had Whitworth's contract signed before he signed the guarantee in the bank. In November, Friend agreed to the terms in Whitworth's document. Later in the same day Friend again called, and witness repeated the terms in the presence of Tickle and Whitworth, and they all agreed to them. Subsequently, witness's attorney, Wakefield, suggested some modification as to the freight, and on a fourth occasion witness dictated the terms to Wakefield, who had them written out, and Friend again agreed. The same afternoon witness went to the bank, and signed the guarantee, after Friend assured them that the guarantee was according to the terms verbally agreed upon. When the ship arrived, Friend asked witness to pay the freight, and witness pointed out that he had nothing to do with the freights. Witness went across to see Whitworth, and Friend came in while they were discussing the matter. Tickle said to witness: "You are not to pay the freight; we will settle it." He did not receive a letter dated February 2 demanding £10,000. At that time he was in a position to pay, and would willingly have paid the money and taken over the cargo. Witness understood the freight had been paid. Previous to receiving the letter of demand the only communication he received was one in March, in which Friend asked him to countersign an order for the release of part of the cargo. A few days before the sale, the timber was covered for the first time; it was very much damaged by rain and sun.

Cross-examined by Mr. Schreiner: He did not take Whitworth's document to the bank, and say to the manager that the terms contained therein were those which he must agree to. The document was not read over to him when he signed, it was read over to him on the first meeting in the presence of Mr. Wakefield, who suggested that it should be modified. He was not sure that the document he signed was the same as the one which was read over to him. When he said that Whitworth should pay the freight, he did not know that the firm was not in a position to pay the freight.

Wm. Tickle, formerly a partner of the firm of Whitworth and Co., stated that he did not know the defendant before this guarantee transaction. Witness was present at the interview with Friend and the defendant when the terms of the contract between Whitworth and Peel were discussed. The bank was aware of the terms of the document.

Mr. Schreiner objected to this evidence on the ground that it was either irrelevant or tending to show a variation of the contract.

Mr. Burton and Mr. Schreiner having been heard in argument on the point,

Maasdorp, J.: I must admit that this question is not altogether without difficulty, and I also say that I do not now decide it upon certain general principles that have been raised in argument. It seems to me there is a special state of circumstances in this case upon which the Court can decide this point. There is now before the Court in a written form a letter written by Whitworth, in which he expresses his consent to enter into a certain agreement. There is nothing before the Court to show under what circumstances that undertaking was given. It is a bilateral contract, and the Court now only has before it the obligation on the one part which necessarily contains certain terms, which will be binding upon both, but it has already been found necessary in going into this case to lay before the Court the circumstances under which this undertaking was entered into by Whitworth; the arrangements that were made at the time for the purchase of certain goods, and how the matter was discussed as to the necessity for paying for these goods and the necessity the defendant was under to obtain the consent of the bank. That was in the shape of a conversation, and upon this conversation this undertaking was signed on the part of Whitworth. It seems to me quite admissible in this case to take evidence as to what was said or written on the part of the bank at the time when this agreement was entered into. We have it, as it were, one letter in correspondence, or one letter in negotiations, and I think the preceding negotiations are admissible in evidence. There is nothing as yet to show that the evidence will have the effect of varying the contract. The question is: How do you know the bank had knowledge of this document? There is nothing to show that the answer will vary the contract, and the Court will lay down this rule, that the evidence is admissible, but not for the purpose of varying the contract.

Witness (proceeding) gave it as his reason that the bank had knowledge of the terms of the document, that Friend was present at the defendant's office when the matter was generally

discussed. The defendant emphatically laid down the conditions under which he would become guarantor. When the defendant mentioned the freight, witness told him that he (defendant) had not to pay for it. Witness proceeded to describe the arrangements made for stacking the timber in the grounds of the Agricultural Society, and the exposure to which it was subjected. The ceiling and floorboards were kept in the yard about 20 months, and should have been covered over. The Repton cargo filled the sheds. Witness considered the Atbara cargo at the wharf to have been worth about £18,000. The erection of a shed to cover the flooring and ceiling boards would have cost about £400 or £500, and the shed could afterwards have been sold for about £200 when it was not required. Many of the boards were discoloured green or black, and portions were rendered unsuitable, and pieces had to be sawn off the ends. He had made calculations with Mr. Gladwin as to the boards sold by auction, and they arrived at the conclusion that 44,000 boards for which 11s. was the market price only realised 3d. He thought the Repton cargo was rather larger than the Atbara's, and would be worth about £20,000. Witness sold as liquidator. He acted at first on behalf of Peel, as he understood; he afterwards acted as liquidator on behalf of the bank, beginning from the 24th February, 1904, about a month after the ship had arrived. He was appointed to be liquidator at a meeting of Whitworth's creditors on 24th February, and to dispose of the cargoes on behalf of the banks.

By the Court: Witness dealt with the cargo as best he could under the circumstances. He was not aware that other stores were available where the timber could have been placed. He had told Mr. Friend that he computed the value of the cargo from £23,000 to £25,000; that was what he regarded as the selling value before the slump came. Peel knew that the cargo was in his (witness's) hands, and at no time did he raise any protest about the sales or the stacking of the timber. Witness was the practical man of Whitworth and Co., and Whitworth was the financial and office man. Whitworth was to find the money, and he led them to believe that he could get money from a private source. That money did not materialise and when the ship arrived Whitworth's had no money to pay the freight. Peel said he was owner of the cargo, and used to call at Whitworth's office. Whitworth's, as far as witness remembered, did not broach the subject of freight to Peel. Witness subsequently told Peel that they had paid the freight; as a matter of fact the bank had paid the freight. Witness had not heard Peel say that he would rather have the ship rot than pay the freight. The agree-



ment between Whitworth's and defendant provided that, in consideration of Peel giving his guarantee, he was to receive £500.

Samuel Thomas Wakefield, of East London, defendant's attorney, said that Mr. Friend, manager of the plaintiff bank, had no knowledge of the consideration of £500 to be paid to Peel by Whitworth's. Witness detailed an interview which took place at the National Bank on the 1st December, 1903, in the presence of Mr. Friend, Mr. Whitworth, defendant, and himself. Witness at the interview raised the question of freight, whereupon Whitworth said that they would pay the freight in East London, and that Peel would only guarantee the letter of credit. Witness then said that the printed form of agreement which Peel was asked to sign would have to be modified, whereupon Mr. Friend said that he did not think the General Manager would allow any alteration of the printed form, that they all knew what the agreement was, and, at any rate, there were three of them against himself. In subsequent conversation Peel said that everything on board was to be his in security for his guarantee. Witness afterwards drew up the statement between Whitworths and Peel.

Mr. Uppington: Did you tell Mr. Friend in November that Peel was good for £15,000?

Witness: I am secretary of the Divisional Council, and I have a good many applications. I may, or may not, have done so. I have no recollection of it.

The effect of your evidence is that Mr. Friend, as manager of the bank, agreed to that document between Peel and Whitworth as a binding agreement?—As far as I am able I am giving exactly what occurred, and I say what I understood was, that the conditions had been agreed to.

You knew if it was intended to make the bank a party to that agreement, no portion of it was in the document that was signed at the bank by your client — No, I don't suppose there was any portion of it in.

Now, if it had been intended that the bank was to be a party to that agreement, Mr. Wakefield, a legal gentleman of your experience would have seen that these terms were embodied in the principal agreement?—Yes; but they would not allow us to alter it. I don't say that the bank intended to make themselves a party to the agreement at all. I say this document embodies practically what was said at the interview.

Thomas George Gladwin, formerly employed by Whitworth and Co., gave evidence as to the state of things where the timber was stored from the time he was engaged as storeman in February, 1905.

Leonard K. Walker, architect, East London, said that he had never, during all his experience, known floor and ceiling boards stacked in the open as in February, 1905, he saw the Atbara's cargo stacked. A shed could have been put over the timber at a cost of about £500.

Mr. Burton closed his case.

*Postea* (June 29th).

Mr. Schreiner (for plaintiff): Peel refused even to pay the freight. He admits that a verbal demand was made for the payment of the bill, but he denies that he received our letter; we can prove delivery of the letter. The bank was left without aid from either the obligors or the obligees and was forced to spend thousands to protect the interests of all concerned. Whitworth and Co. owed the bank over £6,600. The bank had to pay freight and charges on the Atbara shipment as the obligors would not. If Peel had paid his £9,000 the bank would have been glad to hand over the bills of lading and to have had nothing further to do with the matter. The bank was willing to let Whitworth and Co. have the documents to clear the goods and realise, but they could not do so, and Clause 5 authorises the bank to clear and realise should Whitworth and Co. fail to do so. The bank had the right to receive the goods and sell by public auction, but this involved paying landing charges, etc., to get possession of the goods. The Atbara account was kept distinct from the current account of Whitworth and Co. This Atbara account is shown to amount to £6,601.

[Maasdorp, J.: The contention is that you lent the money to Whitworth and Co. to realise the goods.]

We lent nothing; it was not likely that we should practically make Whitworth and Co. a present of £6,601. Whitworth's current account was £12,000. Under Clause 3 the bank was entitled to compel Peel to pay £9,900. Peel's evidence was self contradictory. At one time he said he would rather have let the ship rot than pay a single penny; at another time he said he would have paid the freight if asked. He wanted to get the cargo on paying simply the freight without the other charges which the bank had advanced. Whitworth and Co. indemnified both the bank and Peel against all risk. Peel signed as co-principal debtor. As to co-principal debtors, see *Van der Vyver v. De Wyld and Others* (4 Searle, 27). There Watermeyer, J., discussed the history of the law on this point from *Cod.* (8-41-3) and *Voet* (46-1-16), where *Voet* discusses the force of the clause *singuli in solidum* and holds that it does not involve renunciation of the *beneficium divisionis*. Watermeyer, J., also cited *Cens. Foren.* (4-17-23) and *Van der Kessel* (Thes., 503). Peel is not a mere surety but a



co-principal debtor with Whitworth. Whitworth could not fulfil his obligation, and so Peel in law became liable. We have nothing to do with any understanding between Whitworth and Peel; we take our stand on the agreement between Peel and ourselves. In his evidence Peel says that if he had been asked to pay up the £10,000 as guarantor he would have been glad to have done so, but we asked him to do so in our letter of February 2nd. The bank paid the freight to save demurrage. He admits that he was asked to pay the freight. He knew that a meeting of Whitworth's creditors had been called and yet he then says that he did not know that Whitworth and Co. could not pay the freight. Peel might reasonably have complained had we not released the goods, and thus left him without security. On April 9th he got notice of the dishonour of a bill for £9,978, and to have the proceeds of part of the cargo which had been already sold and apparently he expected us to lie out of the landing charges, insurance, etc., etc. On April 22nd, 1904, he withdrew his guarantee to the bank, and yet long after this he was taking the greatest interest in the condition of the cargo. In February, 1905, the firm of Whitworth and Co., which had for some time been carried on by Tickell for the benefit of the creditors, was voluntarily sequestrated, Tickell signing the petition. We valued the cargo at £12,066 and abandoned it; but it does not follow that the cargo realised £12,500, or that it was worth that sum, or that by abandoning the cargo we received payment of the £12,066 owing to us. We gave full notice of the sale of the balance of the timber although we were not legally bound to do so. We had not given notice of previous sales because they were cash sales. Every allegation in the declaration has been proved, and now the defence is set up that the plaintiff agreed that Whitworth should hand over all bills of lading to Peel. Any arrangement between Whitworth and Peel is *res inter alios acta* and does not concern us. The Court ruled that this agreement could not be brought in to vary our contract with Peel.

[Counsel dealt at length with the evidence of Tickell, Friend and Wakefield.]

[Maasdorp, J.: Peel could never be liable for more than £10,000 as he would always have the security of the cargo to fall back upon. Now he is asked for only £6,000.]

Of course there was a limit to his guarantee, but then he had to pay the insurance, landing charges, etc. The first charges on the proceeds of the cargo are the moneys advanced by the banks to enable the creditors to get the cargo. The contract of a surety must be continued *strictissimi juris* i.e., must always be construed in favour of the surety (*Colonial Government v. Edenborough* (4 Juta 290) where see judgment of De Vil-

liers, C.J. Turn to Burge, Collier or any other authority on suretyship and we shall not find any ground on which the defendant could be excused from liability as a surety. See *MacDonald v. Bell* (3 M.P.C., 315). That case was decided under our law, but see *Black v. Ottoman Bank* (15 M.P.C., 472), *Oudtshoorn Public School v. White* (10 S.C.R., 213.) *Rudd, Milton and Co. v. Dolley and Co.* (3 E.D.C., 351). Even where a creditor holds a second claim against the same security, a co-guarantor who has only one claim cannot come upon the surety unless he meets both claims. Burge on Suretyship (349). Codex (8-41-2) and Donellus (cited by Burge). As to English law, De Colyar on Guarantees (p 257 Edition of 1874. *Williams v. Owen* (13 Sim. 597) *Fairbrother v. Woodhouse* (23 Beav. 18).

Mr. Burton (for defendant). The first point is what was the actual nature of the contract on which the defendant is sued. By the document put in the defendant became liable up to £10,000 as and for the price of a certain cargo. The plaintiff contends that the defendant is liable for all charges and says that he became liable up to £10,000 as and for the price of the cargo. Plaintiff contends that defendant is liable for all charges, but he only became liable for the draft up to £10,000. There is nothing in the document put in as to freight, landing charges, etc. In paragraph six of the declaration plaintiff alleges that the letter of credit contemplates the liability of Peel for freights, etc. I admit that any agreement between Whitworth and Peel cannot vary the written contract. The plea clearly sets forth the defendant's position. He does not say that the undertaking of December 1st sets forth the conditions between the parties, but that the conditions of which all the parties were aware had been incorporated in that document. See *Patile v. Hornbrook* (1896 1 chapter D. 25). The guarantee being silent as to freight, demurrage, etc., none of the parties deemed that these matters entered into the agreement. See evidence of Peel and Tickell.

Although any arrangement between Peel and Whitworth could have nothing to do with the bank, an understanding of which all parties concerned were cognisant, would have been binding. See the evidence of Friend and Wakefield. The East London branch of the bank had only been recently opened, and Friend was naturally anxious to get this business. He sought out Peel, and neither he nor Peel had any doubt as to Whitworth's financial position. All the parties expected him to pay freight on the arrival of the ship. I admit, that if Whitworth failed to fulfil the conditions of his undertaking, the bank was entitled to take the cargo, to land and sell it. Friend did not

deny that he said that the three of them were at the bank, and that they all understood the arrangement. The parties all understood that freight, etc., were outside Peel's guarantee. The bank could have called upon Peel to pay the draft as soon as the ship arrived. He would have been willing to do this, and then would have been free from any further liability.

Friend says that he did write a demand, but the ship arrived on January 22, and he certainly did not write till the 2nd of February. The letter said to have been written then, of which a copy is said to have been made by one of his clerks, and which we deny having received demanded payment of a draft of £10,000. He admits that this letter was a mistake. He said nothing about having made a demand on Whitworth, though he had done so on the same day. He received no reply from Peel, and Peel denies having received the letter. Friend was certain that he had posted the letter; he sometimes sent letters by hand, and these sometimes went astray. I say that no demand was made till April. Friend did not demand payment of a draft, but a sum of £10,000, which was not due. See his letter of February 2 to the bank at Pretoria and the reply. These show that Peel was only liable for his guarantee on the Bill. The letter from Pretoria, of February 8, confirms the letter of February 3, and shows that the bank was disappointed by Whitworth failing to pay the freight. They did not expect Peel to do so. In March the bank wanted Peel to sign a further guarantee form, but he refused. No demand was made upon him for the draft. When he was asked to pay the freight he refused, and saw Whitworth, who agreed that he (Whitworth) had to pay freight. Mr. Friend was present, and Peel went away and left him and Whitworth together. The bank had no right to seize the cargo, for up to February 2 there had been no failure of any condition, and we say that there was no failure afterwards. The bank is in the position of an unauthorised dealer with the cargo and is responsible for any shortage which may arise from its negligence. What the bank has realised on the cargo should go to the reduction of Whitworth's debt. Instead of that they set it off against all expenses incurred, plus the price of the cargo, and then claim £12,000 from Whitworth's trustee. The cargo has been abandoned, and they have realised 10s. in the pound. I submit that defendant is entitled to deduct one half of the amount claimed, viz., £6,000. See *Gie v. Pack* (33 L.J. 49). *Hobson v. Bass* (6 Ch. Ap., 792).

*Postea* (July 6th).

Maasdorp, J.: In December, 1903, the firm of Whitworth and Co., carry-

ing on business at East London, having purchased a quantity of timber in Sweden, found themselves in need of financial assistance to enable them to obtain delivery on board ship from the sellers. The plaintiffs agreed to accommodate them with a letter of credit upon their London office, upon the terms contained in a written acknowledgment signed by E. Whitworth and Co., to which the defendant became a party, in the following terms: "I, Thomas Peel, hereby bind myself as surety *in solidum* and joint principal debtor to the said The National Bank of South Africa, Limited, for the due fulfilment of the foregoing agreement in respect of this letter of credit, No. 3-1, for £10,000." In terms of their undertaking, the National Bank issued a letter of credit in favour of Messrs. Enhornung and Co., of Sundsvall, Sweden, authorising them to draw on their London office to the extent of £10,000 for the purchase of the timber on account of Whitworth and Co., to be shipped from Sundsvall to East London. The timber was duly shipped, and Enhornung and Co., on the 7th of December, 1903, drew upon Messrs. E. Whitworth and Co., for £9,978 17s. 8d., the price of the timber, payable to their own order. This bill of exchange, which was payable 90 days after sight, was endorsed by Enhornung on the 11th of December, in favour of the National Bank, or order without recourse. In January, 1904, their bill was accepted by E. Whitworth and Co., payable at the National Bank, East London. On the 22nd of January the ship Atbara arrived at East London with the timber on board. Thereupon the plaintiffs, who were the holders of the bill of lading and other shipping documents, communicated with Whitworth and Co., in order to obtain a settlement of their indebtedness upon their undertaking of the 1st of December. The bill of exchange was not due until the 7th of April, but Whitworth and Co. had undertaken to pay the amount at the latest on such date as to enable the bank to place the money in the hands of their London office on the day the acceptances would fall. The vessel might arrive at East London. Upon the arrival of the ship, therefore, the amount of the draft became payable to the plaintiffs. It then appeared that Whitworth and Co. had got into such financial difficulties that they could pay neither the bill nor the freight due on the timber. Under the agreement it was contemplated that the plaintiffs might elect to hand the shipping documents to the firm, to enable them to clear and realise the timber upon their undertaking to account to the bank, and to hold the documents on its behalf. Under the circumstances, however, this clause was

not acted upon. The firm was wholly unable to fulfil their engagements, and the 5th clause of the agreement came into operation. It is quite clear, from the evidence, that the defendant was informed of the state of affairs, and that there was a difficulty about the payment of freight. He says himself that when the manager of the bank asked him, upon the arrival of the ship, what was to be done about the payment of freight, he told the manager that it was Whitworth's affair, and he would rather let the ship rot than pay the freight. This must be taken as an absolute refusal on defendant's part to have anything to do with the payment of freight, and the plaintiffs were left to do the best they could under the agreement. Peel said in evidence that Whitworth assured him that the firm would settle for the freight. But nothing was done by the plaintiffs to lead him to believe that the firm ever did so. The defendant was aware, as he says himself, that when Friend spoke to him about the freight, the ship was commencing to incur damage, and he says: "If I had received a letter on that date that Whitworth was not able to pay the freight, I would have paid it and taken delivery of the cargo." He seemed to forget that there was something more to do than pay the freight and take the cargo, and that was to pay the amount of the bill. However, nothing was done by the plaintiffs after the arrival of the ship to forfeit any rights they had under the agreement against the defendant. Upon the failure of Whitworth and Co. to pay the freight, the plaintiffs, who, amongst other rights, had a lien or right of detention against the cargo, as a security for their debt, found that the goods would become liable to demurrage unless they were speedily landed. They therefore took the necessary steps to pay the freight and land the timber. Now, it occurs to me that, without express provision in the contract in that respect, the bank was entitled, as the holders of the bills of lading, to safeguard their rights by retaining the goods until the purchase price was paid. Or, to look at the matter from another point of view, they had a right of retention by way of security, until the principal debt was paid. To preserve the security, and to prevent its being reduced by the liability for demurrage, they were entitled to pay the freight, without which they could not have obtained possession. But in the absence of any express condition in the agreement, they would have been obliged to take judgment against the debtor, and deal with the goods thereafter in execution for the satisfaction of the judgment. However, the contract expressly provided that, failing the fulfilment by Whitworth and Co. of any of the foregoing conditions, the bank should be at li-

berty to land the timber and sell it by public auction or otherwise, and to take a commission of 2½ per cent. on the gross proceeds over and above the aforesaid commission and exchange shortly after the ship arrived. Whitworth and Co. went into liquidation, and the creditors consented that the bank should deal with the goods under the above clause. The bank appointed Tickler, one of the partners in the firm of Whitworth and Co., to act for them in the safe custody and disposal of the timber. After that the estate of Whitworth and Co. was sequestrated as insolvent, and the trustee abandoned to the bank the security they held, at the value placed upon it by the creditor. The timber was realised, with the ultimate result is shown in the plaintiffs' account. The defendant is perfectly right in his contention that he should be allowed the benefit of the securities held by the bank upon his satisfying the debt of his principal. The bank has allowed him the full benefit they themselves derived from the security, but the defendant contends that through the gross negligence of the bank the timber was so seriously damaged and reduced in value that he is entitled to relief in that respect. Without going into the legal question as to the responsibility of the creditor for the safe-keeping of the security, I may say that I am of opinion that the bank did all in their power to realise it to the best advantage, and that any damage that was suffered arose from unavoidable circumstances. Moreover, the defendant was well aware of what was being done, and he could have protected himself. I have dealt with the case thus far irrespective of what I may call the principal ground of defence set up by the defendant. The defendant alleges that by a collateral contract entered into at the same time as the agreement upon which the plaintiff sues he was held harmless of the payment of freight, and that while released from liability from freight he was entitled to the full benefit of the timber as security for the debt, and as the timber realised £14,043 5s. 10d., whereas the debt was £9,978 17s. 8d., the creditor was fully satisfied as far as he was concerned. When evidence was tendered with the object of proving this collateral contract, it was objected on behalf of the plaintiff that it was inadmissible as tending to vary the admitted agreement between the parties. It was argued for the defence that a contemporaneous agreement as to any collateral matter not dealt with in the contract would not be at variance, and was admissible. Without at the time deciding that point, I feel that upon the face of the document relied upon by the plaintiff it was merely a collateral undertaking signed by Whitworth, and as reciting the promise of the bank, but

it did not purport to be a complete and entire contract, putting forth all the terms agreed to by the bank, and that possibly such agreement by the bank might be contained in another document, or might be proved by parol evidence. Upon that ground I admitted the evidence. I do not now say that the defendant's counsel may not have been right in his contention that even if the contract was a complete and entire whole signed by all the contracting parties, that an understanding as to a collateral matter, such as freight, may not have been admissible, but in the view I take of the evidence admitted upon another ground, it is unnecessary to decide that point. And I am not sorry not to be called upon to decide a point as to the admissibility of extrinsic parole testimony to affect written instruments, which Taylor, in his work on evidence, section 1128, declares to be, perhaps, the most difficult branch of the law of evidence. The evidence put in was a document signed by Whitworth and Co., in which they agree to pay the defendant £500 in consideration of his becoming security, consenting that the bank and Peel should have the benefit of the timber as security for the debt, undertaking to pay the freight and landing charges, and indemnifying Peel in respect thereof. There is absolutely nothing contained in the document which adds anything to the obligation incumbent upon Whitworth and Co. under their agreement with the bank. But it is said for the defendant that the bank was informed of this undertaking, and consented to it, and by their consent they undertook to hold defendant harmless of the payment of freight. It was contended that, as a consequence, the bank was obliged to pay the freight, and allow the defendant the full benefit of the security free from freight and charges. The acquiescence of the bank in the undertaking by Whitworth in favour of Peel cannot possibly throw that responsibility on them. But it is not necessary to go into that, for I find upon the evidence that there is no proof that the bank was a party to this agreement. The manager denies that he became a party to it, and there is certainly no evidence on the part of the defendant to prove positively that the manager undertook to indemnify the defendant, and hold him harmless in respect of the freight. A further position is taken up by the defendant, and that is that the bank did not pay the freight by virtue of the terms of the contract, and to protect their security; but they made a loan on advance to Whitworth and Co. to enable them to pay the freight and expenses. If that were so, it might materially affect the right of the parties, but it is unnecessary to go into the law on that point, because the evidence does not establish the fact. I

am of opinion that the defendant is liable for the debt, and has received upon the account rendered by the plaintiff the full benefit of the security. No evidence has been led to dispute the correctness of the figures upon the plaintiffs' account, and judgment must be given as prayed, with costs.

[Plaintiff's Attorneys: Van Zyl and Buisinne. Defendant's Attorneys: Syfret, Godlonton and Low.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

SAAIMAN AND OTHERS v. { 1906.  
VAN DER MERWE AND { July 9th.  
OTHERS. { „ 12th.

Water Court—Jurisdiction—Appeal—Act 40 of 1899.

*A Water Court established under Act 40 of 1899 has jurisdiction to decide a question of damages alleged to have been sustained by a party to a dispute concerning the diversion of water from a stream alleged by him to be a public perennial stream, and if the Water Court decides that the stream is not perennial, there is an appeal to the Supreme Court under the 15th section of the Act.*

This was an appeal from a judgment of the Water Court of the district of Ladismith in an application brought by the appellants against the respondents to recover damages for alleged wrongful diversion of water, and an order for removal of certain obstructions. Mr. Searle, K.C. (with him Dr. Greer), was for appellants; Mr. Schreiner, K.C. (with him Mr. Louwrens), was for respondents.

Mr. Searle said that this was an appeal from a decision of the Water Court held at Ladismith. Judgment was given on the 26th April last in a matter in which the present appellant was applicant and the present respondents were respondents.



Mr. Schreiner (interposing) said that he wished to mention that he took in *limine* an objection that there was no appeal from this judgment of the Water Court.

Mr. Searle said that, with regard to that point, he had better state shortly what the circumstances of the case were and discuss the objection afterwards. The Water Court was established under the Act 40, 1899. The claim in this case was that the respondents be adjudged jointly and severally to pay the applicants the sum of £100 as damages sustained by reason of the respondents having wrongfully and unlawfully diverted water, and that they might be ordered to remove the obstructions they had placed in the Hoeko River to prevent the free flow of water to the applicants' property, the farm Annex Hoeko. Applicant claimed under a servitude registered against the farm Hoeko, whereunder he was entitled to take water from a certain dam. Applicant said that, as riparian proprietor, he was entitled to a sufficient supply of water for his ordinary purposes, and also to a reasonable share for irrigation purposes. The respondents, he said, had constructed certain dams and furrows, and had thereby wrongfully and unlawfully deprived him of the use of the water of the river. First of all, the respondents excepted to the first prayer that the Court had no jurisdiction to award damages. Then in regard to the second prayer they said that all the parties were not before the Court. In their plea defendants denied that they had constructed any additional dams or furrows in January and February as alleged, and deprived the applicant of water that he had previously enjoyed. In case the foregoing plea was held to be insufficient, they set up a defence of prescription.

[De Villiers, C.J. (to Mr. Searle): Under what Act do you appeal?]

Mr. Searle: It seems to me, unless section 15 of Act 40 of 1889 gives the power there is no other power in the Act.

Mr. Schreiner said that the consent filed in the Water Court stated that the applicant procured the intervention of certain executors as co-applicants, and the respondent procured the intervention of certain parties as co-respondents, and they agreed to abide and be bound by the judgment of the Court, and the exceptions were withdrawn.

Mr. Searle: There is no consent filed, save that the Court shall have jurisdiction under the section 16.

[De Villiers, C.J.: That is not the point raised by Mr. Schreiner; his objection is as to the right of appeal to the Supreme Court.]

Mr. Schreiner: That is so.

Mr. Searle said that he did not read the consent to mean that the parties agreed to submit this matter to the final

decision of the Water Court. There were two big dams on the farm, and this dam was one. The water from the dam that the appellants complained of as barring off all their water would come down to the dam marked "q" on the plan. The whole of the evidence did not show that, but the bulk of the evidence certainly showed that.

Mr. Schreiner submitted that on the authority of *Waite and Harrey v. Young* (15 "Cape Times" Reports, 793), the appellants had no right of appeal to the Supreme Court from the judgment of the Water Court in this matter. There were two cases in which a right of appeal was given. The one was where a right of abutment was under consideration. The other was against an order as to the distribution of water. Counsel also quoted the case of *Nel v. Kleinhans* (15 "Cape Times" Reports, 120), and pointed out that that case was decided distinctly under section 11. His point in pressing the preliminary objection was that his learned friend was on an inexorable dilemma, because, if he came under section 5 (subsection 3), there was no appeal from such decision, but only a review on the ground of irregularity or otherwise, and if he came under section 16 it seemed to have been the intention of the parties who signed the consent that they would be bound by the judgment of the Water Court. On the point of damages, the Act, he said, never used the word "damages." If the Court had any jurisdiction in damages it was left entirely to be inferred from the words. The fact that the applicants claimed damages indicated that they came under section 16 when the consent paper was filed. There was no provision for damages except they came under section 16. It was equally good for the purpose of his (Mr. Schreiner's) objection whether it be a section 16 or a section 5 matter.

[De Villiers, C.J.: Is not the line of distinction between section 11 and section 1 a very thin one?]

Mr. Schreiner: The line of distinction is this: that under section 11 the application is always to have a certain scheme of distribution laid down. That is, something that has to be registered on the title.

[De Villiers, C.J.: Supposing it had been a perennial stream, then the Water Court would make a distribution?]

Mr. Schreiner: They could not, because a man cannot get what he does not ask for. He asked for (1) damages, £100, and (2) to remove an obstruction in the stream.

[De Villiers, C.J.: Is that all?]

Mr. Schreiner: That is all; no other relief, nothing else is asked for.

[De Villiers, C.J.: But would not that removal of an obstruction of necessity mean some scheme of distribution?]

Mr. Schreiner: Surely not, my lord. If he did come under section 11, then his



application is not in accordance with the forms prescribed for section 11.

[De Villiers, C.J.: But could not the Water Court go further and say that they would not only remove an obstruction, but also lay down a fair distribution of the water?]

Mr. Schreiner: The difficulty is as to the Act and the regulations. Continuing, counsel said it would be well that people should understand when the Water Court has given its decision on these matters, when they do not come under section 7 or section 15, that there is no appeal. They should know that they should not waste expenses for their own sake and for the sake of others.

Mr. Searle said if the objection of his learned friend was upheld, it would be a frightful confession of the utter ineptitude of the Water Court. Under section 5, sub-section 3, there was no appeal, and yet there was an appeal under sections 7 and 11, and so on. It seemed to him that if the objection was upheld, it was a fortunate thing there was an Irrigation Bill before Parliament now. Why should there be a section 16, which said that in the event of any dispute in a water district concerning the use and diversion of water, the parties may agree in writing to submit the matter in dispute for the final decision of the Water Court. Surely it was the intention of the Court that there should be an appeal, otherwise what would be the use of a section of that kind?

[De Villiers, C.J.: That is an argument which might properly be addressed to the Legislature. You have to satisfy the Court that this is an appeal which comes within the Act.]

Mr. Searle (continuing) said the evidence on both sides showed what was the right distribution, and what was the wrong distribution. Counsel contended all such matters should be appealed against under section 15; otherwise, he submitted, if that was not the intention of the Legislature, it would throw the parties into great confusion, because no one would know what was appealable and what was not, unless it be said that the Water Court had no jurisdiction at all in the matter of damages, except under section 16.

Mr. Schreiner (in reply): Section 15 only relates back to Section 11 and not to Section 10 or any previous section. In every case in which there is no question of registration or title Parliament has given expressly the right of appeal where it has intended to grant it. Here we objected *in limine* to the claim for damages, but we withdrew the exception when all the parties consented to refer the matter to the Water Court. In assessing these damages the Court was not acting as a Water Court but as an arbitrator. There is no machinery by which a Water Court can recover damages save under Section 16.

R 1

[De Villiers, C.J.: How are costs to be recovered.]

They are provided for by section 4.

De Villiers, C.J.: The application in the Court below prayed: (a) That the respondents may be adjudged jointly and severally to pay applicants the sum of £100; and (b) that the respondents be ordered to remove any obstructions which prevent the free flow of water in a certain river to which the applicant claimed to be justly entitled. It is clear that the dispute there arose out of a matter concerning the division of water from a stream alleged to be perennial. Exceptions were taken to the claims on the ground that the first was beyond the jurisdiction of the Court, and that the second claim required the joinder of two other parties. Thereupon these parties were joined and the respondents withdrew their exceptions. Now, it has been argued on behalf of the respondents that that amounted to an agreement between the parties, under section 16 of the Act of 1899, to refer the matter to the final decision of the Court. I confess I cannot look upon that arrangement in this light. The only thing that was consented to by the parties was that when these persons had been joined the exception to the jurisdiction would be withdrawn, but there is not one word throughout to show that all the parties to this dispute had agreed to submit the matter to the final determination of the Court, and, therefore, upon this ground the respondents cannot now successfully maintain that there is no right of appeal. Then we come to the further question: whether in the form in which the proceedings were brought in the Court below, there is a right of appeal to this Court. The powers given to the Water Court are very wide, and they are to be found in several sections of the Act 40 of 1899. The first section provides: That from and after the taking effect of this Act it shall be lawful for the Governor in any area of the Colony to appoint a Court, hereinafter called a Water Court, for the purpose of hearing and determining disputes in connection with the use and appropriation of water and for such other purposes as may be assigned to such Court by this Act, or by regulations framed hereunder, and such area may be styled a water district. These terms “for the purpose of hearing and determining disputes in connection with the appropriation of water” are wide enough to include a claim for damages for improper use and appropriation of water. Then section 5 states the general duties of a Water Court. Among the general duties are the following: (Sub-section 3): “In the event of any dispute arising out of any matter concerning the diversion, use, taking, or appropriation of water from any perennial public stream; or river, to investigate such

dispute on the spot, on the application of any party thereto, and to decide on the matter at issue in accordance with this Act, and regulations thereunder." This sub-section appears to be quite wide enough to embrace a claim for damages arising out of a dispute concerning the use, taking, or appropriation of water. I am not, therefore, prepared to give the limited construction to this Act, which has been contended for on behalf of the respondents. My own opinion is, it was the intention of the Legislature to give very wide powers to such a Water Court, and that if it became necessary to decide the question as to damages sustained by either party, by reason of any diversion, use, taking, or appropriation of water, the Water Court would have the power to decide it. Then comes the 11th section, which says: "In the discharge of the duties assigned to it by this Act, and in any case where the flow of any perennial public stream has not been distributed or apportioned, either under any agreement, whether such agreement be verbal or in writing, or by any other legal mode, it shall be lawful for the Water Court upon application in writing of one or more owners of land adjacent to the said stream to investigate all the circumstances, and to make a fair and reasonable apportionment or distribution of the waters for irrigation or other purposes." Then comes the 12th, 13th, and 14th sections, and the 15th section says: "Within three months after receiving notice of any such order, as aforesaid, any person affected by any such decision who may feel himself aggrieved may move the Supreme Court," and so on. What then is meant by the words "such order as aforesaid"? The only order to which it can, according to a strict construction, be held to refer is the order mentioned in the 14th section, as follows: "A copy of the order embodying such scheme shall be served on the riparian proprietors." In strictness, therefore, if the Water Court made no order embodying a scheme there could be no appeal, but the respondents' counsel admitted that if the Court, acting under the 11th section, decided that a stream was not perennial, there would be an appeal to the Supreme Court. It appears to me that every order made by a Water Court in the discharge of its judicial duties under the Act was intended to be subject to an appeal, except, of course, orders made in reference to disputes which the parties might have agreed under the 16th section to submit to the final decision of such Water Court. This view, no doubt, conflicts with the decision in *Waite and Harvey v. Young* (15 C.T.R., 793), but it does not appear that the provisions of the 11th and 15th sections of the Act were cited in that case. It seems to me that the intention

of the Legislature was to give an appeal in a case like the one now before the Court, and that Mr. Searle should be allowed to argue the case on behalf of the appellants.

Buchanan, J.: The preliminary objection taken to the hearing of this case was that there is no right of appeal vested in the appellants. I think, after careful reading of the Water Act, there are certain decisions by the Water Court against which there is no appeal. For instance, in a case coming under the 16th section. After careful consideration of what has been called the consent paper, I cannot see that this consent paper brings this case under this 16th section. Then it is said that if this case does not fall under the 16th section it falls under the 5th section, paragraph 3 of which has been cited by His Lordship the Chief Justice. In the previous case which came before me, under clause 1 of section 5 I held there was no appeal against a decision of the Water Court under that section. The ground upon which I held this was that the distinction seemed to have been drawn by the Legislature between a Water Court settling whether a user of water was in accordance with a definite right or a contract, which had previously existed, and a case in which the Water Court was called upon, under the 11th section, for the first time to apportion water between different riparian proprietors. In the latter case, under section 11, it is clear that an appeal is given, but it did not then seem to me clear that any appeal was given under section 5. Since the adjournment my attention has been called more specifically to the first line of the 11th section, which couples acts done by the Water Court "in the discharge of the duties assigned to it by the Act," with cases in which the Water Court for the first time apportions and distributes water among riparian owners. It is common cause that by the 15th section there is an appeal from any order made under the 11th section. The 5th section defines the general duties of a Water Court, and, if in the discharge of those duties, the Water Court should make an order under the 11th section, it follows that there is a right of appeal to the Supreme Court under section 15. I therefore think I erred in the previous case in saying that any decision under section 5 could be appealed against, having overlooked the first line in section 11. Any decision by the Water Court under section 5 that is in discharge of the duties assigned to it by the Act, are by section 11 brought into the subsequent provision of the Act, and therefore an appeal can be had against such decision. The decision of this Court now overrules the case of *Waite*, which has been referred to. The case of *Nel v. Kleinhaus* had not then

been reported, and was not referred to in argument in the case of Waite, but it does not settle the same point as was raised in the case of Waite. I think, in allowing this appeal, it must be taken to overrule my decision in the case of Waite.

Hopley, J., concurred.

*Postea* (July 12), Mr. Searle having been heard in argument on the facts,

De Villiers, C.J.: It is not necessary to hear Mr. Schreiner in this case. It is clear that in the year 1838, when a grant of this farm Annex Hoeko was made, a stream which flowed over Hoeko and Annex Hoeko on to Weltevreden was a perennial stream, and this quality of the stream was recognised by the fact that a right was given to the owner of Annex Hoeko to come upon the land of Hoeko and at a certain point marked "q" on the plan, to take out the water, but it is also clear that many years ago, certainly fifty years ago, at the point "a," that is, the upper part of the farm Hoeko, there was a diversion of the main stream. On this point we have the evidence of the respondent's witnesses, and also the applicant's witnesses. Then there is the witness Van Zyl, who says: "Ever since I knew the furrow 'a,' it has always taken away the visible stream of the river, except flood water." He says again: "The river between 'a' and 'c' runs on an average not three months in the year." The whole of the evidence shows that the stream is a very precarious one, and I am satisfied that after the diversion from "a," which has been acquiesced in for more than fifty years, there is not sufficient water to be capable of common use by the proprietors of Hoeko and Annex Hoeko. These witnesses show that the stream is so precarious that it is not capable of common use among the different proprietors. The main point against the present applicant is that he was respondent in a previous case, in which the owner of Weltevreden claimed as against the owners of Hoeko, that they had diverted all the water to Hoeko, and not allowed any to flow beyond. In the previous case he was willing enough to set up the defence that Hoeko had taken all the water, and now, when he wants the Annex Hoeko to take the water, he practically withdraws the defence which had served his purpose when as part owner of Hoeko he was sued by the owner of Weltevreden. The appeal will be dismissed with costs.

Buchanan and Hopley, J.J., concurred.

[Appellants' Attorneys: Sauer and Standen; Respondents' Attorneys: Tredgold, McIntyre and Bisset.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

BRADY V. S.A. TURF CLUB. { 1906.  
July 10th.  
" 16th.

Totalisator — S.A. Turf Club —  
Acts 20 of 1882, 9 of 1886  
and 36 of 1902—*Ultra vires*  
—Gaming—Betting—Game  
of chance.

*It is ultra vires of the S.A. Turf Club under Acts 20 of 1882 and 9 of 1886, to provide a totalisator on the grounds of the Kenilworth Racecourse, granted to them for other specific purposes by such Acts.*

*The totalisator, as carried on by the Club, besides being a means of betting, is a means of gaming, and is, therefore, illegal under the 2nd part of Act 36 of 1902.*

*Held, therefore, that the plaintiff, as a member of the Club, was entitled to an order declaring this system of gaming to be ultra vires and illegal, and to an interdict restraining the committee of the Club from continuing its use.*

This was an action brought by Christopher Brady, attorney, Cape Town, against James Bryant Lindley, in his capacity as chairman of the South African Turf Club, for an order declaring the totalisator to be illegal, and for a perpetual interdict.

Plaintiff's declaration was in the following terms:

1. Plaintiff is Christopher Brady, an attorney of this Honourable Court, practising in Cape Town; defendant is James Bryant Lindley, chairman of the South African Turf Club, and as such the proper person, under section 3 of Act 20 of 1882, as amended by Act 9 of 1886, to be sued for or on behalf of the said South African Turf Club.

2. Plaintiff is a member of the said South African Turf Club.

3. Under and by virtue of Acts 20 of 1882 and 9 of 1886, certain lands situate

at Kenilworth, in the division of the Cape, were granted to the said South African Turf Club by the Governor of this colony, for the purposes of a racecourse and for other purposes, on certain conditions in the said Acts set forth, and to which plaintiff craves leave to refer at the trial. In pursuance of the said grant, the said South African Turf Club constructed and laid out a racecourse on the said land at Kenilworth, and erected various buildings in connection therewith.

4. In or about the year 1884 the said club instituted at their said racecourse a system of betting, gaming, or wagering by means of a machine or instrument of gaming known as the totalisator or *pari mutuel*, and for that purpose has erected on the said course or land certain buildings, in which the said system of betting is carried on. Since the said year, the said club has continued to own, keep, and use the said buildings for purposes of gaming or wagering by means of the said machine or instrument of gaming, and still continues to do so.

5. Plaintiff said that the said club, by instituting and continuing the said system of betting or gambling, and by keeping, owning, or using the said buildings for the said purpose, is acting illegally and in contravention of the provisions of Act 36 of 1902, and more especially of sections 4 to 11, being part 2 of the said Act and section 37 of the said Act.

6. Plaintiff further says that the said club is not authorised or empowered to institute, carry on, keep, or own any such system of betting, gaming, or wagering by means of the said instrument known as the totalisator, under either of the Acts, viz., 20 of 1882 and 9 of 1886, under which the said club is constituted, or under any of the by-laws duly passed, sanctioned, and promulgated in accordance with the provisions of the said Acts, and that the institution, keeping, carrying on, or owning of the said system of betting is *ultra vires*.

Wherefore plaintiff claims:

(a) An order declaring that the system of gaming, wagering, or betting, as at present carried on by the South African Turf Club by means of the machine or instrument of gaming known as the totalisator is illegal or otherwise, that the said club is not authorised or empowered to institute the said system of betting, wagering, or gaming, and that the institution, keeping, carrying on, or owning thereof is *ultra vires* of the club.

(b) A perpetual interdict restraining the said club from keeping, carrying on, or owning the said system of betting.

(c) Alternative relief.

(d) Costs of suit.

Defendant, in his plea, admitted paragraphs 1 and 2 of the declaration, and

also paragraph 3, but craved leave to refer to the Act in question at the trial for their meaning. As to paragraph 4, defendant admitted that the club had erected buildings in which there was worked a system known as the totalisator, whereby persons who chose to do so were enabled to invest moneys on horses engaged in races held by the club on the day of racing. Defendant specially denied that there was any machine or instrument used for that purpose, and he denied all other allegations contained in paragraph 4. At the time the plaintiff became a member of the club, the totalisator was in use, and plaintiff had from time to time invested money on it, and had at all times acquiesced in its use, and had consented to it. As regarded paragraphs 5 and 6, defendant denied every allegation, and specially denied that he had acted illegally or *ultra vires*. Wherefore he prayed that plaintiff's claim may be dismissed, with costs.

Plaintiff, in his replication, said, in reference to paragraph 4 of the plea, he admitted that the totalisator was in use when he became a member of the club, and that he had used it for the purpose of investing his money when it suited his convenience. At the time when he joined the club, and up to recently, bookmakers were licensed to ply their avocation on the racecourse, and he had the choice of investing his money either with them or the totalisator. Since bookmakers' licences were withdrawn, defendant had monopolised the whole of the betting on the racecourse by means of the totalisator. He admitted that he had used the instrument for the purpose of investing this money on the races, because no other means was available, but he denied that in any other respect he had acquiesced in or consented to the use of the instrument. On the contrary, whenever possible, he had opposed the monopoly created by the use of the totalisator, and advocated the return to the state of affairs which prevailed when he became a member of the club. Save as above, and save for admissions, he denied the allegations of fact and conclusions of law in the said plea contained joined issue thereon, and again prayed for judgment as before, with costs.

Mr. McGregor (with him Dr. Greer) for plaintiff. Sir H. Juta K.C. (with him Mr. Molteno) for defendants.

Mr. McGregor explained that the matter originally came before the Court on the 29th March last, (16 C.T.R. 237) when plaintiff, on motion, sought (1) to have the proceedings of a certain meeting of the club declared null and void; (2) to have the totalisator declared illegal; and (3) to obtain a perpetual interdict. The Court then refused the first prayer, and, as to the other parts of the ap-



plication, decided that plaintiff should proceed by action.

Christopher Brady (the plaintiff) said that he had been a member of the South African Turf Club for a few years. Besides the ground devoted to the racing of horses, there was the totalisator, which consisted of about a dozen to fifteen boxes or offices, presided over by attendants, and dispersed about the ground. At those boxes or offices tickets were obtained for the totalisator. The totalisator was worked under regulations by Doyle and Co., under contract with the club (copy of contracts and regulations put in). Witness described the *modus operandi* of betting under the "tote." He said that behind the attendant in each of the offices were pads of tickets, which were sold to investors. A man buying a ticket at an office had no means of knowing how many similar tickets were being sold at another box. If a man bought the only ticket issued in respect of a successful horse, he would take the whole of the pool, less 10 per cent. taken by the club. If twenty others bought a similar ticket, then he would only receive a twenty-first share. After a race had been run, the whole of the pool was divided among the winners, less the usual commission taken by the managers. Until the division took place, it was absolutely impossible to know what was going to be received by a backer. The issue of tickets only began about 15 to 20 minutes before each race. About 10 or 15 minutes after the race had been completed, the dividends were announced on a black-board.

[De Villiers, C.J.: I see, under the contract, Doyle and Co. receive 2 per cent.]

Witness: Yes, and the club takes 8 per cent. Witness (continuing) said that when he joined the club, the totalisator was in operation, but at that time professional bookmakers were permitted to assemble on the course. In October last the club passed a resolution excluding the professional bookmakers. Witness had taken an active part in opposing the exclusion. He had searched the bye-laws of the club, and had been unable to find any bye-law or regulation referring to the totalisator, except the regulations issued by Doyle and Co.

[De Villiers, C.J.: I see the totalisator is described as a "machine." Your description does not show that it is a machine, but a series of buildings?]

Witness: "Machine" is their expression; they call it a "betting machine." They have elaborated it and made it a building. It could have been a portable machine. In further evidence, witness said that on the average about £14,000 passed through the totalisator on a race day. He found that the amount of profit from the

totalisator, according to the balance-sheet for the year ending 31st January last, was £22,872 18s. It was impossible for the managers or "bankers" to lose on the transaction.

[De Villiers, C.J.: But they simply act as agents; they simply distribute the betting according to the result of the races.]

Witness said that the operators were really, to his mind, bankers.

[De Villiers, C.J.: What would be the result, if an outsider which nobody has backed wins?]

Witness: According to their own regulations the club takes the pool.

[De Villiers, C.J.: Do you know whether that has happened?]

Witness: I do not remember anything of that sort. Something very near that I do remember is that on one occasion there was only one ticket taken on the winning horse, and on that occasion I think £429 was paid to the person who backed that particular winning horse.

[De Villiers, C.J.: With one ticket?]

Witness: Yes, that is so.

[De Villiers, C.J.: If it had not been so backed, the £429 would have gone to the club?]

Witness: Exactly so.

Cross-examined by Sir H. Juta: Witness was a member of the Gymkhana Club at the time of the amalgamation in 1903, and on the amalgamation he became a member of the Turf Club. The Gymkhana Club had carried on a totalisator. He had sometimes bet on the totalisator, but mainly when he had no choice, and could obtain no bets amongst the people assembled there. He did not say that betting was a necessary adjunct of racing. Witness had heard of the Goodwood Park Club, but he had not been to the course. He knew a paper called the "Referee." He believed that paper had said it was a public question that he was taking up. Witness did not know whether, because the Goodwood Park Club did not run under Jockey Club Rules, they could not have betting. He knew of the appeal brought by the Goodwood Park Club from the conviction. As far as he knew the meetings of that club were held no longer.

Sir H. Juta: You complain very much about the money that the Turf Club get by this totalisator?

Witness: I think it is absolute robbery.

They don't put it into their own pockets?—I do not know that.

Do you suggest that the officials—? —I don't suggest anything improper against any official.

I put it to you that the money is required for the upkeep of the race-course, buildings, race ground, etc.?—You say so; I don't know that.

[De Villiers, C.J.: (to Sir H. Juta): You must prove that; he cannot know anything about it.]



Sir H. Juta: He is a member of the club, and he ought to know it.

Witness: I have nothing to do with the management, Sir Henry.

Cross-examination continued: Witness had to a certain extent championed the cause of the bookmakers and his own views.

Sir H. Juta: They were very pleased with what you did originally?

Witness: I cannot say that.

They are not very pleased now with your action?—I have not consulted them.

Because it now appears that if the totalisator is illegal, then betting is illegal?—I don't know that.

That will mean that bookmakers will not be allowed anywhere in the Colony?—That I cannot help.

Do you know that they are displeased now with your action?—I have not consulted them.

Asked why he had commenced these proceedings, witness said that he brought the motion some few months back, because he thought a gross monopoly had been created at Kenilworth, and he thought the amount they were charging was scandalous. He looked upon it that they were charging from 25 to 50 per cent. of every penny on the course each race day.

De Villiers, C.J. (interrupting the cross-examination) said that all this might be very interesting, but it did not seem to him to affect the case. Plaintiff might not be acting from the very highest moral principles, but if he had the law on his side, then he would have the judgment of the Court irrespective of his motives.

Cross-examination continued: Witness was not a member of the club when the old totalisator was in existence. He was aware that there had been an increase in starting-price betting of late years.

Sir H. Juta: As a betting man, what is the difference in principle, I would ask you, between starting-price betting and the totalisator?

Witness: I am not a betting man, Sir Henry; I only bet now and then.

Further cross-examined: Witness thought that starting-price betting had come more into vogue than it was ten years ago. By betting on the totalisator, one would get the starting prices, except for the 10 per cent. The bookmakers did not charge 10 per cent. He should say that both systems were illegal.

Sir H. Juta: And a great many people then would have to be prosecuted.

Mr. McGregor: My learned friend asked you if you could race without betting. Can you race without the totalisator?

Witness: There is no necessity for betting, unless you choose. In England they never have the totalisator, they cannot have it. I have been on

nearly every racecourse in England, and I have never seen a totalisator.

By the Court: He would not say that, while bookmakers were allowed on the course, he never bet on the totalisator. Sometimes one could not get the price from the bookmakers, and at the last moment he might have gone to the totalisator.

John Dunn, commission agent, Adderley-street, Cape Town, said that the first totalisator at Kenilworth, which he saw in 1887, was a machine worked with a handle. The totalisator at that time was run by the Turf Club, under the superintendence of Mr. Cloete. He remembered the prosecution of Mr. Cloete. He had not seen the buildings at present on the ground. He saw the totalisator about two years ago, when the ticket system was in force. The 10 per cent. had always been taken off.

Mr. McGregor closed his case.

Henry Graham Cloete (secretary of the Turf Club) said that he had been acquainted with racing in the Colony for a considerable period. In 1887 there was the case of *Day v. Cloete* (5 J., 139). After that they took advice, and enclosed the totalisator. They exercised control over the persons allowed to come into the totalisator, so that it was not public. They adopted the French system of giving tickets, and dispensed with the machine. Witness showed the Court the system now adopted. Proceeding, he said that starting-price betting was increasing a good deal in England. The totalisator was common in some parts. It was common in South Africa, in Buenos Ayres they had nothing else, it was common in New Zealand, and parts of Australia, while in France they only had the pari mutuel, and would not allow bookmakers.

By the Court: In England the totalisator was not allowed; only bookmakers were allowed.

Witness (continuing) said that when the Act of 1902 was passed there were no buildings or structures in the Cape Colony in which bookmaker betting was carried on, but there were structures and buildings where totalisator betting was carried on. The totalisator buildings were of a substantial character, and had cost nearly £2,000. The profits obtained from the totalisator were utilised for the upkeep of the racecourse, and for stakes; there were wages to pay to clerks, and so on. Without revenue either from the totalisator or the bookmakers' licences, he did not think they could conduct a race meeting, because they would not be able to give more than £5 stakes. Witness remembered the Goodwood Park case. Apparently the Goodwood Park people had not been able to carry on their race meetings, because they had been prosecuted for allowing betting.

By the 21st section of the Act, the Jockey Club got jurisdiction over the bookmakers. The racecourse was entirely enclosed, and the Turf Club could remove anyone, according to the condition on the back of the ticket. Frequently he had exercised the right of prohibiting persons from coming on the public stand.

Cross-examined by Mr. McGregor: The barrier at the totalisator was more for preventing a crush than keeping people away. It was a fairly public place, and to get to the totalisator, provided there was no charge against the visitor, all that was necessary was to be a member of the public, and to be in possession of 7s. The principle of the totalisator was that you got the true odds at the time of the start. The totalisator came under the general rules of conducting a race meeting.

[De Villiers, C.J.: On what authority did you enter into the contract with Doyle to allow him to have the totalisator?]

The committee of the club took it upon themselves.

They assume it as part of their duties as a racing club to allow a totalisator?—Yes, they think it is worked better by having someone else than doing it themselves.

They deem it essential to the success of the club and to the purposes for which it was established that betting of some kind should be permitted?—Yes.

Witness (continuing) said that very often people lost their tickets. On one or two occasions the totalisator had received money where the winning horses were not backed.

Sir H. Juta: There never was a bye-law for bookmakers. The Jockey Club, as a rule, took no cognisance of betting, although the Jockey Club took notice of defaulters, and that was how they got control of the bookmakers.

Sir H. Juta closed his case.

Mr. McGregor referred in the first place to the case of *Tollett v. Thomas* (6 Q.B., 514), in which it had been held that the totalisator was an instrument of gaming. He then referred to Part II. of Act 36 of 1902, in which the keeping of a gaming house was prohibited. Keeping a totalisator was keeping a gaming house, section 7 (a) was the nearest approach to a definition of a gaming house. It was necessary to prove two things under that section; (a) that a game of chance was played in the house; and (b) that it was for the profit of the keeper of the house. It was clear that both these elements were present in the case of the totalisator. The totalisator would also fall under section 7 (b), because a bank was kept for the benefit of the Turf Club exclusively, and what was more the bank would always win; and, when an

unbacked horse won, then the totalisator took all the stakes.

[De Villiers, C.J.: Did not the Legislature intend to draw a distinction between gaming and betting?]

Mr. McGregor: Yes, but the totalisator is not an instrument for betting only; it is so ingeniously contrived that it is an instrument for gaming as well.

Proceeding, he said that betting necessarily required certain odds—there was one event, and a fixed amount was paid on the event. Betting on the totalisator was a game of chance, because the odds obtained would depend upon the number of other people who betted.

[Maasdorp, J.: If the totalisator were found to be illegal, would betting with bookmakers be legal?]

Mr. McGregor: Yes, in certain circumstances, my lord.

[Maasdorp, J.: If the Club took no profit would all this argument fall away?]

Mr. McGregor: Yes, my lord, so far as it is based upon section 7 (a) and (b).

The Legislature, he continued, did not forbid a game of chance inuring to the profit of the owner of the horse. Section 21 of the Act was described in the Goodwood Park case as an involved section. That section referred only to Part III. of the Act. The word "part" should be strictly construed, because the Act had been specially divided into parts, and therefore the division into parts was an integral portion of the Act. Part III. only referred to "betting houses," and so the Turf Club was given no exemption under section 21 from the penalties imposed upon keeping "gaming houses" under Part II. of the Act. Section 21 did not legalise "gaming houses," it only legalised betting between persons assembled on the racecourse for the purpose of betting. In England the totalisator was not allowed. Part V. of the Act dealt with betting in streets or "open place." Counsel quoted *Langeridge v. Archer* (10 Q.B. 45), and *Power v. Kempton Park* (18 L.T., 538). In *Day v. Cloete* the use of the totalisator had been declared to be illegal. There were certain physical differences between the totalisator then used and the present one, but the principle of both was the same.

There was another ground on which the use of the totalisator on the Kenilworth racecourse was illegal, and that was that its use was outside the powers granted to the club by statute. The Jockey Club was constituted by Act 20 of 1882, and its powers were transferred to the South African Turf Club by Act 9 of 1886. Section 2 of Act 20 of 1882 set out the powers of the club. It was granted land (a) for a racecourse, (b) for a training ground for horses, (c) for any other public amusement de-

clared to be such by the Governor. The use of a totalisator did not fall under any of these heads. The ground could only be used for these purposes or for some purpose legalised by a by-law made under section 8. No by-law had been made legalising the totalisator. In such circumstances, the use of a totalisator was *ultra vires*. Counsel cited the Encyclopædia of the Laws of England (Vol. XII. p. 360), Bryce on *ultra vires* (3rd edition pp. 37, 43).

[De Villiers, C.J.: Then the position is, is betting by means of a totalisator a necessary adjunct of racing, or of one of three purposes mentioned by the Act?]

Mr. McGregor: Quite so, my lord; I submit it is not.

De Villiers, C.J.: Has the Governor been asked to declare the totalisator an amusement, in terms of section 2 of the Act?]

Mr. McGregor: There is no evidence on that point, my lord.

Even if betting, he proceeded, was a usual adjunct of racing, it was still essential under section 7 that there should be by-laws regulating it, and in this case, no by-laws had been made. The plaintiff was entitled to come to Court in this matter. *Simpson v. Westminster Palace Hotel Company* (8 H.L.C. 112) was quoted.

Sir H. Juta said that the first question was: What was the intention of the Legislature when they passed the Act of 1902? Did they intend to exempt race meetings held under Jockey Club Rules from the operation of the Act? They must have done so; if not, the position would be absurd; because section 21 allowed the Jockey Club to keep a betting house, while section 37 punished anyone who went to bet there. It was also clear that it was intended that the Jockey Club should have control over race meetings, and the Act gave them this control in only one way, and that was by giving them control over the betting. Betting was such a necessary adjunct of racing and the control of betting was such a powerful lever that no races had been held at Goodwood since betting was forbidden there, because the races were not run under Jockey Club rules. Section 37 was not intended to nullify section 21.

[De Villiers, C.J.: I have a recollection that a clause was proposed in one of these Acts legalising the totalisator, but it was struck out.]

Sir H. Juta: Yes, my lord, that was in an earlier Act.

[De Villiers, C.J.: Why was it not put in this Act?]

Sir H. Juta: I don't know, but I know that such a clause would have passed in 1902.

[De Villiers, C.J.: Would it have passed both Houses?]

Sir H. Juta: The totalisator is a much fairer instrument than a book-maker. It is equivalent to a starting price betting.

[Maasdorp, J.: Section 21 allows the Turf Club to keep a shed for betting purposes; but can they do anything more; can they bet?]

Sir H. Juta: The Club does not bet.

[Maasdorp, J.: In certain circumstances, the club takes all the stakes; for example, when no bets are laid on the winning horse.]

Sir H. Juta: The Club really only makes a charge for its trouble.

Continuing, he said that whether the keeping of a totalisator was *ultra vires* depended upon whether betting was a necessary adjunct of racing, and it clearly was. The plaintiff could not take advantage of the fact that it was *ultra vires*, because he was a member of the club and acquiesced in its use for years.

Mr. McGregor was not heard in reply.

De Villiers, C.J.: The plaintiff is a member of the South African Turf Club, and he seeks by this action to have it declared that the system of gaming wagering or betting, as carried out by the committee of the club by means of the totalisator, is illegal as well as *ultra vires*, and he prays for an interdict restraining the committee from continuing to carry out such system. The defendant is the chairman of the committee, and he, by his plea, admits that the club has erected buildings in which there is worked a system known as the totalisator, whereby persons, who choose to do so, are enabled to invest money on horses engaged in races held by the club on the day of racing. He specially denies that there is any machine or instrument used for the purpose, and he denies moreover that the working of the system on the racecourse is either illegal or *ultra vires*. The plea further alleges that at the time when the plaintiff became a member of the club the totalisator was in use, and that the plaintiff has from time to time invested money on it, and has at all times acquiesced in its use and consented to it. It is not clear whether these special allegations as to the plaintiff's acquiescence were intended as a defence to his claim. If the conduct of the defendant club was illegal, or *ultra vires*, the plaintiff's acquiescence could not make it legal or *intra vires*, nor can such acquiescence deprive him of the right which, as a member of the club, he has to prevent the continuance of a system which—whatever his motives might be—he no longer approves of. If by reason of the plaintiff's previous investing of his money on the totalisator—as his betting has been euphoniously termed—the defendant's position had been in some way altered, there might have been some ground for raising the defence of

estoppel, which is not, however, the defence suggested by the plea. Upon this point, I need only refer to the case of *Merriman v. Williams* (Foord's Report p. 176), where it was held that previous concurrence in an illegality cannot be relied upon by way of estoppel to a claim for discontinuance of the illegality.

The plea, as I have said, denies that any machine is used for the purpose of working the totalisator, but the regulations under which the managers of the totalisator work it, are headed in the largest possible letters: "Regulations for the totalisator betting machine." These regulations, I take it, must have been posted on different parts of the racecourse, and must have been known to the committee of the club. Under their contract with the committee the managers of the totalisator bear the expenses of the working, and they took over the plant at the landed cost, but the club has the option of taking over all the plant at the termination of the contract at cost less a fair amount for depreciation. The percentage on receipts from so-called "investors" is ten per cent., of which the managers receive two per cent., and the club the remaining eight per cent. Authorised officials of the club have access to the books of the managers, and the committee has the power to instruct the managers as to the number of boxes to be opened for the issuing of tickets. In fact, there are about fifteen buildings on different parts of the ground, which were originally erected by and at the expense of the club, at a cost of about £2,000. These buildings are inside an enclosed space, which, again, is inside an outer enclosed space. Admission to the outer enclosed space is obtained for non-members of the club by payment of one shilling, and admission to the inner enclosure is obtained by payment of six shillings. On the back of the tickets of admission to both enclosures is an endorsement to the effect that "no person is entitled to remain upon the course if ordered to leave by one of the stewards or the secretary," and the tickets for the inner enclosure purport to admit the bearer to the "public stand." The different buildings are used as offices for the issue of the totalisator tickets, and the roofs of these offices run over the place outside, where people come to obtain their tickets. From the place where they stand pads are visible at the back of the office, showing in large numerals how many tickets have been taken to back each horse to run in the immediately following race. A ticket may be taken for a place or for a win, and, in either case, the price is a pound sterling. The delivering of tickets continues until the race commences, after which no tickets for that race can be issued, and after the race has been decided the entire

money taken at the various offices is "aggregated," and the balance of the takings, after deduction of ten per cent., is equally divided among the backers of the winning horse in the proportion to which he has been backed. It is clear that this is a combined system of gaming and betting, and that although persons desirous of betting do not meet each other for the purpose, the Club, through its managers, act as the intermediary for the receipt and distribution of the stakes, and receives a commission of 10 per cent. for its services. That these services have been profitable to the Club, if not to all the backers of horses, is clear from the last annual report, which shows that the receipts of 8 per cent. for the year 1905 amounted to £22,872, being more than half of the total receipts from all sources for the year. The money thus received is expended on the upkeep of the course and the stakes for the races. The use of the word "machine" as applied to the totalisator appears to be somewhat inappropriate, and the more correct term to employ would be "machinery" for efficiently and expeditiously carrying out the combined system of gaming and betting which I have described.

The first question to be decided is whether under the Acts which authorise the grant of the racecourse to the Club for certain specific purposes and entrusted the management to the Club, the committee had the power to provide such machinery as I have described for the benefit of the so-called "investing" public. The first of these Acts (No. 20 of 1882) is entitled an Act "to empower the Governor to grant land for a racecourse and purposes connected therewith, and to provide for the management and regulation of the club to which such land shall be granted." The preamble states that it is expedient to encourage efforts to improve the breed of horses, and the second section enacts that "it shall be lawful for the Governor to grant to any club now established, or hereafter to be established, for the control and management of matters connected with the racing of horses, such parcel of land as to him may seem fit, for the purposes hereinafter described, that is to say, firstly as a course upon which horses may be run with the consent or under the direction and control of the said club; secondly, as a training ground for the purpose of training horses intended to race, and also for the erection of training stables and dwellings for the use of persons engaged in training racehorses; thirdly, for any other public amusement or purpose which the Governor may, upon the application of the said club, declare to be a public amusement or purpose for which the said land may be used."



Under this section the ground at Kenilworth was granted to the Jockey Club, and by the Act 9 of 1886 the grant to the Jockey Club was vested in the defendant Club for all and several the purposes of the former Act, and all the rights, privileges, duties and liabilities created by such former Acts are declared to apply to the defendant club. It appears that the defendant club has used the ground as a training ground, and as a racecourse, but there is no evidence that any part of it is used for the erection of training stables and dwellings for the use of persons engaged in training racehorses. As to the third purpose for which the grant was to be made, namely, to provide for any other public amusement it does not appear that an application has ever been made to the Governor to declare the use of the totalisator as such a public amusement, nor is it by any means clear that the Governor if applied to would make such a declaration. The 7th section of Act 20 of 1852 enacts that "the land by the second section of this Act authorised to be granted to the club shall be held, enjoyed and used only for the purposes authorized by this Act or by any bye-law to be made under and by virtue thereof." Nowhere in the Act is any provision to be found which mentions any purposes for which the land can be used other than those specified in the 2nd section. That section cannot, with the most liberal interpretation possible, be construed as having contemplated the use of the land or any part thereof for a totalisator. The 8th section of the Act authorises the committee to make bye-laws "for regulating all matters concerned or connected with any lands, buildings or other property belonging to the club . . . . . And for the general management of the said racecourse; provided that no such bye-laws shall be repugnant to the laws for the time being in force in this Colony." The 9th section enacts that no such bye-law shall be of any force or effect until it shall have been sent to the Colonial Secretary, and, after approval by him, published in the "Gazette." It is admitted by Mr. Cloete, the secretary of the club, that it was not thought necessary to get a bye-law for the totalisator, "no more," he adds, "than we should go for permission to start refreshment rooms." The analogy would be complete if, like refreshment rooms, a totalisator were a necessary adjunct to horse-racing, but the evidence does not satisfy me as to such necessity. He admits that in England, the home of horse-racing, the totalisator is not allowed at race meetings, and, consequently, it cannot be regarded there as a necessary adjunct to horse-racing. It is said, however, that bookmakers are

there allowed, but the evidence does not show on what terms they are allowed to pursue their calling at race meetings. For the present the Court can only deal with the totalisator, and, if the defendant fails to satisfy the Court that, according to the most liberal construction of the Act 30 of 1882, the statutory purposes for which the club was entrusted with the management of the course do not include the maintenance of the totalisator, the fact that bookmakers are allowed at English race meetings cannot assist him. It has been contended that the 21st section of Act 36 of 1902 shows that the Legislature approves of the use of the totalisator at race meetings held under the rules and regulations of the Jockey Club of South Africa. The effect, however, of that section is merely to exclude the operation of the 3rd part of the Act relating to betting-houses in the case of the owner of a racecourse keeping or using, on any day on which a race is held under the rules of the Jockey Club, any buildings or enclosed spaces within the ground, for the purpose of betting, between persons there assembled. Even, presuming that the taking of tickets by individuals constitutes betting between persons there assembled—and this is by no means clear—there is more than betting, as I shall presently shew, and the 21st section of Act 36 of 1902 cannot be relied upon as conferring on the club powers which the previous Act omitted to bestow. It may well be that the section was intended to legalise the calling of bookmakers at race meetings held under Jockey Club rules, but that does not affect the question whether the club has the power to establish a totalisator on the course.

I have thus far assumed that the totalisator is a perfectly legal institution, and I now proceed to consider whether its illegality has been established. The evidence satisfies me that it is a system, not only of betting, but also of taking part in a game of chance. A person who bets, whether he gives or takes odds, knows what he stands to win, but a person who backs a horse with the totalisator cannot know what the winner is to receive until the amount is distributed. Even, if he knows at the time of taking his ticket how many others have backed horses for a race, the odds are liable to be altered afterwards by others taking tickets for the same race. In one sense the result of a horse-race itself is a matter of chance, but betting upon such an event is well understood. The totalisator introduces this further element of chance that the amount to be paid to the winner depends upon what the Lord Chief Justice, in the case of *Tollet v. Thomas* (6 K.R., Q.B.), styled "the will caprice of the other persons betting." In that case it was the unanimous opinion of a strong Court, including,



besides Chief Justice Cockburn, Justices Blackburn, Meller and Lush, that the totalisator is an instrument of gaming at a game of chance. The appliances have been somewhat modified since that time so as to enable a larger number of persons to stake their money, but the essential features are the same in both. There are still the same elements of "uncertainty and chance to the individual bettor," which were referred to in the judgment as constituting the whole proceeding a game of chance. If this view is correct it would follow that the keeping a totalisator constitutes a contravention of the second part of Act 36 of 1902, which relates to gaming-houses. The 7th section enacts that "on a charge brought against any person for keeping a gaming-house it shall be sufficient to prove that the house or place . . . . . is allowed to be used or frequented for the purposes of playing therein at any game of chance for the profit, advantage or gain of the owner or keeper thereof." All these facts have been proved in the present case. It has been urged that when the Legislature enacted in the 21st section that "nothing in this part shall extend" to the person therein described, it really meant to say "nothing in this Act," but it is impossible to uphold this contention, more especially in view of the fact that by the 1st section of the Act the Legislature directed special attention to the division of the Act into parts of which part 2 relates to gaming and part 3 to betting. Under these circumstances, I am of opinion that the plaintiff is entitled to judgment as prayed, with costs.

[Maasdorp, J.: I agree in the decision, and I only wish to make it quite clear that I reserve my opinion upon one point that has been raised in this case. It appears that in Part 3 of the Act of 1902 the keeping of betting-houses is prohibited, and penalties are imposed upon persons who contravene the sections in that part. But under section 21 it is provided that this part of the Act shall not extend to the owner of a racecourse who keeps any buildings or enclosed spaces for the purpose of betting between persons there assembled. The respondents in this case claim their protection under that provision, because they contend that, as the owners of a racecourse, they keep these buildings for the purpose of betting between persons there assembled. But it seems to me that they have gone much further than that, and they have gone beyond the protection of the section. They have introduced in this enclosure which they have preserved for betting a system which they describe as a new system of betting, but, forming an opinion upon their procedure and upon the finding of the Court in the case which has already been given, they have really introduced a system which

goes far beyond the ordinary system of betting, and they have introduced a system of gaming. It has been pointed out that there are introduced into their system many elements of chance which do not exist in merely betting. Betting is supposed to be upon the result of a race and the result of the takings of the totalisator seems to me to depend upon other considerations than merely the result of the race. Then we find that there is an element of gaming in this, that the keeper of the "house" takes large profits to himself, and not only that, but he even seems to act as is done sometimes by the keepers of gaming tables themselves. He would under certain circumstances, sweep all the stakes. On the whole, I come to the conclusion that large elements of gaming are introduced into the system which has been adopted by the respondents. But what I want to reserve my opinion upon is this: that doubt has been cast upon the powers of the respondents to erect buildings even for the purpose of ordinary betting, and it has been contended that the grant has been so made that it might exclude such buildings and such powers, because they are not provided for under the grant, and the grant must be strictly construed as merely providing for races and such matters as are essential to races. Now, in my opinion, which I express with some reserve, the Legislature intended that there should be power in persons who run this racecourse to make some provision for betting, and it may be found to be within their powers to erect these buildings and make provision for betting. But I merely express this view with reserve, not as a final finding, but because the question has been so pointedly raised and it might be taken that the Court has to some extent proceeded upon that also.

[Plaintiff's Attorney: C. Brady.  
Defendant's Attorneys: Fairbridge,  
Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ARDERNE V. MILLER. { 1906.  
{ July 10th.

This was an application for an order empowering the applicant to withdraw his name as one of the signatories to a deed of assignment in the estate of the respondent, by reason of the respondent having failed to make a full and complete cession of his assets. Mr. Searle, K.C., was for the applicant, and Mr. Alexander was for the respondent.

Mr. Searle said the applicant, Henry Matthew Arderne, was one of the creditors in the assigned estate of Jacob Mil-

ler. Mr. Steytler was appointed assignee. All the creditors signed except the Board of Executors. It was understood by all parties that the Board of Executors should stand out and administer their own property. Certain property in Hanover-street, on which the applicant held a second mortgage bond, was managed by the respondent for some fifteen months. The rents were collected by the respondent and paid to the assignee. At the end of fifteen months the tenants left the premises, and Miller was the only remaining tenant, but he failed to pay his rent. The assignee took proceedings in the Magistrate's Court to have the respondent ejected, but he failed, the Magistrate holding that the assignee did not represent all the creditors, and under these circumstances the applicant now sought to be relieved from the deed of assignment.

Mr. Alexander said there was no necessity for the applicant to withdraw his name as all the creditors had not signed the deed and the deed had not become operative. The respondent had been sued by the Board of Executors, the outstanding creditor, and sued by the assignee.

Mr. Searle: He may take up the position now that the deed is operative. The respondent failed to pay any rent for the property for the last six months.

Mr. Alexander: The affidavit of the respondent shows that when he assigned his estate he understood he should be released from all claims and demands his creditors might have against him. The deed of assignment, deponent stated, had never been of any legal force and effect, and had never been recognised as such by him.

Counsel having been further heard in arguments on the facts,

Buchanan, J.: In September, 1904, the respondent, Miller, assigned his estate to one Steytler for the benefit of the creditors. The deed was signed by all the creditors except one, namely, the Board of Executors. It was known by all parties that the Board of Executors had not signed, and they stood outside the assignment. The assignor, Miller, acted upon the deed for eighteen months, and treated Steytler as the assignee on behalf of the creditors. At the end of eighteen months he takes up a hostile position towards the assignee, and when sued for the rent of the premises let to him by the assignee, he disputes the right of the assignee and alleges that the deed is invalid. The Magistrate before whom the case came sustained the objection and, thereupon, the assignee, Mr. Steytler, was unable to carry on the administration of the estate. The application in the present case now says: "I have been bound by the assignment for the last eighteen months and in consequence of the assignor's conduct I now ask to with-

draw." Miller says: "I don't care whether he does or not." The only question is one of costs. I certainly do not think that the respondent is entitled to any costs. The application will be granted, and there will be no order as to costs.

#### PINTO V. PINTO.

Mr. Watermeyer asked leave to have the return day extended from 1st August until 31st August, as it was found impossible to communicate in time with the respondent, who was in Delagoa Bay.

Application granted.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDOEP.]

PURCELL, YALLOP AND EVERETT, LTD., AND W. AND G. SCOTT AND CO., LTD. V. BRICE BROS. 1906. July 11th.

Fraudulent insolvency—Anticipation of return day.

*Where it was alleged that certain persons whose estates had been provisionally sequestered had fled the country and taken with them the assets of their partnership and private estates before the return day of the rule nisi, the Court amended the original rule by fixing a nearer date for the return day.*

Mr. Benjamin moved, as a matter of urgency, on the petition of the applicants, for an order anticipating the return day of a certain summons. Petitioners said that they had petitioned the Court for the sequestration of the estate of the firm of Brice Bros., and of the private estates of the partners thereof, viz., Robert Brice and George Brice. In the said petition, it was alleged that defendants had absconded from the Colony, and were on their way to England. Petitioners then asked the Court for directions as to the

service of process upon defendants. On the 25th June, 1906, the Hon. Sir John Buchanan granted a provisional order of sequestration against the defendants, which order was made returnable on the 2nd August, but no further directions as to service were given. Petitioners had been informed and believed that thereafter summons was issued against the defendants, calling upon them to show cause why a final order should not be granted, which summons was duly served at the last known place of residence of the defendants. Defendants had carried away with them a large sum of money, being the realised portion of their available assets in this colony. Petitioners believed that it was the intention of the defendants to escape to America or some other foreign country with their assets, and so evade the payment to their creditors of the proceeds of their assets. Defendants would effect such escape if the final order of the adjudication of their estate was not granted before the 2nd August next. Petitioners intended to apply for the arrest of defendants on the ground of fraudulent insolvency, but they were advised that they could not obtain a warrant for such arrest until the final order be granted. They therefore prayed that the return day should be anticipated, and that the summons should be made returnable for some day not later than the 14th July.

[Maasdorp, J.: The Court cannot interfere in the matter in that form. A rule has been issued, and the Court cannot interfere when the rule has been issued.]

Mr. Benjamin: The difficulty is this: I understand that application was made to the Attorney-General for an extradition warrant, but he declined to issue it until a final order of sequestration was obtained against defendants' estate.

[Maasdorp, J.: What was the necessity of giving such a long return day? It was quite unnecessary to have such a long return day.]

Mr. Benjamin: The return day seems to have been fixed by his lordship, Sir John Buchanan, in Chambers, but I do not think his lordship was aware that an application of this sort was necessary.

[Maasdorp, J.: I did not know that it was fixed by the Court.]

Mr. Benjamin: It was fixed by his lordship when the papers were laid before him in Chambers.

[Maasdorp, J.: It was unnecessary to come to the Court until the return day. Why not issue a fresh summons?]

Mr. Benjamin: Under the Insolvent Ordinance, the return day has, I think, to be fixed by the judge in Chambers to whom the matter is referred.

[Maasdorp, J.: That makes a difficulty again. That order would have to be varied.]

Mr. Benjamin: Yes, by making a shorter return day. At the time when the application was made to his lordship in Chambers, the defendants had not been absent from the Colony for forty days. Therefore his lordship made no order with regard to additional publication.

[Maasdorp, J.: If a new order is granted, then defendants would have been absent forty days.]

Mr. Benjamin: They would.

Maasdorp, J., said that the original order would be varied, and the return day altered to the 14th inst.

#### GOLDSTEIN V. MAY.

This was an action brought by George Goldstein, medical practitioner, Cape Town, against George May, photographer, Cape Town, to recover £30 10s. for professional attendance on one Mrs. Parry.

Plaintiff, in his declaration, said during the period from July, 1903, to January, 1904, both months inclusive, he attended one Mrs. Parry professionally in his capacity of medical practitioner, the costs and charges of which attendance defendant promised to pay. He said that £30 10s. was a fair and reasonable sum to charge for such attendance. Defendant wrongfully and unlawfully refused to pay the said sum, wherefore plaintiff claimed judgment for £30 10s., with interest, *a tempore morae*, and costs.

Defendant, in his plea, admitted the formal allegations, but he specially denied the allegation that he had promised to pay the costs and charges referred to in paragraph 2. Otherwise, as to the allegations in paragraph 2, he said that he had no knowledge of, and did not admit, the same. He admitted that he had refused to pay, and so he repudiated any liability in respect of the claim, and otherwise denied the allegations in the fourth paragraph. He prayed that the claim may be dismissed, with costs.

The replication was general.

Dr. Greer was for plaintiff; Mr. Lewis was for defendant.

George Goldstein (the plaintiff) stated that he had attended Mrs. Parry from time to time. He attended her before the dates in question. She was then living in Plein-street and Caledon-street, and was known to witness as Mrs. May. Witness thought she was Mrs. May until November, 1902. Defendant had paid for witness's professional services up to that time. In November, 1902, Mr. May told him that the lady he had known as Mrs. May was really Mrs. Parry. May at the same time told him that it would not make any difference as regarded payment for his services. In January, 1903, Mr. May paid him for

professional services rendered to Mrs. Parry. Witness subsequently attended Mrs. Parry between the dates named in the declaration..

Thor Osberg (private inquiry agent), John H. Mitchell (retired merchant, Sea Point), and Lena Wasser (formerly an employee of defendant) also gave evidence in support of plaintiff's case.

Dr. Greer closed his case.

George May (the defendant) said that the plaintiff had attended him in 1900. He had paid the plaintiff for attendance by cheque. The payments in the plaintiff's books referred to attendance upon witness, and once upon Mrs. Parry. About 1901 witness had a fever, and was very ill. The doctor came and caught him at work. Plaintiff got out of temper, and witness lost his temper, and he asked plaintiff for his bill, and paid him. He was not afterwards attended by plaintiff. Mrs. Parry had been in witness's employ for about 10 years off and on as a retoucher and assistant. Mrs. Parry had been called by various people Mrs. May and Miss May. He had not told anyone, as far as he knew, to call Mrs. Parry Mrs. May. He had paid her a salary. She was in his employ while his wife was living. Witness gave a cheque to Mrs. Parry in favour of Dr. Goldstein on account of wages due to her. He did not remember any other occasion when he had given her a cheque in favour of Dr. Goldstein. He had never promised Dr. Goldstein that he would discharge Mrs. Parry's indebtedness to him. Mrs. Parry had not occupied the same room as witness.

Cross-examined: While witness was in Caledon-street Mrs. Parry looked after his children. People generally called her "Mrs. May." He denied that the plaintiff attended him in 1903 and 1904. He could not understand what plaintiff's motive would have been in making entries in his account book against witness's name. When Mrs. Parry went to England, witness paid certain of her expenses. Mrs. Parry looked after his children. Witness carried on a fairly big business, but he did not keep proper books.

Wm. Wilson, accountant, Cape Town, who had shared a room with defendant, was also called.

Mr. Lewis read the evidence on commission of Mrs. Parry, who was an inmate of the Eaton Convalescent Home. She said that she had been employed as a retoucher by the defendant. She denied that she had told Dr. Goldstein that Mr. May would pay the bill. May did not send her to the doctor in 1903 or authorize her to go. She was suffering from a sore leg. As far as she knew, Mr. May had never promised to pay the account. She was sure that the account could not be correct. She had not lived with the defendant as his wife. Lots of people coming into the

reception room of defendant's place had called her "Mrs. May." She had never led the plaintiff to believe that she was Mrs. May.

Mr. Lewis closed his case.

Counsel having been heard in argument on the facts.

Maasdorp, J.: It seems to me that the decision of this case should largely depend upon the view which the Court takes of the evidence in respect of the personal relationships that existed between the defendant and Mrs. Parry. It is quite clear that when the doctor made the acquaintance of the defendant and Mrs. Parry during the time they lived in Caledon-street, he regarded them as husband and wife, and he seems to have come to that conclusion from the manner in which they lived together, without any admission, as far as his evidence goes, having been made to him by either of these parties. Mr. Mitchell was also acquainted with the defendant, and this lady when they lived in Caledon-street, he (Mr. Mitchell) being the defendant's landlord, and he says that in the communications that he had with them he was expressly informed by the defendant that the lady was Mrs. May. At the same time there was in the service of the defendant this girl Wasser, who lived with them for many years, and seems at the last to have left on the most friendly terms with both Mrs. Parry and the defendant. She states in the clearest terms that the defendant and Mrs. Parry lived together as man and wife, and that she was told after the death of the defendant's first wife that this lady was Mrs. May. Now, in addition to the direct evidence given by these witnesses, we have the arrangement of the house from which one must come to the conclusion that certainly at Caledon-street there was only one bedroom for the occupation of defendant and Mrs. Parry. The defendant explains the residence of Mrs. Parry in his house by saying that she came there, and looked after his children, and that she was to some extent regarded as their mother, but it incidentally transpired during the examination of the girl Wasser that for some period there were no children in the house. The conclusion, therefore, that I come to, is that in Caledon-street the defendant and Mrs. Parry were on such terms of relationship as to justify people in regarding her as his wife. If it is found that they lived together as man and wife, then the evidence given by the defendant himself upon that part of the case is untrue, and the discredit which is consequently thrown upon his statements must affect the whole of his evidence. It has been argued that, whatever their relationships in Caledon-street, it had not been proved that intimate relationships continued in



Plein-street. But then, it has not been admitted by the defendant that there was any change of relationship. Certain of the documents that have been put in corroborate the statement of the plaintiff in this case. There was one circumstance which I thought at one time was unfavourable to the plaintiff, and that was the delay which occurred in pressing his claim after the defendant had positively disputed it. However, he has given reasons which I can accept for his conduct in that respect. In the absence of any evidence which can throw doubt upon the items in the account itself, I must accept it, supported as it is by plaintiff's books, as correct, and though perhaps there might be some ground for arguing that daily attendance in this case would hardly be regarded as necessary, and that the services were too frequently rendered, I see no reason for believing that the doctor would have pressed his services upon this lady, unless they were required and asked for, and I consequently take this account as correct. Judgment is given for the plaintiff as prayed, with costs.

Dr. Greer said that the plaintiff had obtained judgment against the defendant under Rule 329d, and that that judgment had been set aside, and costs ordered to be costs in the cause.

Maasdorp, J., said that the costs would include the costs of the proceedings.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

STAG LINE, LTD. V. TABLE { 1906.  
BAY HARBOUR BOARD. (July 12th.

Table Bay Harbour Board—Dock regulations—Breach of contract.

*The plaintiffs, being the owners of ship C., which required to be painted, entered into a contract, by which the defendant Board undertook to take her*

*into the Graving Dock, but no specific day for doing so was agreed upon. Before the date of this contract the owners of the ship M. had engaged room in the Dock for a certain day, but owing to a detention on the Coast she did not arrive on the day agreed upon, whereupon the Board allowed her to enter when she arrived, two days later, charging her with dock fees from the day agreed upon. The result was that the ship C. could not enter the Dock until about 14 days after the date on which the contract for dry docking her was entered into. The Board is a statutory body, having power to make regulations for the management of the Docks, and one of the regulations so made was to the effect that 'on failure to place a vessel in the Dock on the day appointed for that purpose, such vessel should, if the Dock be required, lose her turn on the list, and the owner shall be liable to pay to the Board the expenses which may have been incurred in preparing the Dock for her reception.'*

*Held, that the regulation did not make it obligatory on the Board to let the M. lose her turn, and that, as under the circumstances disclosed in the evidence, it was not unreasonable to allow the M. to enter when she did, the defendant Board was not liable in damages for the detention of the ship C.*

This was an appeal from a decision of Mr. Justice Maasdorp, sitting as Divisional Judge of the Supreme Court, in an action in which the Stag Line sued the Table Bay Harbour Board for £1,000 by way of damages. The plaintiffs were, on the 21st March, 1901, the owners of the steamship Clematis. On or about the 20th March, 1901, the plaintiffs, through their agent in Cape Town, entered into an agreement with the Table Bay Harbour Board through the Dock Superintendent, whereby the defendants undertook to take the Clematis into the Graving Dock for painting, upon certain terms and conditions. Among the law-



ful regulations in regard to the Graving Dock was one: "On failure to place a vessel on the dock on the day appointed for the purpose, such vessel shall lose her turn on the list, and the owner is liable to pay the expenses to the Board." On the 23rd March, 1901, an agreement in similar terms was entered into with the owners of the S.S. Matabele. The day appointed for the Matabele was the 24th March, 1901, but the evidence showed it was the 25th March. The defendants, by the Dock Superintendent, refused to take the Clematis into the Graving Dock, and £1,000 was sustained in damages in consequence of the detention. The defendants said that their own regulations were not in contemplation of the parties to the agreement, and even if they were they were not binding. When the Court found that the regulations were part of the agreement and binding, it was argued further and with success that the Board had a certain discretion under these regulations, and that they were entitled, notwithstanding the strict tenor of the regulations, to act in the spirit of them, and to say in this case that the Matabele should be allowed to go into the dock. The owners of the Clematis were not allowed to claim for the days during which she had been excluded from the dock as against the charterers who hired the ship, and the loss fell upon the owners of the Clematis.

Plaintiff's declaration was as follows:

1. The plaintiff is the Stag Line, Limited, which is a company duly registered in England, having its office at North Shields, and is the owner of sundry steamships.

2. The defendant is the Table Bay Harbour Board, constituted under Act No. 36 of 1896, and the Graving Dock at the port of Cape Town is, amongst other property, vested in the Board, and by it placed under the superintendence of the Dock Superintendent.

3. The plaintiff was before and on the 20th March, 1901, and thereafter at all times material to this suit, the owner of the steamship Clematis.

4. On or about the 20th March, 1901, the plaintiff by the agents at Cape Town of the said steamship entered into an agreement with the defendant through the Dock Superintendent, subsequently specifically approved of by the Board whereby the defendant undertook and agreed to take the Clematis into the Graving Dock for painting on the 27th March, 1901, upon the following terms and conditions, to wit:—

(1) The vessel shall be taken into Graving Dock by and under the direction of such person as may be appointed thereto by the Board, in the presence of the Master or his duly appointed representative. (2) So soon as the vessel is declared by the person in

charge to be properly placed on the blocks, the Master or his duly appointed representative shall forthwith satisfy himself thereof, and failing to point out any defect in such placing to the superintendent or his representative, the vessel shall be considered to have been properly and safely placed on the blocks.

(3) The Board shall not be liable for any damage which may be sustained by the vessel, and the vessel shall not be liable for any damage which may be sustained by the Dock or its appurtenances either in docking or undocking.

(4) The Board shall not be responsible for any detention of vessels in the Graving Dock through stress of weather, disarrangement of machinery, block of work, or from any other cause whatever.

(5) Every vessel using the Graving Dock will be charged at least one day's rent in addition to the charge for docking and undocking. (6) Notice in writing must be given by the Master or agent when the vessel is ready for undocking, but such notice will not be accepted by the Superintendent until the vessel has finished her work and the Dock cleaned, cleared and ready for flooding; if such notice is served before 10 o'clock a.m., the day on which such notice is given, Sundays excepted, will be considered the undocking day.

5. Amongst the lawful regulations regarding the said Graving Dock made by the Board under the Act aforesaid is the following, to wit: "On failure to place a vessel in the Graving Dock or on the Patent Slip on the day appointed for that purpose such vessel shall if the Dock or Slip be required lose her turn on the list and the owner, master or agent of such vessel shall be liable to pay to the Board the expenses, if any, which may have been incurred on preparing the Dock or Slip for her reception." And the said regulation was in contemplation of the parties to the aforesaid agreement and binding upon them.

6. On or about the 23rd March, 1901, an agreement on similar terms and subject to the said regulations was entered into between the defendant and persons representing a certain vessel, the Matabele, but the day appointed for the Matabele to be placed in the Graving Dock was the 24th March, 1901.

7. The Matabele was not duly placed in the Graving Dock on the appointed day and lost her turn on the list, yet thereafter on the 27th March, 1901, despite lawful protest by the master of the Clematis on behalf of the plaintiff company, and in breach of its agreement aforesaid with the plaintiff, the defendant, by the Dock Superintendent acting wrongfully and unlawfully and not in accordance with the said agreement and regulations refused to take the Clematis into the said Graving Dock

and took in the Matabele, which remained in the said Graving Dock until the 9th April, 1901, to the exclusion of the Clematis.

8. The Clematis was on the 10th April, placed in the said Graving Dock and undocked on the 12th April, the painting required being done in two days.

9. The Clematis was detained and delayed for fourteen days by reason of the premises, and the plaintiff sustained damages in the sum of £1,000 in consequence of such detention including specially loss of hire of the Clematis for the period of detention, in addition to the actual expenses and costs occasioned by the delay of the vessel, for which sum, by reason of the premises, the defendant is liable.

10. Notwithstanding frequent demand the defendant refuses to pay the said sum.

Wherefore the plaintiff prays for judgment for £1,000 sterling by way of damages or for such further or other relief as to this honourable Court may seem meet together with costs of suit.

To this declaration defendant pleaded as follows:

1. Paragraphs 1, 2, 3, 8 and 10 of the declaration are admitted.

2 The defendant denies that any agreement to take the Clematis into the Graving Dock on the 27th March was entered into between the plaintiff and the Dock Superintendent and that any such agreement was subsequently specially approved by the Board. Defendant says that on the 20th March, 1901, the Dock Superintendent signed the following document: "Terms on which the Table Bay Harbour Board engage to place the Clematis..... in the Graving Dock on the following conditions" which was signed by the agents of the plaintiff, "We agree to the above condition" and the document contains in the margin the words "Cleaning and painting only." The conditions are those stated in paragraph 4.

3. The defendant admits that the regulation set out in paragraph 5 is one of its lawful regulations for the management and working of the Docks under the provisions of Act No. 36 of 1896, and that the same is binding upon all masters, agents and owners of vessels, but save as above it denies paragraph 5.

4. The defendant denies paragraph 6. Application to have the Matabele, which was represented as a vessel carrying mails and as fitted as a passenger boat, dry-docked was made prior to the month of March, 1901.

5. The defendant says that the Matabele arrived in Table Bay on the 27th March, that the Dry Dock was partly occupied by a vessel lawfully and properly placed there previously, that the Clematis required the whole dock which

was not available, whereas the Matabele only required that portion of the Dry Dock which was available, and that the defendant was not legally bound to take such other vessel out of the Dry Dock to make room for the Clematis. The Matabele was placed in the said portion of the said dock on the 27th March, where she remained until the 9th April. Save as above the defendant denies the allegations in paragraph 7 and denies that the plaintiff had any legal right to claim that the Clematis should be docked on the 27th March or for the 14 days thereafter.

6. The defendant denies the allegations in paragraph 9 and denies that it is liable for any part of the sum claimed, and save as above denies the allegations in the declaration.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

The following judgment was delivered in the Court below.

The plaintiff company allege in their declaration that on the 20th of March, 1901, they entered into an agreement with the defendants, whereby the defendants undertook to place their ship, the Clematis, in the Graving Dock of the Table Bay Harbour for cleaning and painting, on the 27th March, upon the terms and conditions contained in the printed form of contract, which was duly signed by all the necessary parties. The plaintiffs were on the appointed day prepared to place their ship in the dock, but the defendants failed to take her in, and delayed doing so until the 10th of April. They now claim as damages sustained by them, by reason of this delay of fourteen days, the sum of £1,000. It appears there was a prior undertaking on the part of the Harbour Board to place another ship, the Matabele, in the Graving Dock on the 25th March. That ship did not arrive until the 27th, when she was docked, and she was not undocked until the 29th of March. It was the presence of the Matabele in the Graving Dock which prevented the Clematis going in. And in anticipation of this fact being set up as a legal impediment to docking the Clematis on the 27th, the plaintiffs proceed to state that upon the failure of the Matabele to go into the Graving Dock on the 25th March, which was the day appointed for the purpose, she lost her turn on the list in accordance with Regulation No. 45, sub-section D of the Harbour Board. It is alleged that if this regulation had been observed, the Graving Dock would have been available for the Clematis on the 27th of March. The defendants deny that they agreed to place the Clematis in the Graving Dock on the 27th of March, and say that the Dock was not available for that ship until the 10th of April, being occupied

by the Matabele until that day, but they admit that they engaged to place the Clematis in the Dock in terms of the printed document which was put in at the trial. The first point to decide is whether there was a definite agreement on the part of the defendants to dock the Clematis on the 27th. It appears from the evidence of Captain Stephen, the Dock Superintendent, that when he was approached in the matter by the agents of the ship, which had not then arrived, he entered into the agreement mentioned, pointing out to the agents that he had already undertaken to place the Matabele in the Dock on the 25th of March, and he was under the impression that she would be disposed of in a couple of days, in which event the Dock would be available for the Clematis. He says he never definitely undertook to dock the latter ship on the 27th. This is the only direct evidence in respect of the terms of the agreement at the time it was entered into, the agent who made the contract on behalf of the ship not having been called at the trial. Captain Stephen says he never enters into an engagement by which he undertakes to put any vessel on an appointed day out of the dock to make room for another, and he did not do so on this occasion. I am bound, under the circumstances, to take the evidence of Captain Stephen as conclusive upon this point, there being no direct contradiction of it. Captain Stephen is supported in his statement by a passage in a letter written by the agents of the Clematis on the 1st of April, to the following effect:—"The steamer Clematis arrived here on the 24th ult., the Dry Dock having been booked by the Matabele from the 25th, which latter steamer we were informed would leave the dock again on the 27th ulto." There is no pretence here that the 27th was fixed in express terms as the day for the docking of the Clematis. In the printed undertaking no date is fixed. I come to the conclusion that the plaintiffs have failed to prove that there was an agreement to place the Clematis in the Dock on the 27th. The defendants undertook, on the 20th, to place the Clematis in the Dock, and I am of opinion that they then entered into a binding contract to do what was required within a reasonable time, having regard to the regulation of the Harbour Board, and the ordinary course of business at the port. These agreements are entered into in contemplation of the regulations and the ordinary course of business at the port. It would appear that, in the ordinary course, it would be reasonable to expect that a ship would be docked within such time as the necessary arrangements can be made if the Dock is available, or so soon after the Dock becomes available. Independently of the consideration of the further question raised by the plaintiffs,

which I still have to deal with, it would seem that the Matabele, which had a prior claim, and had to be disposed of, occupied the Dock until the 9th April. The work on the Matabele took longer than was anticipated, and the dock was not available for the Clematis until the 10th April, when she was actually docked. But it is contended on behalf of the plaintiffs that in calculating the reasonable time within which the defendants should have carried out their undertaking to dock the Clematis, the alleged prior rights of the Matabele should not enter into the calculation, because she had, under the Harbour Board regulations, forfeited her claim to be docked through her failure to be placed in the Graving Dock upon the appointed day. The regulation in question is to the following effect:—"On failure to place a vessel in the Graving Dock on the day appointed for that purpose, such vessel shall, if the Dock be required, lose her turn on the list, and the master shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the Dock for her reception." It seems to have been contemplated by the regulations that a book should be kept, in which the names of vessels applying for the use of the Graving Dock should be entered, and that such vessels should be placed in the Dock in the order in which they appear on the list, providing all the prescribed conditions were fulfilled. The abovementioned rule provides for the forfeiture of this right of precedence under certain circumstances. It was contended for the plaintiffs that the moment a vessel fails to be placed in the Dock on the appointed day, she, as a necessary consequence, lost her place on the list, and the next vessel could claim the right to go in. If the regulations were strictly construed, a vessel would lose its turn on the list even where the failure to go into Dock arose from no fault on her part, and indeed, when the failure was due to default on the part of the Harbour Board. That could never have been intended. The regulation seems to me to provide for a forfeiture of a right, and for a penalty upon failure to enter the Dock through default of any vessel, as a matter of contract between that Harbour Board and that particular vessel, and is no direct concern under its contract of any other vessel on the list. In the analogous case of forfeiture provided by contract, the rule is that a forfeiture of rights should not be too readily assumed, and in this case, I think, it was in the discretion of the Dock Superintendent to take into consideration all the circumstances before he pronounced that the Matabele had lost her right to go into Dock. I can find nothing in the evidence to show that he exercised his discretion in an unreasonable manner, even it were in

the jurisdiction of the Court, to interfere with his discretion. A point which it is unnecessary to decide. I am of opinion that the Harbour Board placed the *Clematis* in the Graving Dock in such reasonable time as they had by their contract undertaken to do, when they put her in after the Dock was vacated by the *Matabele* on the 9th April. That being my view of the case, it is unnecessary to decide whether the measure of damages contended for in the declaration is the correct measure to apply in a case like the present.

Judgment must be given for the defendants with costs.

Mr. Schreiner, K.C. (with him Mr. Close and Mr. D. Buchanan) for appellants. Mr. Searle, K.C. (with him Mr. Bisset) for respondents.

Mr. Schreiner: The learned judge in the Court below is mistaken in saying that the Port Captain has discretion to vary the turns of vessels using the patent slip. The *Matabele* should not have been allowed to enter the dock. The Port Captain can turn a vessel out of the dock should she stay too long, but the rule that should a vessel fail to enter the dock on the day appointed "she shall lose her turn on the list" is imperative, and the Port Captain has no general discretion. Stephen said the dock would be ready by March 25th. The *Matabele* did not arrive till the 27th and then was not admitted into the dock though she was charged dues from the 25th. Stephen says in his evidence that he never promised the dock on any particular date, and yet he promised to dock the *Matabele* on the 25th. Sec. 40 (as to giving notice of the Board's regulations must be brought to the notice of parties. Bulman is not contradicted by Stephen in any part of his evidence. The *Gudrun* could easily have been shifted (see evidence of Bulman and Stephen). The *Clematis* could not enter the dock while the *Gudrun* was there the *Matabele* (being a smaller vessel) could do so. Stephen says that the fact that the *Matabele* was a mail boat had no weight with him.

[De Villiers, C.J.: But may it not have weight with the Court?]

But the following regulations are compulsory and bind the Board just as much as they bind the ship:—

(d) On failure to place a vessel in the Graving Dock or on the Patent Slip on the day appointed for that purpose, such vessel shall, if the Dock or Slip be required, lose her turn on the list, and the owner, master, or agent of such vessel, shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the Dock or Slip for her reception.

(f) The Port Captain and the Dock Superintendent may, in his discretion, allow any vessel which shall have arrived in the Harbour in a distressed or leaky

condition, to enter the Graving Dock before all other vessels in the entry book.

[De Villiers, C.J.: The Board took advantage of sub-section (d). May not that have been inserted to meet cases like the present?]

[Hopley, J.: Did not the Captain agree to pay from the 25th?]

There is no evidence as to that. Stephen had no power to put the *Clematis* off her turn. He knew (see his evidence) that she would be in dock for ten or twelve days.

[De Villiers, C.J.: The Court will have to determine what is meant by a "reasonable time." Evidently the object of the rule is to protect the Board.]

The word "turn" is significant, and means that the ship next in rotation must go in.

[De Villiers, C.J.: Do you say that a mail steamer, no matter what the urgency for her early despatch might be, would lose her turn, if she failed to dock on the due date?]

So it would appear, and if it is not so that should be clearly expressed in the Regulations.

[De Villiers, C.J.: Why did you not contract to be docked on the 25th?]

We saw Bulmer's letter.

[De Villiers, C.J.: On the 26th March, Stephen says that he could not get the dock ready for the *Matabele*.]

Yes, but that was simply a declaration of what he was going to do. It does not prove his right to do it. We say that the interpretation of the rules given by his lordship in the Court below is incorrect. The word "turn" is very expressive. See *Gough v. Port Elizabeth Town Council* (16 C.T.R., 229), and the judgment at p. 231. The principles there enunciated are clearly applicable in the present case. Also *Brady v. Turf Club* (16 C.T.R., 237), *Wright v. Paterson* (5 Searle, 29, and 5 E.D.C., 390), and *Bristow v. Paterson* (5 Searle, 29, and 5 E.D.C., 390), and *Liquidator Cape Central Railway v. Nothling* (8 Juta, 25).

[De Villiers, C.J.: But this regulation is for the benefit of the Board, not for that of the public.]

The regulation says "in turn." We only claim our turn and not any particular day.

[De Villiers, C.J.: Cannot the Board waive a privilege in its own favour?]

Not to the prejudice of others. I rely on the word "turn," it shows that each ship must come in rotation. Sec. 7 of Regulations shows that "turns" must be strictly observed. The Board can waive its own rights but not those of the people, e.g., they could not shut up the graving dock altogether, *Harbour Board v. Bucknall Line* (14 C.T.R., 351). There the Board escaped liability because they had observed their own con-



ditions: here *e converso* they have not observed them.

Mr. Searle (for respondents): This was an action on contract, but as the learned Judge said, the action on contract nearly broke down. We refused to admit that we had contracted to allow the *Clematis* to go into dock on the 27th. The Board's regulations are empowering: they are made for the purposes of their own business. It makes binding regulations only for other people. Had these things been done under an Act of Parliament, of course the Harbour Board would have been bound. These regulations are not incorporated in any contract with the Harbour Board. No contract has been proved. Stephen says that he never contracted to put in any vessel on any specified day.

[De Villiers, C.J.: If the *Matabele* was charged from the 25th does not that go far to prove that she ought to have been docked on the 25th. Must not the rule as to vessels in distress being first docked be taken to imply that all other vessels must be taken in their turn?]

No, we have simply followed the custom of the Port. The *Matabele* was due on the 26th; she arrived on the 27th, and was docked. No time was specified in the contract. See *Alice Municipality v. Crallen* (7 C.T.R., 409). This case is not quite on all fours with the present, but it is analogous, as to the force of empowering regulations.

Mr. Schreiner (in reply) cited *London Shipowners v. London Docks* (1902. 3. Ch.D. 252) in which the whole question of bye-laws and *ultra vires* is fully discussed. The case of *Alice Municipality v. Crallen* does not touch this case, but see *Hopkins v. Mayor of Swansea* (4 M. and W., 640).

De Villiers, C.J.: This action is founded upon a contract by which the defendant Board is alleged to have undertaken to take the plaintiff's ship *Clematis* into the Graving Dock on the 27th of March, 1901. The finding of the Divisional Court was that a contract to drydock the *Clematis* had been duly made, but that no date had been fixed upon in the contract. The written contract did not fix the date, but there was evidence for the plaintiff to the effect that the 27th had been agreed upon, whereas the evidence for the defendant was that the date was not fixed. Incidentally the declaration refers to one of the regulations of the Harbour Board which is said to have been in the contemplation of the parties to the contract and to be binding upon them, but if that regulation is to form the basis of the contract the date would have to be the 25th instead of the 27th of March. In so far as the plaintiffs rely upon an oral agreement that the ship was to be taken into dock on the

27th I quite agree with the Court below that no such definite agreement was made.

Assuming, however, that the regulation just referred to was in the contemplation of the parties at the time when they entered into the contract the question arises whether there was any breach of contract on the part of the defendant Board in not taking the *Clematis* into dock until the 10th of April. The delay was occasioned in the following manner. Before the date of the contract in question the Dock Superintendent had agreed with the owners of the ship *Matabele* to take her into the Graving Dock on her arrival, which was expected would be on the 25th of March, from which day dock dues were to become payable. This was during war time, and the agents of the *Matabele*, which was used in carrying mails on the East Coast, had been instructed to have her docked immediately. She did not arrive until the 27th, on which day she was allowed to enter the dock. On this point the Dock Superintendent gave the following evidence: "I knew the necessity for despatch in the matter of the *Matabele*. When the *Matabele* did not arrive on the 25th I still knew that she was coming down and that, barring accidents she would be here almost immediately. To have taken the *Clematis* in would have meant incurring a day's delay. The half of the dry dock, which is all that the *Matabele* required, is always prepared, but the whole of the dock which would have been required for the *Clematis*, required a day to prepare, and I would have had to put the *Gudrum* out of her berth until the *Clematis* left. I felt that if I had to begin to prepare the dock for the *Clematis* the *Matabele* would arrive whilst in the midst of the preparations. I thought the *Matabele* required only painting and cleaning." The contention on behalf of the plaintiffs is that under regulation 45 (d) the Board had no discretion, but was bound to refuse admission to the *Matabele* into the dock on the ground that the agents had failed to place her in the Graving dock on the 25th March, being the day appointed for that purpose. The regulation reads as follows: "On failure to place a vessel in the Graving Dock on the day appointed for that purpose, such vessel shall, if the dock be required, lose her turn on the list, and the owner, master, or agent of such vessel shall be liable to pay to the Board the expenses, if any, which may have been incurred in preparing the dock for her reception." The object of this regulation was not to confer rights on other ships, but to enable the Board, whilst refusing to allow admission to the ship which is in delay, to charge her with the expenses incurred for her reception. Under sub-section (f) the



Dock Superintendent may, in his discretion, allow any vessel which shall have arrived in the Harbour in a distressed or leaky condition, to enter the Graving Dock before all other vessels in the entry book," but it does not follow that he was deprived of all discretion in every other case. To give one particular ship a preference over all other vessels in the entry book would be such a wide exercise of discretion as to require special authority under the regulations of the Harbour Board, but this is not the kind of discretion which was exercised in the present case. A berth had been engaged for the Matabele before the agents of the Clematis asked for a berth, and although the Matabele did not arrive on the very day agreed upon there were circumstances in the case which might reasonably induce the Superintendent to keep a berth for her although she was late. Anyhow, I cannot read regulation 45 (d) as depriving the Board itself of all discretion in a case like that of the Matabele, and in the present case the Board has adopted the act of the Superintendent. That regulation contains provisions in favour of the Board which it may, in my opinion, waive in favour of a particular ship if circumstances exist which in the opinion of the Board justify such a waiver. Under circumstances such as those under which a berth was engaged for the Matabele the Board was not bound to insist upon her losing her turn. Cases could be imagined in which it would be a breach of duty towards other ships if special favour is shown to some particular ship, but the present is not such a case. Nor is it part of the plaintiff's case that the defendants have been guilty of neglect of a statutory or quasi-statutory duty which it owed to the plaintiffs. The claim is for damages for breach of contract, and as the contract relied upon has not been proved, the judgment of the Court below was rightly given for the defendants. The appeal must be dismissed with costs.

Buchanan and Hopley, J. J., concurred.

[Appellants' Attorneys: Fairbridge, Arderne and Lawton. Respondents' Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

### ADMISSIONS.

} 1906.  
{ July 12th.

Mr. Benjamin moved for the admission of Cecil Ernest Benjamin as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Port Elizabeth.

Mr. Pohl moved for the admission of Leibbrandt van der Berg as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Aberdeen.

Mr. Douglas Buchanan moved for the admission of John Peter Frylinck as an attorney and notary.

Application granted and oath administered.

## PROVISIONAL ROLL.

### NIMMIO V. STURCK.

Mr. Douglas Buchanan applied for a further postponement until Saturday, certain affidavit which had been expected from Johannesburg not having arrived.

Defendant said that this was the second postponement, and he could not keep coming to court in this way.

Ordered to stand over until Saturday, plaintiff not to be allowed costs of today.

### INSOLVENT ESTATE BOTHA V. FITZGERALD.

Mr. Louwrens moved for provisional sentence for £224 18s. 11d. and £747 12s. 1d., upon certain conditions of sale, with interest and costs, the amounts representing the first and second instalments of purchase price, which had become due.

Order granted.

### LIEBOWITZ V. HENDRIKS.

Mr. Benjamin moved for the final sequestration of defendant's estate as insolvent.

Order granted.

Mr. Benjamin also applied for the appointment of Mr. G. W. Steytler as provisional trustee, with power to carry on the livery stables, etc.

Order granted as prayed.

### MILLER AND CO. AND ANOTHER V. CAMERON.

Mr. Pyemont moved for the final sequestration of defendant's estate as insolvent.

Order granted.

### LAWRENCE AND CO., LTD. V. DRUKER.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**BARRON V. WHITAKER.**

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**BOWNTREE V. EARL.**

Dr. Rainsford moved for provisional sentence for £900 upon a mortgage bond due by reason of non-payment of interest, and for interest, less £14 2s. 3d., paid on account; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**BRUNT V. WALKER.**

Mr. Lewis moved for the final sequestration of the defendant's estate as insolvent.

Order granted.

**DOYLE V. HARRIS.**

Mr. Toms moved for a decree of civil imprisonment against defendant upon an unsatisfied judgment for £44 11s. 2d., less £12 10s.

Defendant appeared and said that she admitted the judgment debt, but she had no means, and was without occupation. The matter related to costs incurred by reason of her having withdrawn an action against a man who had owed her money. She was at present living with her parents.

No order was made, his lordship remarking that it was clear that defendant was without means.

**ESTATE HERTZOG V. ROBERTS.**

Mr. Watermeyer moved for the final adjudication of defendant's estate as insolvent.

Order granted.

**ROUX AND OTHERS V. FORD.**

Mr. Bailey moved for provisional sentence for £400 upon a mortgage bond, due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**NATIONAL BANK OF SOUTH AFRICA V. GOLDSTEIN.**

Mr. Howes moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court.

Defendant offered to pay £1 a month. He said he was without means, goods, or occupation. He had been interested in a building, having put in £350. The judgment he was now sued upon related to an accommodation bill that he had given to Elias Harris. He had lost about £1,200 on a deal in shares. He had been unable to raise a bond on the building.

Decree granted, with costs, to be suspended upon payment of £1 a month, first payment to be made on August 1, with leave to plaintiff to move for an increase of monthly payment when so advised.

**COURTIS V. HENRY.**

Mr. Sutton (for plaintiff) applied for a provisional order of sequestration to be superseded.

Provisional order superseded.

**SWANICH V. GOLDBERG.**

Mr. Benjamin moved for provisional sentence for £1,050 on a certain acknowledgment of debt, with interest.

Order granted.

**ILLIQUID ROLL.**

KRAMER V. BRAUDE. { 1906.  
{ July 12th.

Mr. Lewis moved for judgment under Rule 329d for £73 13s. 6d., balance of account due for goods sold and delivered and moneys disbursed.

Order granted.

**ALIE V. MAKWENA.**

Dr. Rainsford moved for judgment under Rule 329d for £22 rent, due in respect of certain lease of land, and for an order of ejectment against defendant and cancellation of the lease, with costs.

Judgment was granted for the rent, with costs, but no order was made as to the other part of the application.

**SCHOLTZ V. DU PLESSIS.**

This was the return day of a summons calling upon the respondent to show cause why he should not be declared insane and incapable of managing his affairs, and a curator appointed of his person and property.

Mr. Roux was for applicant; Mr. De Waal appeared as *curator ad litem* for the lunatic.

Dr. Dodds, superintendent of Valkenberg Asylum, said that respondent was admitted in 1901 in a demented state,

and he was now practically no better. His general health was, if anything, rather weaker.

Mr. De Waal said that he raised no opposition to the application.

Order granted as prayed, Pieter Eduard Scholtz to be curator of the lunatic's person and property, costs out of the estate.

### REHABILITATIONS.

Mr. Payne applied for the discharge from insolvency of Abner Brown.

Granted.

Mr. Palmer applied for the release from an order of sequestration of Benno Maisel.

Granted.

Mr. Douglas Buchanan applied for the rehabilitation of Saniefa Harries.

Granted.

Dr. Greer applied for the rehabilitation of Coenraad Wilhelmus Johannes Marthinus Steensma.

Granted.

Mr. Alexander applied for the release from sequestration of Barney Israelson.

Granted.

### GENERAL MOTIONS.

WIGGETT V. WIGGETT. { 1906.  
July 12th.

Mr. Benjamin moved for a decree of divorce, in default of defendant's compliance with an order of restitution, and for forfeiture of benefits under the antenuptial contract, plaintiff waiving his prayer for costs.

Decree granted, with forfeiture as prayed.

### DONNELLY V. DONNELLY.

Plaintiff appeared in person, and applied for a decree of divorce, in default of defendant's compliance with an order of restitution, with maintenance for the child at the rate of £3 per month. Defendant was stated to be a plumber. His present whereabouts were unknown.

Decree granted, plaintiff to have custody of the child, and defendant to pay £3 a month towards its support until the said child attains the age of sixteen years; defendant to pay costs.

### FRYER AND CO. V. WELCH.

This was an application to have a certain rule *nisi*, relating to rights to an auctioneer's stand on the Parade, made absolute. Mr. Alexander was for applicant.

Dr. Greer (for respondent) said that he had just been instructed, and was not prepared to go on at present.

Ordered to stand over till Saturday.

### *Ex parte* JOYCE AND MCGREGOR.

Mr. Palmer moved for a rule *nisi* to be made absolute authorising alteration of a certain general plan.

Rule made absolute.

### STROTHER V. JALIEL.

This was an application by Harry Heath Strother, upon notice to Behair Jaliel, to show cause why she should not be interdicted from ejecting one Javardien from certain property in Leeuwen-street, Cape Town, until respondent has discharged her indebtedness to the applicant, secured by a cession of the rents. Dr. Greer was for applicant; Mr. Benjamin was for respondent.

After affidavits had been read and counsel had been heard in argument,

The application was refused, with costs.

### *Ex parte* BERNING AND ANOTHER.

Mr. Roux moved, on behalf of the petitioners, as executors in a certain estate, for leave to execute certain mortgage bonds.

Order granted as prayed, subject to Master's report.

### INDEPENDENT ORDER OF BRITISH FREE RIGHTS BENEFIT SOCIETY V. RUNCIMAN.

This was an application, upon notice, to set aside a certain judgment, to purge default, and to file a plea to respondent's claim. Mr. Benjamin was for applicants; Mr. Gutsche was for respondent.

From the affidavits, it appeared that Mr. Runciman had advanced certain moneys to the Simon's Town branch of the British Free Rights Benefit Society, and had taken judgment against the applicant society. Applicants said that the Grand Independent Order at Rondebosch had been sued, and that the proper parties to be sued were the African Methodist Equitable Order, at Simon's Town, to which the money was advanced. Applicants repudiated liability for the loan, or any portion thereof.

Mr. Benjamin submitted that there was nothing to show that the Rondebosch branch were liable for the moneys advanced to the Simon's Town branch. On the merits, applicants were entitled to have the matter re-opened. He further

submitted that the service of summons in the provisional case was not good.

Mr. Gutsche submitted that the service which had been made was quite valid. Before the order of the Court was set aside, his learned friend must show a reasonable ground why his clients did not appear at the hearing of the provisional case, and that they had a good defence to the claim. No reasonable cause had been shown why appearance was not entered at the provisional hearing. On the point of merits he submitted that both societies were one Grand Lodge, that they had been sued as one Grand Lodge, and that the branch at Simon's Town was a subordinate member. The lodge at Rondebosch was the parent lodge.

Maasdorp, J., granted an order setting aside the provisional judgment and authorising applicants to purge default, and to enter appearance and defend the action, question of costs to stand over.

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*Ex parte* THE COLONIAL TIMBER CO., LTD. (KNYSNA).

Mr. Douglas Buchanan moved for an order confirming the reduction of the company's capital from £3,500 to £875 the proposal being to reduce the shares to 5s. each, instead of £1 each, as heretofore. The capital was issued after registration, and fully paid up, by fifteen shareholders.

Ordered to stand over for further information as to the articles of association.

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*Ex parte* MURRAY.

Mr. W. Porter Buchanan moved for an order authorising petitioner to raise a loan for £50 upon a life insurance policy ceded to her by her husband under ante-nuptial contract.

Order granted as prayed.

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*Ex parte* CASTLE.

Mr. W. Porter Buchanan moved on the petition of Charles John Castle, as the duly authorised representative of the Matatiele Lodge of Freemasons, No. 2,130, for an order authorising transfer of certain landed property to the Municipality of Matatiele, and distribution of the proceeds among the eleven surviving members, and the heirs or representatives of the two deceased members. It had been found impossible to continue the lodge and the charter had been returned to England.

Order granted authorising transfer, appointment of petitioner as receiver of the proceeds, and payment of the costs out of the fund, but as to the prayer for

directions with regard to distribution of the proceeds, no order was made.

Maasdorp, J., pointed out that there was no resolution of the members as to the division of the property.

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*Ex parte* NEL.

Mr. Van Zyl moved for leave to dispose of certain property in the division of Ladismith, and invest the proceeds thereof in the purchase of another farm in the division of Robertson. The petitioner was a minor. The Master's report was favourable.

Order granted in terms of Master's report.

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*Ex parte* ESTATE LATE HALL.

Mr. J. E. R. de Villiers moved on the petition of the executor for leave to hypothecate certain property in Bree-street and Buitengracht-street, Cape Town, for the sum of £1,000.

Order granted.

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*Ex parte* PETERS.

Mr. De Waal moved for leave to presume the death of petitioner's brother, Willem Peters, who formerly resided at Lady Grey, division of Robertson, and for the appointment of petitioner as *curator bonis*. The said William Peters was supposed to have died about 23 years ago. A dead body, believed to be that of Willem Peters, was found near a hut on the veld, in the Swellendam division.

Maasdorp, J.: I think that under the circumstances the Court will deal with the matter as if the death of Wm. Peters had been established. The proceedings will be far too summary thereupon immediately to dispose of his property without taking the necessary steps in the ordinary way to see that it passes on to his lawful heirs. Under the circumstances the Court will authorise the petitioner to pass transfer of the property, to receive the purchase price to satisfy his own debt out of the balance of the fund to be paid to the Master, the Master being authorised to take the necessary steps for the appointment of an executor *dative*, costs to be paid out of the proceeds.

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DUNELL V. MOROKA.

Mr. Van Zyl moved for leave to sue respondent by edictal citation and to attach certain landed property in the division of Mafeking. Respondent was living in the Orange River Colony.

Leave to sue by edict granted, and property attached as prayed, citation to be returnable on August 1, and to be served personally.

*Ex parte* MINNAAR.

Mr. W. Porter Buchanan moved, on the petition of a minor residing at Stellenbosch, for an order authorising the payment of a certain legacy.

Ordered to stand over for a supporting affidavit.

*Ex parte* TRUSTEES INSOLVENT ESTATE KOENIG.

Mr. Howes moved for an order seeking the aid of the Courts of Natal in certain bankruptcy proceedings.

Order granted as prayed.

SALIE V. MOORE AND CO.

This was an application calling upon respondents to show cause why they should not be ordered to forward, deliver, and hand up to applicant a certain deed of transfer and diagram made in his favour, and relating to certain property at Somerset West Strand. Mr. Douglas Buchanan was for applicant; respondent appeared in person.

It appeared that the matter had been narrowed down to a question of costs, respondent having handed up the deed. Respondent at first claimed to have a lien on the deed for £36 10s. in respect of a debt owing to him by applicant, but he had now delivered the deed, and he said that he proposed to institute an action to recover the debt. The deed was originally handed to respondent for the purpose of raising a mortgage on the applicant's property at Somerset Strand.

Respondent was ordered to pay the costs of the application.

ROWE V. ROWE.

Mr. Roux moved on behalf of the petitioner for leave to sue his wife, Alice Rowe, by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Petitioner had not seen his wife for a considerable period, and her whereabouts were unknown to him.

Leave to sue granted citation to be returnable on October 15, personal service, failing which publication once in the "Government Gazette," "Cape Times," and a Melbourne newspaper, with leave to serve interdict and notice of trial at the same time.

*Ex parte* EXECUTOR ESTATE LATE HIGGS.

Mr. W. Porter Buchanan moved for an order fixing the date within which claims from persons entitled to share in

the residue of the estate should be filed. Mr. Higgs died about November last.

Counsel (in answer to the Court) said that the object of the application was to assist the executor in distributing the residue of the estate. The property left by Mr. Higgs, who died a widower without issue, was stated to be worth about £3,000.

Maasdorp, J., said that the executor seemed to be too expeditious. No order would be granted now, but leave would be given to apply at a later stage.

*In re* THE KRAAIFONTEIN HOTEL CO.

Mr. Roux presented the third and final report of the liquidators, and applied for the usual order.

The usual order as to lying for inspection was granted.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN, the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

CAPE TOWN TOWN COUNCIL  
V. COLONIAL GOVERNMENT  
AND TABLE BAY HARBOUR BOARD. 1906.  
July 13th.

[For head note, see report of the case in the Court below, p. 137.]

This was an appeal from a decision of His Lordship, the Chief Justice, declaring certain land on the Green Point Common to be the property of the plaintiffs.

The plaintiff's declaration was as follows:

1. The plaintiff is the Town Council of Cape Town, a body incorporated under Act No. 26 of 1893; the first defendant is the Honourable Arthur John Fuller, of Cape Town, who is sued in his capacity as Secretary of Agriculture, and as such representing the Colonial Government; the second defendant is the Table Bay Harbour Board, a body incorporated under Act No. 36 of 1896; and the third defendant is Colonel Chandos Hoskyns, Commanding Royal Engineer, Cape Town, and as such representing His Majesty's Secretary of State for War, or the former Board of H.M. Ordnance.



2 By Section 110 of the Act No. 26 of 1893, the Green Point Common, so far as it is situated within the Municipality of Cape Town, and also the foreshore within the said Municipality beyond the Harbour Board enclosure on the north side of the Breakwater, are vested in the plaintiff Council.

By Section 111 of the said Act, all waste ground or land situated within the said Municipality, which was before the first day of January, 1828, vested in or committed to the administration of the late Burgher Senate, and all other property which at the time of the expiration of Ordinance No. 1 of 1840 was legally vested in the Commissioners mentioned therein, was vested in the plaintiff Council, a reservation being made of any right or title which His Majesty's Imperial Government might have to any such immovable property.

Upon a portion of the said Green Point Common adjoining the Somerset Hospital is situated a certain fort now called "Fort Wynyard" but formerly known as "Kyk-in-de-Pot" Battery, and a laboratory. On June 1st 1840, His Excellency Sir George Napier, the then Governor of the Cape Colony, granted to the respective officers of Her Majesty's Ordnance, a certain piece of ground shown on the plan annexed to the said grant, together with all military buildings thereon, the said land being the aforesaid laboratory together with a small portion of ground surrounding it; it was further guaranteed, in the said grant, to the grantee, that no buildings whatsoever should henceforth be suffered to be erected on a certain larger area of land shown on the said plan as surrounding the ground granted as aforesaid, the said land included the "Kyk-in-de-Pot Battery" as shown on the said plan; the plaintiff Council craves leave to refer to the said grant and plan when produced at the trial.

The said grant was made on the further condition that the ground thus granted and guaranteed should be found, not to comprise, encroach upon or interfere with any ground already disposed of by Government.

6. The whole of the land dealt with as aforesaid is situated within the limits of the Municipality of Cape Town, and extends down to the seashore between the Breakwater and Mouille Point over the lower portion of it, a road has existed for far more than thirty years, and the said road is now the public road in front of the Somerset Hospital to Three Anchor Bay.

7. The Green Point Common, including the whole of the land shown upon the aforesaid plan attached to the said grant of 1840, formed portion of the land vested in or administered by the Burgher Senate before January 1st,

1828, and is now vested in the plaintiff Council under the one hundred and eleventh section of Act No. 26 of 1893.

8. The plaintiff Council further says that the said land, saving the portion actually granted as aforesaid, and "Fort Wynyard" has for a period of far more than thirty years always remained open and unenclosed, and has always been freely, continuously, uninterruptedly and as of right used and occupied by the inhabitants of Cape Town as a pasturage for cattle, and for recreation and other purposes, in the same manner in which the rest of the said Common has been used, and the said inhabitants have acquired a prescriptive right to the aforesaid use thereof.

9. Even if it be not proved that the said land was vested in or administered by the Burgher Senate, before January 1st, 1828, or that since the said date the inhabitants of Cape Town have acquired a prescriptive right as aforesaid to the use thereof, the plaintiff Council submits that the said land being the said land shown on the said plan excluding that expressly granted, and excluding "Fort Wynyard" vested in it upon the promulgation of Act No. 26 of 1893, the said ground being at the said date open for the use of the inhabitants of Cape Town and used and enjoyed by the said inhabitants, as aforesaid, as portion of the Green Point Common.

10. On September 9th, 1897, the Surveyor-General purporting to act under the eleventh section of Act No. 15 of 1887 and in pursuance of a resolution of the Houses of Parliament dated July, 1896, issued a certificate of reservation, reserving for the purpose of defence the portion of land hereinbefore referred to as to which the aforesaid guarantee in the grant of 1840 was given, the plaintiff Council had no knowledge of the said certificate of reservation, or of the aforesaid resolution or of any of the proceedings connected therewith, and only recently discovered the same, and submits that it is in no way bound or affected thereby.

11. In or about the year 1903, the plaintiff Council discovered that the Imperial Military Authorities were purporting to give a lease or right of occupation to the second defendant, the Table Bay Harbour Board, over portion of the said land, being that portion situated between the road passing in front of the said "Fort Wynyard," and the sea; and the said Military Authorities in or about the said date, fenced in a portion of the said land, and obstructed a road or roads, across it, to which the public had a right.

12. Thereafter the second defendant took possession of a portion of the said land, between the road running in front of "Fort Wynyard" and the sea, and adjoining the ground of the Cape Can-

ning Company, made excavations thereon, laid down lines of railway, and constructed sheds and buildings thereon, enclosed the said portion with an iron fence, and also encroached upon, took possession of, and commenced work of reclamation upon the foreshore adjoining the said land.

13. The public, and the inhabitants of the Municipality are, by the aforesaid works, excluded from all access to the portion of land taken possession of as aforesaid, and to the foreshore, and the second defendant, in the construction of the said works, has encroached on the public road in paragraph 6, referred to: none of the aforesaid works which are being constructed or purposes for which the said land is being used, and occupied by the second defendant, are in connection with the military or naval defence or protection of Table Bay, or the Harbour thereof.

14. The plaintiff Council has recently ascertained that the first defendant has purported to deliver over the said land, of which the second defendant has taken possession, to it (the second defendant) and is about to issue a title of the said portion of land situate between the road in front of "Fort Wynyard" and the sea, to the second defendant, unless restrained from so doing by order of this honourable Court.

15. By reason of the aforesaid acts of trespass committed by the defendants, and each of them, the plaintiff Council, and the inhabitants of Cape Town have been deprived of the free use and enjoyment of the said land, and have sustained loss and damage.

The plaintiff Council claims:

(a) A declaration as to the rights of the plaintiff Council and the defendants in respect of the said portion of land—the plaintiff Council making no claim in respect of the said laboratory, and the small portion of ground surrounding it which were actually granted in 1840, nor in respect of the land occupied by "Fort Wynyard."

(b) An interdict restraining the first defendant from granting any portion of the said land, save as above, to either the second or third defendant, or from purporting to reserve the said land so as to give the said second or third defendant any rights over the same.

(c) An order on the second defendant.

1. To quit and deliver up the portion of the said land of which it is in occupation.

2. To remove all buildings and other obstructions therefrom, and the fencing around the same.

3. To fill up all excavations made by it thereon.

4. To build up and restore the road which it has encroached upon.

(d) A declaration that the plaintiff Council and the inhabitants of Cape

Town are entitled to the free and unobstructed use of and access to the foreshore, encroached upon by the second defendant, and an interdict restraining the second defendant from interfering with the same, or from interfering with, obstructing, or trespassing on the foreshore.

(e) An order compelling the third defendant,

1. To remove the fence placed by him or under his authority round portion of the said land.

2. To allow all roads across the said portion to remain free and unobstructed.

(f) As against the two first-named defendants £100 damages for trespass.

(g) As against the third defendant £100 damages for trespass.

(h) Alternative relief.

(i) Cost of suit.

To this declaration the third defendant (Colonel Hoskyns) put in the following exception and plea in abatement.

The defendant, Colonel Chandos Hoskyns, comes into Court for the purpose of taking exception to and plead in abatement of the plaintiff's action, including the summons and declaration, on the ground that without obtaining submission and consent on the part of His Majesty's Secretary of State for War to the jurisdiction of this honourable Court the plaintiff was not entitled to institute and is not entitled to have and maintain this action against him, the said defendant, and that neither in the summons nor in the declaration is it alleged that such submission and consent has been obtained.

Wherefore the said defendant prays that this action as against him may be set aside and abated with costs of suit.

The exception was allowed with costs.

The first and second defendants pleaded as follows:

1. Paragraph 1 of the declaration is admitted.

2. Paragraph 2 is admitted save that as regards so much of the paragraph as refers to the foreshore the defendants refer to the terms of the said Section 110.

3. Paragraph 3 does not correctly state the provisions of the 111th Section of Act 26 of 1893, and is denied and the defendants beg to refer this honourable Court to the said Section for the terms thereof showing what waste land or other property was vested in the plaintiff.

4. The defendants deny that the said Fort Wynyard and the laboratory hereinafter mentioned are or were situated upon the Green Point Common, vested in the plaintiff. The defendants admit the grant referred to in paragraph 4 being a grant of the said laboratory with a small portion of the

ground adjoining and the said grant guaranteed to the grantees of the guarantee set forth in paragraph 4; and contained the proviso in paragraph 5 set forth and also with permission to dispose of or alienate the said ground with the approbation of the Government and subject to all such regulations as were either already or should in future be established with regard to such lands.

5. As to paragraph 6 the defendants deny that the land referred to in the said paragraph is situated within municipal limits, they deny that the said land extends to the seashore between the Breakwater and Mouille Point. They admit that a certain road exists between the Somerset Hospital and Three Anchor Bay but otherwise they deny the allegations in paragraph 6.

6. The defendants deny the allegations in paragraph 7 of the declaration. They admit that the land referred to in paragraph 7 was for a period of time open and unenclosed, but they deny all the other allegations in paragraph 8 and they specially deny that the inhabitants of Cape Town have uninterruptedly and of right used and occupied the said land for a period of thirty years and they specially deny the said use and occupation as regards the land referred to in paragraph 8 hereof. The defendants deny the allegations of fact and conclusions of law in the 9th paragraph contained.

7. The defendants admit that on the 9th September, 1897, the Surveyor-General issued the certificate referred to as he legally might in accordance with the law and the resolutions of both Houses of Parliament, and they deny the other allegations in paragraph 10 contained.

8. The defendants have no knowledge of the alleged discovery by the plaintiffs, and do not admit the same. They say that the Imperial Military Authorities did in 1897 purport to give a right of occupation to the second defendant over the portion of land between the said road and the sea, and the defendants did take possession thereof in the said year, save and except a certain portion thereof, which was granted years ago by the Crown, and is now the registered property of the Canning Company, from whom the second defendant has leased it. The defendants have no knowledge of the other allegations in paragraph 11.

9. As to paragraph 12, the second defendant admits that under the powers conferred on him by law and with the sanction of the Colonial Government he took possession of the land as described in the 8th paragraph hereof, and that he reclaimed certain land from the sea and filled up and levelled the said land which chiefly consisted of rocks and has improved and made the land which was

useless, of great value, and has laid down lines of railway and constructed sheds thereon. Save as above, paragraph 12 is denied.

10. The defendants admit that the public and inhabitants of the Municipality are excluded, as alleged in paragraph 13, of the declaration, but they deny the other allegations in paragraph 13.

11. As to paragraph 14, the defendants admit that the Colonial Government was about to issue a title to the second defendant of the said portion of land in paragraph 8 hereof referred to, but they deny the rest of the said paragraph 14, and they deny paragraph 15.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the second defendant says:

1. That in case this honourable Court should adjudge in terms of the plaintiff's prayers in convention, he begs to refer this honourable Court to the pleadings in convention, and says that as a *bona fide* possessor of the said portion of land from which the plaintiff claims that he should be ejected, he has made great improvements upon the said land, and of which improvements the plaintiff was fully aware, and has enhanced the value of the said ground by £12,000 more than which was expended by him thereon.

Wherefore he prays:

(a) For an order that the plaintiff is not entitled to eject him from the said land without the payment to him of the sum of £12,000.

(b) Alternative relief.

(c) Costs of suit.

Replication and plea to claim in reconvention:

Plaintiffs say for a replication:

(1) (a) That as to paragraph 4 of the plea and the effect in law of the said grant of 1840 they refer to the terms of the said grant.

(b) That as to paragraph 8 they do not claim any part of such ground as may have been granted to and is now owned by the said Cape Canning Company.

2. Save as above and save in so far as the said plea admits any of the allegations in the declaration, they deny all the allegations of fact and conclusions of law therein, join issue thereon and again pray for judgment with costs.

And for a plea to the claim in reconvention, they say:

3. They crave leave to refer to the several matters hereinbefore by them pleaded.

4. If this honourable Court should find that the said Harbour Board is a *bona fide* possessor in respect of improvements effected prior to the summons in this suit (as to which allega-

tions they submit to the judgment of the Court) they say that the said works done by such Board are not works which they as owners would have executed and they have not received any account from plaintiffs in reconvention of the said works of their value; they say that if this honourable Court should find that the said works enhance the value of the land and are improvements within the meaning of the law in that behalf, they are prepared and hereby tender to pay the fair and legal value of such improvements as have been effected prior to the date of summons in this suit.

Wherefore, subject to the above, they pray that defendants' claim be dismissed with costs.

The rejoinder and replication in reconvention were general.

The reasons of the Chief Justice, for his judgment were as follows:

The original defendants in this action were the Colonial Government, the Table Bay Harbour Board and Colonel Hoskyns, as representing the Secretary of State for War. On behalf of the last of the three defendants an exception was taken to the exercise of jurisdiction by this Court over him in his said capacity without the consent of the Crown, and the exception was allowed by me. The only remaining defendants, therefore, were the Colonial Government and the Harbour Board.

The action is for a declaration of the respective rights of the parties in respect of a portion of land which formerly formed part of the Green Point Common, for an interdict restraining the Government from granting the land to the Harbour Board, for an order of ejectment against the Board, for a declaration that the plaintiff Council and inhabitants of Cape Town are entitled to the free and unobstructed use of and access to the foreshore, for an order compelling the Board to remove a fence placed round the land and for damages against both defendants.

The plaintiff's claim to the control over and ownership of the land in dispute is based on the free, continuous and uninterrupted user from time immemorial by the inhabitants of Cape Town and upon the different statutes by which the rights of the plaintiff Council and of its predecessors, as formerly constituted, were from time to time extended and defined.

The defendants, by their joint plea, deny any uninterrupted user by the inhabitants, and they also deny that the land now in question ever formed part of the Green Point Common or of any land vested in the Council by the different statutes relied upon by the Council. The defendants more especially rely upon the fact that the land in dispute forms part of an area as to which a guarantee was given in 1840 by the Colonial Government to the Imperial

Government that no buildings would be suffered to be erected thereon. This guarantee appears in a grant made by the Governor on 1st June, 1840, to the officers of Her Majesty's Ordnance of the Laboratory, with a small portion of ground surrounding the same, the effect of the guarantee being to create in favour of the Imperial Government a servitude upon the area just mentioned, preventing its owners or occupiers from thereafter erecting any building thereon.

The defendant Board filed a claim in reconvention demanding payment of £12,000 as compensation for improvements in case it should be decided that the Council is entitled to eject the Board from the land in dispute. After the arguments had been completed I understood it to be agreed between counsel that the Harbour Board should remain in possession of the land in dispute and pay to the Council such compensation as should be settled by a referee, the only matter left for future argument being the name of the referee. I did not accordingly, enter fully into my reasons for holding that the land in dispute was vested in the Council subject to the servitude in favour of the Imperial Government and I gave no judgment on the defendant's claim in reconvention which obviously would fall to the ground if the order of ejectment was not made. It is clear that if the order of ejectment had been made the Board, which had all along acted in perfect good faith, would have been entitled to full compensation for the improvements made by it to the extent of the enhanced value of the land. In referring the value of the land in dispute to a referee the judgment excluded any portion of the land that may have been reclaimed by the Board from the sea and it also excluded the value of any other improvements made by the Board. I added that in estimating the value of the disputed piece of land the referee would have to bear in mind the fact that the Council would not have been entitled to erect buildings thereon or sell it for building purposes but it was not necessary to give a special direction to that effect to the referee.

In the consideration of this case it was necessary to assume the validity of the servitude for two reasons, viz.: Because the Imperial Government was no longer a party to the suit and because no steps had been taken to set aside the grant of 1840. I am by no means satisfied that, even at that time, the Colonial Government had the right to issue the grant in the form in which it was issued. From very early times there had been a governing Municipal body for Cape Town with a right of control over waste lands within the Municipality. From and inclusive of



the ground afterwards used as cemeteries, the land between Lion's Rump and the sea was an open space to which the burghers had rights of access as well as grazing rights. Within that large open space forts and other military buildings were from time to time erected and of course the successive municipal bodies exercised no control over them. Among these forts was the Kijk in de Pot battery, which was afterwards known as Fort Wynyard, and which stood within the area subjected to a servitude by the grant of 1840. When, at different times, grants of portions of the waste lands were required to be made, the practice was not quite uniform. Sometimes, as on 23rd October, 1827, two members of the Burgher Senate, acting with the consent of the Government, would make the grant and, at other times, as on 9th February, 1802, the grant would be made by the Government. The latter was the strictly correct course because the nominal title to all ungranted land remains with the Crown, but where a public body has a statutory title to land there would seem to be no valid reason why such body should not, acting with the approval and under the authority of the Crown, pass a valid title to others. In fact we find that in all the statutes vesting waste land in municipal bodies there is always a provision that they shall not be allowed to alienate without the consent of the Crown. This provision is mainly due to the desire of the legislature to prevent alienations except for legitimate public purposes, but it may also have been partly due to the necessity of upholding the doctrine that every title of land should originate with a grant made by the Crown or with the consent of the Crown. Coming next to the land known as the Green Point Common, the documentary evidence satisfies me that even before 1840 the Common included the land now in dispute. With the exception of Holm, the old witnesses could not speak to what took place before 1840, but as far back as they could remember the land was considered part of the Common on which the cattle of the inhabitants grazed and over which people freely went for the purpose of having access to the seashore. As to Holm, who is 70 years of age, he says that he remembers the Laboratory and used to play in the neighbourhood as a child. "The Common," he said, "was open right from the cemeteries to Three Anchor Bay. The Municipality regulated all the Common. One could not take a load of sand without a permit." By Ordinance No. 1 of 1840, the Municipality was re-modelled, but the Commissioners were not deprived of the rights which had been exercised by the Burgher Senate and subsequent Municipal governing bodies. Not long after the

passing of that Ordinance the Government made the grant of 1840, and this fact has been relied upon as shewing that the Municipality had no right over the land. It should be remembered, however, that the only land actually granted was the land on which certain Government buildings stood and over which the Commissioners could claim no right of control. The so-called guarantee included a much larger area around the land granted and the Government may well have believed that it was quite safe in giving the guarantee, seeing that, without the consent of the Government, the Commissioners could not have disposed of the land for building purposes. The guarantee could not, however, deprive the Municipality of its rights in respect of the waste land not granted to the Imperial Government. That land remained under the control of the municipal body, established in 1840, and afterwards under the control of the municipal bodies which succeeded it. The evidence given on behalf of the plaintiff Council is conclusive on this point, and there is practically no evidence to contradict it. The neighbouring land on which the Somerset Hospital was built has been admitted by the Government to be land vested in the Council. The land in front of the Somerset Hospital and immediately abutting on the strip of land in dispute was actually hired by the Harbour Board from the plaintiff Council. Much reliance has been placed on behalf of the defendants on the fact that the Council raised no objection to portion of the land in dispute being granted to the Cape Canning Company, but any admission which may have been impliedly made by the Council in the course of the correspondence on this subject cannot affect its legal rights in respect of the rest of the land in dispute. The correspondence between the Board and the Council in 1887 shows that at that time the Council was regarded by both parties as the owner of the land between Gallow's Hill and the boundary of the Board's property. In 1893, when the Act establishing the present Council was passed, the land now in dispute was still treated as part of the Green Point Common over which the plaintiff had control and by means of which the inhabitants had free access to the seashore. It is true that the Board tipped some clay and rubbish on to part of this land in the same way as some of the inhabitants seem to have done, but it does not appear that the plaintiff Council was made aware of the fact. For the rest the ground around Fort Wynyard was open and was used for sporting purposes as well as for the grazing of cattle. People wandered about there freely and used to go over it for the purpose of bathing and fishing in the sea. Such was the state of affairs when Act No. 26 of 1893 was passed. The 111th section of that Act vests in the Council all property previously vest-



ed in the Commissioners, but even if that section had not been applicable, I am clearly of opinion that under the 110th section of the Act the Council can make good its claim. That section vests in the Council the property of and in the Green Point Common so far as it is situated within the Municipality. The land in dispute was part of the Green Point Common and was situated within the Municipality. Since 1893 the Harbour Board has enclosed the land and has expended considerable sums of money on it but there is no proof of such acquiescence on the part of the Council as to deprive it of its undoubted rights to protect the interests of the inhabitants whom it represents. The Imperial Government appears to have waived in favour of the Board the right to prevent building on the land but, such waiver cannot confer on the Colonial Government the right to transfer the land itself to the Harbour Board in contravention of the statutory rights which the legislature has conferred on the plaintiff Council. The grant which was made in 1840 and which has never been set aside must be respected but the terms of that grant are quite consistent with the retention by the Council of the ownership of the portion of land not specially granted. The interests of all parties will be safeguarded if the land now in question, no part of which has been so granted is declared to be the property of the Council subject to the servitude in favour of the Imperial Government. The obvious consequence would under ordinary circumstances, be that the Government would have to be interdicted from carrying out its avowed intention of transferring the land to the Board. The parties, however, have agreed that the Board shall remain in occupation subject to the payment of compensation to the Council and any over valuation will be prevented if the referee bears in mind that the Council would not have had the right to sell the land for building purposes and that reclaimed land and the value of improvements made by the Board must be excluded. The defendants will pay the costs of the action.

Sir H. Juta, K.C. (with him Mr. Nightingale) for appellants. Mr. Searle, K.C. (with him Mr. McGregor) for respondents.

Sir H. Juta said that the land in question was vested in the Governor and not in the Town Council. It had never been granted to the Town Council, unless it was granted under section 110 of Act 26 of 1893 or under section 111 of the same Act, which was in terms similar to certain sections in earlier Acts, and granted all the waste lands in the Municipality to the Town Council. It was not granted under that Act. Section 110 vested Green Point Common in the Town Council, so the question arose: Was

this land a part of Green Point Common? Whether this was so or not depended upon what the Town Council in 1893 meant by Green Point Common, because this was a private Act of Parliament, which should be construed as a contract between the Town Council and the Colonial Government. Certain acts of the Council subsequent to 1893 showed conclusively that it never considered this land part of Green Point Common. For instance, it did not object to the grant of part of the land to the Cape Canning Company. Of course, if the Act of 1893 did in fact grant this piece of land to the Town Council there was an end of the matter, but he referred to the action of the Council subsequent to 1893 to show that it did not intend to include this piece of land in Green Point Common when it applied to Parliament to transfer Green Point Common to it. This land could not be vested in the Town Council by section 111, because it was not waste land within the Municipality. It was commonage. Counsel cited *Colonial Government v. Town Council* (19 S.C., 87). Prescription ran against the Crown if the land could be alienated, but where the land was reserved for military purposes prescription could not run against the Crown. *Blankenberg's case* (11 S.C., p. 90) and *Municipality of French Hoek v. Hugo* (2 J., 230) were quoted. There was no evidence of prescription against the Crown.

Mr. Searle (for respondents): In the Court below the Chief Justice decided that the Town Council were entitled to the commonage both under Section 110 and 111 of Act 26 of 1893 (see 16 C.T.R., 137, and judgment p. 140).

[Buchanan, J.: I do not see that the land was vested in the Commissioners.]

I shall show that that is so. The Chief Justice found that the Town Council had a claim to it under Section 110.

[Buchanan, J.: I do not see it.]

The whole of the Green Point Common was vested in the Burgher Senate by Ordinance 34 of 1827. From time to time grants of portions of it were made by the Burgher Senate to Government and to certain trustees. All the land which the Harbour Board got was alienated by Government with the consent of the Burgher Senate, see Ordinance 1 of 1840. The other side admit that the surrounding land was municipal land, and it could not be that unless it was vacant land under Act 26 of 1893. We had all the land save that on which the buildings stood. The Ordinance survey shows that the land in question was waste land, and as such vested in the Council. See Section 111 of Act 26 of 1893. Till 1893 there was no authority in the Council to open out waste land. The Burgher Senate lasted till 1827, and by Ordinance 34 of 1827 its property was transferred to trustees,

As to the formation of the Burgher Senate see Mr. Leibrandt's evidence (p. 40 of the record). See also Ordinance 4 of 1839, Section 152, as to Green and Sea Point, cited in the Court below. In 1832 a grant of land for a cemetery was made by the Senate to the English Church, and in 1840 to the Ebenezer Church; both of these grants speak of the land granted as being bounded by waste land. All the evidence showed that the commonage extended from the cemeteries to Three Anchor Bay; but in view of Section 110 it is not necessary to labour that point.

[Buchanan, J.: Was not some kind of compromise arrived at?]

The Chief Justice suggested that the question of the Harbour Board being compensated for improvements might be referred to arbitration (16 C.T.R., 139), but no referee was appointed. The Government seem to think that as they had paid compensation they could grant part of their land to the Cape Canning Company. By their letter of January 17th, 1896, they show that they had some knowledge as to their rights. We do not claim the Canning Company's land, but we do claim the foreshore in front of the Somerset Hospital. There can be no doubt that this is vested in the Council. Various Acts from 1839 to 5 of 1895 show that Green Point Common was the property of the Council. The Council always treated the ground as a *quid integrum*, as one plot. Relief is not always granted on the ground of error. In *Heatlie v. Colonial Government* (5 Juta, 353), the Government never meant to sell the cottage, but the Court would not grant them relief.

[Sir H. Juta: No, but there there was no *justus error*.]

Anyhow, they did not mean to sell the cottage. We do not now dispute the ownership of the magazines, but we do not admit that the ground was rightfully alienated.

[Hopley, J.: Is commonage waste land?]

Yes, commonage is always referred to as waste land. The case of *Colonial Government v. Town Council of Cape Town* (12 C.T.R., 96), only decides that land reclaimed from the sea is not waste land. As to prescription, the evidence is very clear in our favour. We do not claim the right to oust the military, but we claim by prescription, see paragraph 8 of the declaration. The letter of April 15, 1887 (p. 56 of the record) shows that the Government recognised the right of the Town Council to this land. See *Blankenberg v. Colonial Government* (4 C.T.R., 61). This case does not altogether apply, because here the whole of the property was not fortified. There were no guns there in 1840.

Sir H. Juta (in reply): The argument for the respondents seems to treat the case for the Crown as if we were the original plaintiffs and the onus was upon us to prove our case. That is not so,

they were the plaintiffs. Waste land is not commonage, but land to which nobody has a title. In the case of *Cape Town Town Council v. Table Bay Harbour Board* (12 C.T.R., 159), my learned friend quoted all the leading cases. Land which is marked off ceases to be waste land. The surrounding land which was not demarcated may have been waste land, but in 1893 the Harbour Board had been working on this land for six years, and therefore it could not be waste land (16 C.T.R., 138). Holm was only four years old at the time the things took place to which he refers in his evidence. If in 1840 the Crown granted a servitude over the land to the Military the land must have belonged to the Crown if the servitude was worth anything.

[Hopley, J.: The Government calls it a guarantee.]

We cannot get rid of legal consequences by calling things by different names. The grant was a servitude and nothing else.

Buchanan, J.: This action was brought to declare the rights of the parties in the suit in respect of certain portion of ground within the Municipality of Cape Town. A grant was made by the Governor of the Colony in 1840 of a portion of this land to the officers of Her Majesty's Ordnance on which there was erected the old laboratory, in which cartridges were loaded, together with a limited area around the same and with all the military buildings and fortifications erected thereon, with a guarantee to the grantees that no buildings whatever should be allowed to be erected on a specified extent of land round the magazine. It is portion of this larger extent on which, what has been called, a right of clearance exists that is in dispute in this case. This right of clearance seems to mean that there should be no buildings erected upon this ground, or, if any buildings have been erected, that these buildings could be removed. When the grant was made, it does not appear that there were any buildings upon this surrounding land. When the case came before the Court of first instance, this reservation—this right of clearance—was construed to mean a servitude imposed by the Governor upon the rest of the ground therein situated within the specified area in favour of the officers of the Ordnance. There has been no appeal against this part of the judgment. But an appeal has been brought against the portion of his lordship's judgment which declares that the *dominium* in this land is now vested in the Town Council, subject to the servitude. It is claimed, on behalf of the appellants, that the property in this land is vested, not in the Town Council, but in the Governor. In this country, in theory, all lands are vested in the Crown in the first instance, and private ownership can always be traced back to some specific grant from

the Crown. But there may also be a statutory grant of Crown property. It appears that as far back as 1839 the Municipality of Cape Town was first formed, and in 1840 an Act was passed which vested in the then Municipality certain specific properties named, and also waste lands situated within the Municipality, which had been vested in or committed to the administration of the then late Burgher Senate, and it is said that the whole of these lands had been subject to the control of the Burgher Senate. But we find, in 1849, shortly after the Ordinance was passed, several grants were made by the Governor of the Colony of portions of the ground within the Municipality, and the ground now in dispute was also granted after this Ordinance of 1840 was enacted.

It is alleged on the part of the Council that the Act of 1840 and subsequent Acts are in effect statutory grants of these waste lands, which were formerly within the Municipality under the administration of the Burgher Senate. If this land had been transferred out and out by the statute from the Crown to the Municipality, it is certainly inconsistent with any such transfer that the Governor should still issue titles direct from himself, not on behalf of the municipality, but from the Crown of a number of different portions of ground. These grants have been in existence since 1840, and are not now in question, and I think that now it is too late to say that these grants are now invalid in consequence of competing rights. The municipality are quite willing that the specific property granted in 1840 to the officers of the Ordinance shall remain vested in the military authorities, and they make no claim in respect of the specific property so granted, but they claim, by virtue of these different statutes, the other property over which only a servitude was created, but which was not granted away by the Crown. The Ordinance No. 40 was passed for a period of 20 years, and in the renewing Act of 1861, similar words were used as to waste lands in the municipality. In 1882, in the next municipal Act passed, similar words are again used. In 1893 the present Act was passed. This present Act goes further than any of the previous Acts. It contains in the 110th section words which are not to be found in the other Acts. The 111th section is a repetition of the previous Acts, and refers to the ground vested in the Burgher Senate, but the 110th section expressly vests in the Council all lands, streets, roads, and open places to which the inhabitants of the municipality have acquired a common right, "and in the Green Point Common in so far as it is situated within the municipality," as well as of certain portions of the foreshore." Now, neither the ground upon the common nor the foreshore was men-

tioned in the previous Acts, and I read this section as removing any doubt which might before have existed as to whether the Green Point Common was now vested in the Town Council. By this Act of 1893 it is clear, I think, that the Parliament of the country vested the common in the Town Council. The question then arises, is the portion of the ground now in question part of the Green Point Common? In the Court of First Instance evidence was led showing that this land was so regarded for a number of years, and there is evidence of user on behalf of the inhabitants of this particular ground. In the plaintiff's declaration there is a claim of prescriptive rights, but it is not a claim to the dominium in the ground in question, but only of the right of use thereof. The evidence led in support of this right, I think, is useful in this case, and was so found by the Court of first instance as showing that the ground in question was part of the Green Point Common, situated within the municipality. If that evidence is satisfactory as showing that it is part of the common within the municipality, then it seems to me to indisputably follow that the 110th section vests this ground in the Corporation of Cape Town. It is said that certain acts were permitted, and suffered by the Town Council and that certain rights were exercised by the Government, which were inconsistent with the right of property now set up. But even if those acts were inconsistent with the rights of the municipality, that does not cancel the Act which transferred the property to the municipality. It may be that the municipality, after the passing of the Act, were not fully aware of the rights conferred upon it. But there is nothing to show why the Court should read this Act in any way otherwise than as the words actually used by the Legislature evidence its meaning. It may well be argued that this very land in question was by the various earlier statutes vested in the municipality before the Act of 1893 was passed, but I think, after the passing of the Act of 1893, there can be no doubt whatever that the Parliament of this country has transferred this Government property which was within the municipality, and over which a servitude was created in favour of the Ordinance officials to the municipality. His Lordship the Chief Justice, in giving judgment, said that while it would be declared that this land was the property of the Council, the interests of all parties would be safeguarded, and his declaration was coupled with the condition that the ground was granted to the municipality subject to the servitude in favour of the Imperial Government. It seems, therefore, no injustice was done. All rights have been carefully safeguarded, and, with the Acts before us and with the different statements as to the

user of this property, I think there can be no doubt that the decision of the Court of first instance is correct, and that this appeal cannot be allowed. The appeal must be dismissed with costs.

Maasdorp and Hopley, JJ., concurred.  
[Appellants' Attorneys: Reid and Nephew. Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { . 1906.  
July 14th.

Mr. W. P. Buchanan moved for the admission of Henry August Peter von Holdt as an attorney and notary.

Application granted, and oath administered.

### PROVISIONAL ROLL.

#### NIMMO V. STURCK.

Mr. Douglas Buchanan moved for provisional sentence on a promissory note for £150, with interest and costs.

The defendant appeared in person, and read an affidavit, in which he stated that he was induced by misrepresentation of a third party to purchase certain shares, and the note was signed in consequence of this. It would be impossible for him to settle the debt if judgment went against him, except by small monthly sums.

Order granted.

#### STEYN V. PRETORIUS.

Mr. Van Zyl was for the plaintiff, and Mr. Louwrens was for the defendant. Mr. Van Zyl moved for provisional sentence for £60 on a promissory note, less £42 10s. paid on account. The defence was a counter-claim for board and lodging, etc., which extinguished the balance claimed.

Order granted, with costs. His Lordship added that the defendant could still go into the principal case when the question could be tried.

#### ESTATE HIGGS V. RUCK.

Mr. Inchbold moved for provisional sentence on two mortgage bonds for £200 and £100, with interest and costs, and that the property be declared executable.

Order granted.

#### KATZ AND OLSWANG V. SEPEL.

Dr. Greer moved for provisional sentence on a mortgage bond for £1,000, with interest and costs, and that the property be declared executable.

Order granted.

#### PURCELL, YALLOP AND EVERETT V. BRICE AND BRICE.

Mr. Benjamin moved for the final sequestration of the defendants' estates.

Order granted.

#### SHAW V. BLACK.

Mr. Bailey moved for provisional sentence on a mortgage bond for £200, with interest, and that the property be declared executable.

Order granted.

#### CENTRAL NEWS AGENCY V. ZEEMAN.

Mr. Upington moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court. The defendant (counsel said) sued the plaintiffs, and claimed £4 for salary and £2,000 for malicious prosecution. The jury found that the plaintiff was only entitled to £2 10s. 4d., which was tendered. The plaintiff was ordered to pay the costs of the action, and there was a return of *nulla bonum*.

The defendant appeared, and said he was without work, and had a wife and four children to keep. He was unable to pay anything. The costs in the case amounted to £319.

[De Villiers, C.J.: You would have done much better by keeping the money and avoiding the law?—Yes, my lord: there are a lot of uncertain points in law.

Cross-examined by Mr. Upington: He had a life policy for £250, which was pledged with the S.A. Mutual for £24. He had sold everything.

Mr. Upington then said, in face of the evidence, he could not press for a decree.

De Villiers, C.J., said at present there would be no order, but if at any time the defendant got property, the plaintiffs could renew the application.

THE MASTER V. WINTERBACH.

Mr. Howel Jones moved for an order compelling defendant, as tutor testamentary, to file an account in the estate.  
Order granted.

THE MASTER V. FRYER.

Mr. Howel Jones moved for an order compelling the defendant to file an account in the estate of the late Chas. M. Fryer.  
Order granted.

BLAIBERG, GREENBERG AND CO. V. GOLDING.

Mr. Benjamin moved for provisional sentence on a dishonoured cheque for £25 ls.  
Order granted.

YEOMANS V. DUFFUS.

Mr. Benjamin moved for provisional sentence on certain acknowledgments of the receipt of sums of money for £105, £118, and £80.  
Order granted, one of the receipts being unstamped admitted subject to the payment of a fine of £5.

ILLIQUID ROLL.

W. AND G. SCOTT, LTD. V. MULLANEY. { 1906.  
July 14th.

Mr. Douglas Buchanan moved for judgment, under rule 329d, for £38 15s. 7d., for goods sold and delivered.  
Order granted.

HORNE V. HORNE.

Mr. W. P. Buchanan moved for an order of restitution of conjugal rights. The plaintiff was allowed to embody her evidence in an affidavit, which counsel now produced. The evidence set out that the parties were married at Ladismith, in October, 1901. The parties afterwards resided at Cape Town, where the defendant maliciously deserted the plaintiff.

The defendant was ordered to restore conjugal rights by the 1st August, failing which to show cause, on the 31st August, why a decree of divorce should not be granted; the rule to be served as in the previous order.

REHABILITATION. { 1906.  
July 14th.

Mr. Van Zyl moved, under the 117th section, for the discharge of Johannes Jacobus Pretorius, jun., from insolvency.  
Application granted.

GAUPOULOS V. HARRIS AND DICKSON.

Ship—Attachment—Bodily fear.

*The Court refused to order the attachment of a certain ship, ad fundandam jurisdictionem, at the suit of a fireman on board, who claimed a balance of wages due and cancellation of his contract of service on the ground that he went in bodily fear of certain members of the crew.*

Dr. Greer moved, as a matter of urgency, for an order attaching the S.S. Heath Glen, to found jurisdiction in an action to be brought against the owners by the applicant for the payment of wages. Counsel said that the applicant was a fireman, and he was engaged in Antwerp in August, 1905, for three years. On the same vessel there were two Belgians and a Hollander, and they disliked the petitioner, who was a Greek. One of them violently assaulted the petitioner, and the captain ignored his report. They had repeatedly threatened to kill petitioner, and he feared when the ship went on to the high seas, they would carry out their threats. The applicant was quite willing to carry out his contract, but it was not incumbent upon him to do so. He claimed payment of £24, balance of wages, and cancellation of his contract. The ship was about to leave Table Bay. There was a supporting affidavit from another of the crew, in which he stated that he honestly believed there would be murder on the high seas.

[De Villiers, C.J.: Should not the Court assume that the master is not going to allow this thing to happen. What have the owners got to do with this? Surely a man is not entitled to break his contract if one of his fellow-workmen make a threat.]

Dr. Greer: The petitioner believes he is in danger of his life.

De Villiers, C.J.: I do not think there are grounds for attaching the ship. It is too absurd to think that the captain will allow a thing like this to be carried out. The application must be refused.



## GENERAL MOTIONS.

STEWART V. STEWART. { 1906.  
{ July 14th.

Dr. Greer moved for a decree of divorce and forfeiture of the benefits of the marriage, in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted as prayed.

## RAY V. RAY.

Mr. Benjamin moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights.

Decree granted.

*Ex parte* MALANGA AND ANOTHER.

Mr. Roux moved for the decree *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* MCGREGOR.

Mr. Gutsche moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* SOUTER.

Mr. W. Porter Buchanan moved for a certain rule *nisi*, authorising payment of certain money to petitioner, to be made absolute. It was stated that the opposition of petitioner's husband had been abandoned.

Rule absolute.

## INSOLVENT ESTATE BOTHA V. COETZEE AND SCHNEIDER.

This was an application for an order expunging the objections to certain liquidation and distribution account framed by the applicant as trustee.

Mr. Benjamin said that the objections had now been withdrawn, and he had merely to apply for costs.

Order granted for costs against respondents.

*Ex parte* QUINN.

Mr. M. Bisset moved for leave to pass transfer of certain property.

Order granted as prayed, subject to any valid objections raised by the Registrar of Deeds to the issue of a certified copy.

## DIXON V. DIXON.

Dr. Greer moved, on the petition of Mary Kate Dixon, for an extension of return day of certain rule *nisi* until the 21st August.

Application granted.

*Ex parte* CROESER.

Mr. W. Porter Buchanan moved, on the petition of G. J. H. Croeser, on behalf of his minor son, for an order authorising amendment of the minor's name upon a certain deed of transfer of landed property at Malmesbury and registration of a bond of £300 upon the said property. It was stated that the land had been given to the minor by his godfather.

Order granted as prayed, except that petitioner is to act as father and natural guardian, and not as *curator ad litem*, as set out in the petition.

*Ex parte* GROENEWALD.

Mr. J. E. R. de Villiers moved for an order authorising transfer to one Pienaar, of certain property at Graaff Reinet, which was shown on a certain diagram as a street. Counsel said that the ground had never been used as a street since 1822. The Registrar of Deeds took up the position that he could only pass transfer as a street, and not as private property, seeing that it was not specifically mentioned as private property in the order granted by the Court under the Derelict Lands Act. Petitioners said that by prescription he had become the owner.

Order granted authorising transfer of the property without including the term "street."

## DE VILLIERS V. PHILPOTT AND OTHERS.

This was an application upon notice of motion for an order invalidating a certain School Board election at Uitenhage.

Mr. Howel Jones (for respondents) said that the notice had not yet been received by the respondents' attorneys in Cape Town. The usual period for allowing service at a place like Uitenhage was seven days, and as a matter of fact service in this case was only on the 9th. Mr. Cloete (for applicant) had informed him that he would raise no objection to the matter standing over until Monday, July 23.

Ordered to stand over accordingly.

## INCORPORATED LAW SOCIETY V. VILLET.

Mr. Benjamin moved for the removal of respondent's name from the roll

of conveyancers by reason of the irregularities disclosed at the third meeting of the creditors in the insolvent estate of Henry Arthur Villet and Manuel Ferreira Villet, trading in Cape Town as Richard Villet, where it appeared that trust moneys had been used for the purpose of speculation. Mr. T. H. Hazell (the trustee), in his affidavit, said that he was authorised at the second meeting to prosecute respondent for fraudulent insolvency. None of the creditors, however, were willing to make the necessary affidavits, and up to the present no further action had been taken.

De Villiers, C.J., asked why no prosecution had been taken. It was, he remarked, most extraordinary that this man was alledged, in fact, to have stolen money, and yet there was no prosecution.

Mr. Benjamin: The matter has been left with the creditors, and they have taken no action. Perhaps if the matter had been brought to the notice of the Attorney-General a prosecution would have been instituted.

De Villiers, C.J.: I suppose somebody will now bring it to the notice of the Attorney-General. The man does not appear to defend, and I suppose he admits that he has been guilty of this act. It is a matter that should come before the Public Prosecutor. An order will be granted for removal of respondent's name from the roll.

#### *Ex parte* SILBERMAN.

This was an application for leave to sue *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce.

Mr. Lewis now produced a further affidavit in proof of domicile.

The matter was ordered to be mentioned before the learned Judge before whom it was mentioned in the first instance.

#### *Ex parte* MINNAAR.

Mr. W. Porter Buchanan again mentioned the application of petitioner, a minor residing at Stellenbosch, for an order authorising payment of a sum of £154 odd in the hands of the Master. Counsel now produced an affidavit by a minister in Stellenbosch in support of the application.

Order granted as prayed.

#### *Ex parte* THE COLONIAL TIMBER CO., LTD.

Mr. Douglas Buchanan mentioned the petition of the Colonial Timber Company, Ltd. (Knysna) for leave to re-

duce the company's capital from £3,500 to £875, by making the 3,500 shares 5s. each, instead of £1 as heretofore. Counsel now produced an affidavit showing that a resolution had been passed by the shareholders to make the necessary alterations in the articles of association. Order granted as prayed.

## SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

MATARE, BRUNS AND CO. { 1906.  
V. MOSSEL BAY MUNICI- { July 16th.  
PALITY.

Mr. Searle, K.C. (for the defendant Municipality), applied for a fresh day to be fixed for the trial of this suit before a jury. The case, he said, had been set down for the 21st August, but it was found that a jury trial had already been set down for hearing on the preceding day, and that that case was likely to extend beyond one day. Counsel, therefore, applied for the case to be set down for the 15th August.

Mr. Sutton (for the plaintiffs) acquiesced.

The case was accordingly set down for trial on the 15th August, costs to be costs in the cause.

#### *Ex parte* GANIE.

Mr. Roux moved, as a matter of urgency, for an order upon one Lallsan Doovey to place the petitioner in possession of a certain shop, which he had carried on at Salt River, and restore to petitioner the books which had been taken from the premises.

De Villiers, C.J., said that the Court could not grant an order at the present stage.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D).]

FRYER AND CO. V. WELCH. { 1906.  
July 17th.

This was an application to make absolute a rule nisi calling upon the respondent to show cause why he should not be interdicted from conducting any sale by auction on the stand of applicant firm on the Grand Parade, No. 15, of the Municipal Chart, with costs. Mr. Alexander was for applicants, Harry Fryer and Co.; Dr. Greer was for respondent, Charles Stockford Welch.

Voluminous affidavits having been read,

Mr. Alexander submitted that after the notice which had appeared in the "Cape Times" on the 21st June, at the instance of respondent, stating that the agreement between the applicants and himself had been cancelled, and the evidence contained in the affidavits of his intention on the 23rd June, to hold a sale on the Grand Parade on their stand, they were bound to come into court for an interdict. He inserted an advertisement in the paper, in which he said that the business would be carried on by him, and he did not recognise any liability at all. Now, apparently, according to his own statement, he wanted to sue for breach of agreement, while, according to the advertisement, he had himself broken the agreement. He submitted that it was quite clear that respondent was not a partner of Fryer and Co. There was no question of his being a partner. He was simply a remunerated assistant, and it was quite clear that he had acted on commission. In view of the fact that the rostrum had been placed on the Parade by respondent's instructions, and the statement that he had made to applicants' attorneys, and to various witnesses, the applicants, counsel submitted, were entitled to come to Court and they were now entitled to have the rule made absolute.

Dr. Greer submitted that the grounds which were alleged in the petition upon which the rule was granted had not been clearly made out. It was said that respondent was going to conduct a sale on the Parade at stand 15 on the Saturday, but there was a distinct denial of that by respondent. This rule was granted on the 21st, and yet the Court was asked to confirm that rule upon the strength of something which was alleged to have taken place two

days later, when it was said the rostrum was placed on the stand. It seemed that respondent had omitted to give his contractor notice not to take the rostrum there. The respondent said that he was going to adopt a different remedy for the breach of agreement which he said had been committed. Under the circumstances, counsel submitted, applicants had not made out a clear ground for the interdict.

De Villiers, C.J.: It is clear the agreement between the parties that, at the time the applicants engaged the services of the respondent, the applicants were the holders of the stand No. 15 on the Grand Parade. It is clear also, when the agreement was put an end to, not only was notice given by the applicants that the agreement was put an end to, but the respondent himself issues an advertisement to the effect that "the agreement heretofore existing between the undersigned and Messrs. Fryer and Co. has been cancelled," he says, "by me." Well, one would have supposed that the respondent would thereupon have told his contractor in future not to put the rostrum on that stand. Anyhow, we find that the rostrum was again placed there. Now, that in itself was an indication of an intention on the part of the respondent to continue to hold sales upon that stand. Then we have the affidavit of the attorney for the applicants (Mr. W. G. Coulton), who states positively that on the 21st June he met the respondent, when the respondent acknowledged having received the previous letter, but that the respondent further expressed his intention of ignoring the letter, and was determined to conduct the sales upon the stand on Saturday, the 23rd June, and he knew he did so on his own account. That is a definite statement by the attorney for the applicants. The respondent, in his affidavit, denies that statement, and he produces the statements of several witnesses to the effect that the respondent had told them that he did not intend to continue sales on that stand, but statements of that kind cannot counterbalance any statement to the effect that he did intend holding a sale upon the stand. A man is charged with the crime, say, of murder, and witnesses are called to show that he had said he intended to commit the deed. The fact that he has told others that he did not intend to commit the deed cannot affect the question. The respondent may have told some people that he did not intend to carry on the sale, but if he had told others that he did intend, then the ground for the interdict is made out. Now, it is not only Mr. Coulton who makes the statement, but there are other witnesses. In the replying affidavits, amongst others, Ritevsky says: "On the 20th inst., I met Welch on the Parade. He

said he intended selling on Fryer's stand on the Saturday on his own account, and would pay out in cash immediately after the sales." It is said what motive could Welch have had in saying this to Ritevsky? That motive is supplied at once, because he says that Welch asked him to give him his sales. After that, by leave of the Court, the respondent was permitted to put in fresh affidavits to answer the new matter. Well, this was new matter, but it is not answered. The only answer is to Bull's statement with regard to the rostrum, but he says nothing with regard to Ritevsky's statement as to the intention to sell on his own account. Upon the whole, therefore, I am satisfied that the respondents have shown good ground for the application. There was an intended breach—at all events, statement of an intended breach—by the respondent of his duty, and, consequently, the applicants were entitled to apply for an interdict. The rule will be made absolute, with costs.

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

	1906.
MULDER AND ANOTHER V. OLIVIER AND OTHERS.	July 17th.
	" 18th.
	" 19th.
	" 20th.
	" 23rd.
	" 24th.
	Aug. 13th.
	" 14th.
" 30th.	

Water—Public perennial stream  
—Furrow—Right of entry  
on land of upper riparian  
proprietor for the purpose  
of repairing furrow.

This was an action brought by Hendrik Johannes Mulder, M.L.A., and Johannes Jacobus Mulder, against Willem Gerhardus Olivier and others for a declaration in regard to water rights in the Armoed Division of Oudtshoorn, and for £2,000 damages in favour of the first plaintiff, and £1,000 damages in favour of the second.

The declaration was as follows:

1. The plaintiffs are registered owners, together with the defendants other than Willem Gerhardus Oliver, of a certain defined portion of the farm Armoed, situated in Oudtshoorn, and the defendant Olivier, hereinafter styled the defendant, is the registered proprietor of certain other parts of the farm.

2. A public perennial stream, the Kandelaars River, flows over the farm, and the parties are riparian owners.

3. Upon the 9th of December, 1880, a certain award of arbitrators was made a rule of Court, to which the parties to this suit, or their predecessors in title, were parties, and by the said award provision was made respecting the use of the water in the river by means of certain watercourses. To avoid prolixity, the plaintiffs do not set forth the terms of the said award, but beg to refer to the same when produced from the records of this Honourable Court.

4. The land of the defendant, hereinafter referred to, is below the lowest watercourse provided for in the award, and the land of the plaintiffs, hereinafter referred to, is situated below that of the defendant.

5. Notwithstanding the provisions in the award concerning the watercourses and the uses of water thereby, a stream of water, capable of common use, flows and has flowed in the river below the lowest watercourse aforesaid.

6. In 1883, the defendant constructed on his land a weir and a furrow, by which he diverted part of the water flowing as aforesaid below the lowest watercourse. The point of intake was at Zeekoegat in the river from which part of the overflow was diverted into the furrow, and used for the irrigation of a small area of land, which was all that was capable of irrigation under the furrow, and the water diverted was only a small proportion of the water at the intake.

7. In 1886, the plaintiff, Hendrik Johannes Mulder, owned, besides other parts of Armoed, lands lying below the aforesaid land of the defendant, but thereafter, upon his wife's death, their joint estate was dissolved, and her heirs became entitled to her half of the estate, including half of the lands. These heirs are the other plaintiff and the defendants other than Willem Gerhardus Olivier.

8. Transfer has been passed to the heirs, and a sub-division has been agreed upon: sub-divisional transfers are being prepared, and all occupy in accordance with such agreement, but the plaintiffs in this action are entitled to all the land belonging to the joint estate below the defendants' land, irrigated from the watercourse hereinafter referred to. The defendants, other than Willem Johannes Olivier, are joined to complete the record in this suit.

9. The defendant continued from 1883 to 1886 to divert and use water as set forth in paragraph 5, and in 1886, the plaintiff, Hendrik Johannes Mulder, on behalf of himself and his successors in title, entered into an agreement with the defendant whereby, for value, the plaintiff acquired, as against the defendant, the right to all the water avail-

able at the intake of the furrow, and the defendant further bound himself at all times to permit the weir and furrow to be used for the purpose of diverting and leading water from the river for the use upon the lands of plaintiff, to which he, and the plaintiff, Johannes Jacobus Mulder, are now entitled as aforesaid, and it was also agreed that the plaintiff, Hendrik Johannes Mulder, and his successors in title, should at all times have the right to maintain and repair the weir and furrow as occasion might require.

10. The plaintiff accordingly extended the said furrow on to his land, and up to the year 1892 exercised and enjoyed the rights aforesaid in respect of the weir and furrow on the defendants' land.

11. In 1892 portion of the furrow of defendants' land was washed away, and therefore, in consideration of receiving and enjoying the use of water taken out as aforesaid sufficient to irrigate  $1\frac{1}{2}$  morgen of land, the defendant further agreed that the plaintiff might divert the course of the furrow on the defendants' land, and it was diverted accordingly, save as aforesaid the plaintiff retained his rights under the agreement mentioned in paragraph 9, including the right as against the defendant, to all the water available at the intake with the exception of the water sufficient to irrigate the said  $1\frac{1}{2}$  morgen of land.

12. In 1903 the defendant acting wrongfully and unlawfully, and in breach of the agreement, by means of a pump, worked by a steam engine placed above the weir, pumped out the water in the river, especially in times of scarcity of water, and used the water to irrigate land not included in the  $1\frac{1}{2}$  morgen aforesaid.

13. The method adopted by the defendant was to pump out the water from the Zeekogat so as to keep the water below the level of the overflow from the Zeekoegat into the furrow, and so deprive the plaintiffs wholly of the water which they were entitled to, and the plaintiffs say that thereby the defendant acted wrongfully and unlawfully, and took and used water which he was not entitled to take and use under the agreement.

14. As an alternative and independently of the said agreement, the plaintiffs say that by so taking and using the water as aforesaid, the defendant made an unlawful and unreasonable use thereof, and wrongfully and unlawfully deprived them of the use of the water to which they were entitled.

15. Notwithstanding repeated protests by the plaintiffs, the defendant has continued since 1903 to make such wrongful, unlawful, and unreasonable use of the water by the method indicated in paragraph 13.

16. In July, 1905, the defendant wrongfully and unlawfully caused the furrow on his land to be blocked up with

sand and silt, so that the plaintiffs were deprived for a time of the use of the water to which they were entitled.

17. In September, 1905, the furrow was washed away and partly silted up owing to floods, and the defendant wrongfully and unlawfully refused to allow plaintiffs and their servants to repair the same, and prevented them from so doing, whereby the plaintiffs lost the use of water to which they were entitled.

18. By reason of the premises the plaintiffs have sustained damages in the sums of £2,000 and £1,000 respectively, and are entitled to the relief hereinafter prayed for.

Wherefore the plaintiffs pray for: (a) A declaration that they and their successors in title are entitled to make use of and keep in repair the said weir, and furrow on, and across the said defendant's land, and to lead water from and across the defendant's said land; (b) a declaration that the said defendant is not entitled to pump water out of the weir as aforesaid, save for the irrigation of the land aforesaid, amounting to  $1\frac{1}{2}$  morgen, or, as an alternative to (b); (c) a declaration that the said defendant is not entitled to pump out of the said weir more than a reasonable quantity of water; (d) an interdict restraining the said defendant from violating the rights of the plaintiffs and their successors as declared, or from preventing or interfering with their enjoyment and exercise of the said rights; (e) judgment for £2,000 by way of damages in favour of the plaintiff, Hendrik Johannes Mulder; (f) judgment for £1,000 by way of damages in favour of the plaintiff, Johannes Jacobus Mulder; (g) other relief; (h) costs of suit.

The defendant's plea was as follows:

He admits paragraphs 1 and 3 hereof.

2. As to paragraph 2 thereof, the Kandelaars River flows on to the farm Armoed, and discharges itself into the Olifant's River, on the said farm. The lots belonging to the defendant are riparian to the Kandelaars River, but the lots of the plaintiffs are not, that is, they do not abut upon the river, though they were by the award of 1880 in the water distribution awarded water out of both the servitude furrows.

3. As to paragraph 4 thereof, the defendant's ground is situate below the two servitude dams mentioned in the award, but the two furrows from the said dams flow through his ground. The plaintiffs' lands are situate below the defendant's.

4. As to paragraph 5 thereof, there is, in ordinary seasons, water percolating in the bed of the Kandelaars River below the lowest servitude dam, but in dry seasons there is none. Save as above, he denies paragraph 5 thereof, though he says that at certain times there is surplus water, after he has used what he requires.

5. As to paragraph 6 thereof, the furrow called the Klein Sloopje was con-



structed by the defendant about 1883. The dam was partly on the defendant's ground, and partly on the ground of one C. J. Nortje, and he (defendant) diverted there all the water that there was at that spot, except in case of floods. The intake was at a deep pool or "Zeekoegat," but this has now disappeared. In ordinary seasons there was usually not enough water to fill the furrow. Save as above, he denies the allegations in paragraph 6.

6. As to paragraph 7 hereof, at the date of the agreement in paragraph 8 hereof referred to, the plaintiff Hendrik Johannes Mulder owned one lot of ground, a portion of which could be irrigated by means of the Klein Sloodje, but thereafter he acquired certain other lots from E. F. Olivier and P. J. S. Meiring. Save as above, he admits paragraph 7 thereof.

7. As to paragraph 8 thereof, he has no knowledge, and craves leave to refer to such proof thereof as plaintiffs may adduce.

8. About the year 1884, in consideration of four head of cattle handed over by the plaintiff H. J. Mulder to the defendant, the defendant agreed to allow to flow down to the plaintiff such surplus water in the Klein Sloodje, if any, as he (the defendant) did not require. The furrow was then about 3 feet wide, and the defendant informed the plaintiff, as part of the arrangement, that it should not be made wider, but that the surplus water as aforesaid could be made use of by the plaintiff and his children after him. It was agreed that both plaintiff and defendant should contribute men to clear the furrow, and that defendant should make a gate to enter by, and plaintiff should make two stiles, which, however, plaintiff failed to do. Save as above, he denies paragraph 9 thereof.

9. He denies paragraph 10 thereof. The plaintiff did widen the furrow, but without having any right so to do, and without the defendant's consent, and in spite of defendant's objection thereto. In consequence of the widening of the furrow, the furrow has been damaged and broken by flood water, and portions of it entirely washed away.

10. He denies paragraph 11 thereof.

11. As to paragraphs 12 and 13 thereof, he admits that he, without objection on the part of the plaintiff, erected a pump in or about the year 1897, and used the same for three years and a half, until his horses were taken away under martial law, and about 1903 he erected another pump, and used all the water obtained by means of pumping whenever he liked, but in or about September, 1905, the pool disappeared, owing to the very heavy floods, which caused much damage to the river and its banks. Save as above, he denies the paragraphs.

12. As to paragraphs 14 and 15 thereof, he denies plaintiff's right to make the claim alleged, or that he has made

any unreasonable use of water, and says that the ground which the plaintiff H. J. Mulder acquired from Meiring, and upon which he claims to lead the water from the Klein Sloodje, was not given out in the sub-division as arable land, but as "veld," and that the other ground for which the said right is claimed was arable land, to be irrigated according to the said award of 1880, from the servitude furrow therein mentioned. Save as above, he denies the paragraphs. All the ground for which water is claimed by plaintiff out of the Klein Sloodje is now irrigated out of the slood called Brak Slood.

13. As to paragraph 16 thereof he admits that in July, 1905, he blocked up the furrow, but at the time of the blocking the water in the furrow was flowing into the Kandelaars River through a breach in the furrow higher up than where the furrow was blocked and no damage was caused by the furrow being blocked. Save as above, he denies the paragraph, and says that it was not owing to the blocking of the furrow that the said breach was caused.

14. As to paragraph 17 thereof he admits that in September, 1905, the furrow was partly washed away and silted up, and that he objected to the plaintiff entering upon his (defendant's) ground to execute repairs to, or to relay the furrow without notice, and without any arrangement having first been come to between himself and plaintiff as to the manner of executing such work. Plaintiff claimed the right to come thus upon defendant's ground which defendant denied. Save as above he denies the paragraph. A portion of the Klein Sloodje cannot now be constructed upon the old site unless it be made about 30 feet wide and defendant objects to such width and also to the manner in which defendant throws silt on to the banks of the furrow.

15. He denies the allegations in paragraph 18 or that plaintiffs have sustained any damage for which he (the defendant) is responsible.

16. The said furrow was destroyed by an act of God or *vis major*, namely, excessive floods, for which defendant is not responsible, but defendant is willing to abide by the terms of the agreement made with the plaintiff H. J. Mulder as in paragraph 8 hereof set forth, provided that the furrow can be reconstructed on the same spot without damaging defendant's property, and provided that it is not constructed to a greater width than three feet.

Wherefore he prays that plaintiffs' claims may be dismissed, with costs. For a claim in reconvention the defendant, now plaintiff, in reconvention says:

17. He craves leave to refer to the matters above pleaded.

18. By reason of the defendant in reconvention H. J. Mulder, having widened the said furrow on the ground of plaintiff in reconvention, thrown the soil therefrom on the lucerne lands and damaged them, cut down branches and dug into a portion of the ground of plaintiff in reconvention and under his fence and otherwise damaged his property he has suffered loss and damage in the sum of £500.

Wherefore the plaintiff in reconvention claims: (a) The sum of £500 as damages; (b) alternative relief; (c) costs of suit.

The replication was general.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.) for plaintiffs. Mr. Searle, K.C. (with him Mr. Howes) for the first defendant.

Mr. Schreiner said that there were seven defendants in the case, and six were joined formally to complete the record. Of the defendants, five had been barred, and nothing was prayed against the sixth, counsel holding a consent paper on behalf of defendant number 4. Counsel said that it would be an interesting point as to whether a man could take water out of a public perennial stream by artificial means, and continue to take it to ground where it would not flow in the ordinary course of gravity.

Hendrik Johannes Mulder, M.L.A., first plaintiff in the suit, stated that in the scarce time the furrow took out continuously all the water. He was not aware that the defendant between 1886 and 1892 irrigated any of his ground under the Kleinslootje. In 1892 part of the sluit on the defendant's land got washed away, and a deviation was necessary. It was agreed that the sluit was to be relayed farther away from the river, and the defendant was to have some of the water for his irrigation, but he had to supply some of the men to help in the reconstruction. Except on one occasion the defendant failed to contribute towards the work. The first pump was not so effective as the second one erected by the defendant. The first pump did not do witness any actual damage, but the second one, which was constructed in 1903, was of a different complexion, and witness, when he returned—the pump had been erected during his absence—most strongly objected to it. Immediately after that, witness took advice at once on his legal position.

Cross-examined by Mr. Searle: He denied that he said he had no right to turn out the Kleinslootje, and that Olivier, if he chose, could close the dams. Witness's son was an invalid, and was not able to manage his own affairs. Witness took up the position that the defendant must not pump the water at all out of the river.

Jacob Cornelius Breytenbach, J.C.'s son, farmer, Oudtshoorn district, stated

that in 1886 he was working on the plaintiff's ground, which was watered by the Klein Sluitje. He was there when the Klein Sluitje was extended. Before that time the defendant had taken out the sluit. Witness drew the plaintiffs' attention to the defendants' suit. The defendants' furrow was from one to two foot wide, and witness worked at widening it. The defendants did not give any men to assist in the work. On Olivier's ground he worked to make it the same width as on the plaintiff's ground. The defendant did not offer any objection to witness widening the sluit. Twice in the time witness was there the water did not reach him.

Abram Reintjes having given evidence,

Jacob Cornelius Breytenbach, A.'s son, farmer, was called. He said that he had known the Klein Sluitje ever since it was made. It was taken out from a dam just below the Zeekogat. The water to the Zeekoegat came from fountains right up towards witness's house. When the water to the Zeekoegat got a certain height, it overflowed. It always flowed over the road. After the Klein Sluitje was made, he spoke to Mr. Olivier about his receiving certain oxen from Mr. Mulder. Mr. Olivier told him that he had exchanged oxen with Mr. Mulder. In consideration of the latter giving him young oxen, Mr. Olivier let him have certain of the water. At that time things were very bad in Oudtshoorn. Money was scarce, and produce and feathers were cheap. It would not cost much to make a furrow such as they had there. After the exchange between Mulder and Olivier, he saw the sluit when it was widened from the road. The sluit was now about 4 or 5 feet wide, about the same width as he saw it after the exchange had been effected between Mulder and Olivier. In January, 1905, witness was asked to take particular note of the pump working on the Zeekoegat above the road. The portion where the road was pumped dry. While the pumping was going on no water was going down the Klein Sluitje. None of the land above the Klein Sluitje could be irrigated from the Klein Sluitje, for the reason that the ground was too high. In August last, on going to the dam, he found that the watercourse had been blocked up. The water could not run well, as there was about a foot of soil in the course. The water ran over a little below the intake. If the sluit had been properly cleaned all the water could have come down that day. On the 28th May this year, on going to the spot again, he found that the sluit was still in order, but in some places the bank had been washed away. He had not at any time found the sluit wider than four or five feet. Witness spoke to the cleaning of the water sluit, and denied that any damage was done to

Mr. Olivier's land, stating that the material was put on the banks. Witness had been sued in the Circuit Court by Willem Andries Olivier for £500 damages for going on to his land to inspect. Witness tendered £3, and Magistrate Court costs. Judgment was given for that amount, and the plaintiff in that case was ordered to pay the costs. The Klein Sluitje would bring a good deal of water down if left undisturbed. Mr. Mulder's ground was good for lucerne and ostriches. Last year witness made, out of a little less than a morgen of ground, by lucerne, £36 13s. 3d.; he pressed the lucerne, and cut it three times. The average amount that one could get from a morgen of land was about £25 worth of lucerne, and they could also run ostriches on the ground. In the Oudtshoorn district they had a plucking and a half a year from the ostriches. The average value of a plucking would be about £4 per bird. Feathers were making good prices this year. After two years they could pluck the birds three times a year. When he had gone up the sluit, he had found that Olivier's land irrigated from the pump was fine, but Mr. Mulder's land was dry. It was possible to put the bank of the sluit right again without going 30 feet on to Olivier's ground; there would be no particular difficulty in putting it right again. The dam would present no difficulty; a couple of people could put the dam right in a few minutes.

Cross-examined: Witness was not aware that there was anything between himself and Mr. Olivier as a result of the Circuit Court action. He had not seen places where the silt had been taken out of the sluit and thrown upon Mr. Olivier's ground. He did not know that it would be necessary to make the sluit deeper than before. He did not think that, if the sluit had to be constructed, it would be necessary to take it 5 feet deep on Mr. Olivier's ground. He could put the sluit right, and make a dam wall, not above 2 feet 6 in. high, and yet enable Mr. Olivier to lead out water to his land. He had had no personal experience of this sluit.

V. Rhede, farmer, and part owner of Armoed, stated he was on good terms with both the parties to the suit. In 1887 witness and his father worked some of the plaintiffs' ground under the Kleinslootje. The sluit at present was the same width as in 1887. Witness used to clean the sluit, and went right up to where the dam was. The defendant's people had never helped him. In March last year he inspected the plaintiffs' lands, and found them dry. There was nothing growing. The lands that the defendant irrigated with the pump were good in March of last year. The pump was worked in March and May of last year, with the result that

no water came down to the plaintiffs. The stream that he saw running he estimated from nine to twelve inches. In February he inspected the extent of land of the plaintiffs and the defendant, and agreed with what the witness Breytenbach had said.

Cross-examined by Mr. Searle: With six inches of water, he could irrigate about a morgen a day. The ground was not cultivated before he came there in 1887. He did not ask the defendant's men to clean the furrow. As far as he could see, the flood had not washed out the bed of the sluit. To repair the furrow, it was not necessary to encroach upon the defendant's land.

Re-examined by Sir H. Juta: About three times a year he irrigated.

Andries Louwrens van der Westerhuizen stated that from 1887 to 1889 he occupied lot 43, which was sold to the plaintiff. Cornelius Breytenbach irrigated land from the water out of the sluit. When the defendant worked the oil pump on the 3rd March, he had a nice flow of water, but nothing went down to the plaintiffs' land. Last year, from his 60 morgen, witness sold 100,000 lb. of lucerne at 4s. a 100 lb., and the ostrich pluckings were each worth between £5 and £6.

Cross-examined by Mr. Searle: In March, 1905, there was a stream of about nine inches on the Zeekoegat. In May this year there was a good stream of water in the river. Witness crossed below the dams "a" and "c," and there was no water. Witness was a tenant under Mr. Mulder. Mr. Mulder asked him to go and make an inspection of the sluit.

Re-examined: Witness paid £200 a year to Mr. Mulder as rent, but with the earnings from his land, he had no difficulty in paying his rent, and he was not indebted to Mr. Mulder. Witness had often acted as arbitrator in water cases in the Oudtshoorn district.

Cornelis Michiel Johannes Breytenbach, farmer, said that he formerly lived at Armoed. In 1894 he was there with Mr. Andries Olivier (defendant's son), who was then farming Mr. Mulder's land, which took water from the Klein Sluitje. In 1898 he went to Mr. Olivier, sen., and, after remaining with him for a year, he returned to Mr. Olivier's son, with whom he lived until 1904. Mr. Olivier, jun., had most of the ground, and he used most of the water. Piet van der Westhuisen also had land, and he took some of the water from the sluitje. Witness had cleaned the furrow on several occasions, but he had never seen anybody else clean it except those interested in Mr. Mulder's ground. While he was with defendant he did not irrigate on the land below from the Klein Sluitje. He only once took water from that sluit for defendant's land. Andries Olivier (defendant's son) stopped him from leading

water on to his father's land. After the oil pump had been put up, there was no water in the Klein Sluitje, all the water being taken away. The water thus taken out did not come back to the Klein Sluitje, but went to other ground, keeping that land in a good and flourishing condition. The pump was often worked in the summer months. It took the water out of the Zeekoegat, so as to dry the road. Witness considered that Mr. Mulder's ground was, on an average, as good and valuable as that at Zeekoegat, except for the water. He was employed by Lipschitz and Co., and superintended about 1,800 ostriches.

Cross-examined: Witness had no ground now that he farmed in his own account. While he had ground under Mr. Andries Olivier witness became insolvent. He was not on good terms with Mr. Olivier, because he thought the latter was, to some extent, to blame. Witness had had an ostrich camp between the Zeekoegat and the Oliphant's River, but during that time he did not take water from the Klein Sluitje, but from the brak sluitje. During the time he was there, he never saw Mr. Willem Olivier's men cleaning the sluit. While he was with Andries Olivier, there were no complaints of an insufficiency of water. He remembered on one occasion he took away 140 ostriches or more to the grass veld in the George district. At that time they had no water on the farm. It was not correct that every season they had difficulty about water in the Klein Sluitje.

Re-examined: Witness took away the ostriches in 1896. That was an exceptionally dry year. In winter time the birds were usually kept in the veld. Apart from that year, the land Andries Olivier had from Mr. Mulder was good ground, and the ostriches used to thrive.

Saul Peterson, of Oudtshoorn, said he was formerly in Mr. Ockert Oliver's service at Armoed. Mr. Ockert farmed ground of his own, and also ground owned by Mr. Hendrik Mulder. He was with Mr. Ockert about 1893 or 1894, and stayed in his service three years. Mr. Ockert used the Klein Sluitje for the land he hired from Mr. Mulder. Witness used to work at the furrow, look after the water-leading, and clean the furrow. Mr. Willem Olivier's people did not attend to the cleaning of the furrow. When the furrow was deviated, Mr. Willem Olivier's people worked at it, but that was the only time he had seen them working there.

Cross-examined: Mr. Willem Olivier's people might have worked at the furrow some time when witness had not seen them.

James Alex. Foster, M.L.A., said that he was an attorney, practising at Oudtshoorn, and he was the plaintiff's local attorney in this matter. He was consulted by the plaintiff about the end of 1903 or the beginning

of 1904. He had to leave Oudtshoorn to be in Cape Town for the session of Parliament in February, 1904, and he did not return to Oudtshoorn until July. Between July and the end of that year he made efforts to bring about a settlement between the parties. They were both friends of his, and he tried to effect an amicable settlement. Witness kept the minutes of two meetings of certain heirs, which had been put in. He had no recollection of any mention at the meetings, on the part of Mr. Mulder, of the Klein Sluitje. It was not until after Mr. Olivier had erected his oil pump that witness took action, in 1903 or 1904.

Mr. Searle: Mr. Andries Olivier says that he would not sign, and that you brought him back to sign, because he refused to do so on account of this matter of the Klein Sluitje.

Witness: If that is what he says, I will go so far as to say that it is not so. An incident like that I should well remember.

[Maasdorp, J.: What was that?]

Witness: That Andries Olivier would not sign because the water had not been distributed, and that I forced him to sign.

Mr. Searle: No, no; he says that he showed reluctance in the matter.

Witness: That I do not remember. I think it is extremely improbable, because I should remember a matter like that.

Mr. Schreiner closed his case.

Willem Gerhardus Olivier (defendant) stated he had land on the Kandelars River, besides that which was shown on the plan. Shortly after the award of 1880 he made the dam, and took out the furrow called the Klein Sluitje. The dam he made was about 10 or 12 yards below the road. In the first instance, the morgen and a half was cultivated from the dam. In some years the pool was very low. After the furrow was constructed, he made an arrangement with the plaintiff. The plaintiff came to witness's house, and said it seemed to him that the water was good, and he asked for surplus water, which was allowed, the plaintiff promising four young oxen. Witness made a condition that the sluit should remain as large as it was then, and no other person was to have anything to do with it but witness, plaintiff, and their children. The plaintiff said to witness that he (witness) could turn the water into the river, and witness replied: "If I do so, you can cut my throat." He had used the water from the Klein Sluitje from 1882 until the present, and used it on different lands. After the arrangement was made with the plaintiff, witness had kept the furrow in order up to 1891, except when the plaintiff came to widen it. Everyone of the farmers knew that there was not much use to be got of the "dead" water. It was in 1892 that the



furrow was widened for the first time, and witness asked the plaintiff for an explanation, but the plaintiff merely shrugged his shoulders and made no reply. Witness's people repaired the dam when it was broken. The furrow, which was 4 feet wide, was now 7 feet, and the widening of it had encroached on witness's land. Part of the sluit was washed away, and that was the cause of the widening of the furrow. He believed it was in 1887 that witness and the plaintiff took out the Braksluit, which was their best sluit. When the plaintiff first spoke to him about the water, there was only a small piece of land under cultivation. There was a better stream of water where the Kandelars ran into the Oliphant's than at the Kleinsluitje. In March, 1899, he placed a pump near the dam, which he worked with horses. For about two years he worked the pump. Martial law was then proclaimed, and as the military took his horses, he had to cease working. There was never any objection offered to this pump by the plaintiff. If his horses had not been taken away he would have continued to work the pump, and he preferred it to the oil pump, which was not always in order. In 1903 he put the oil pump near the river on David Olivier's ground, which was higher up than the first pump. The reason it was fixed higher up was because there was no other suitable place. From the pump he watered lands that he could and could not have irrigated from the Klein Sluitje. The water he pumped out was too weak to be led on to the plaintiff's lands. Supposing witness took none of the Klein Sluitje water, the plaintiff could barely water ten morgen in a good year. In February, 1904, the plaintiff came to witness's house and objected to the pump, because he said it was taking his water. The working of the pump was very unsatisfactory at first.

Cross-examined by Mr. Schreiner: He pumped out seven inches, and he knew that the water down below was only three inches. Immediately after the arrangement with the plaintiff the sluit was not widened. In 1892, for the first time, the sluit was widened. Both the parties were experienced irrigators. He did not feel aggrieved because the plaintiff gave him two Grasveld oxen instead of Transvaal oxen; he thought it rather queer. Witness sued Bretenbach in the Circuit Court for £500 damages for trespassing on his ground. The defendant tendered £3 and Magistrate's Court costs, which was all that was allowed. Witness had to pay the other costs. Bretenbach came at the instance of Mulder to inspect witness's property. As to the widening of the sluit, witness protested to one of the plaintiff's men. That was in June, July, and August, 1892. The

plaintiff kept on increasing the width of the sluit. In 1891 there was a heavy rain that washed away part of the sluit. The plaintiff never consulted him about deviating the sluit, and at that time he was on good terms with the plaintiff. Witness could not explain to the Court why the plaintiff should adopt such a strange course. When witness complained the plaintiff said: "What is it; I have the rights." Eight years ago the plaintiff suggested that in partnership a pump should be put up, and witness offered no objection to the plaintiff putting up one for himself. After that witness erected the pump, and the plaintiff never raised any objection. If the plaintiff had complained, witness would have left the pump at once. If the plaintiff had objected to the oil pump before it was erected, witness would not have erected it. The plaintiff had no opportunity of knowing that the pump was going to be erected. If the plaintiff paid him the expenses of the pump, he was willing to submit to an order of the Court that he must not pump any more. If the plaintiff had kept cool, that arrangement might have been come to. Of the pair witness was the cooler. The deviation of the furrow was carried out before the widening.

Maasdorp, J., then suggested that some arrangement might be come to, as it was a pity to see people at law who had been on the best of terms all their lives.

Mr. Schreiner: And closely connected by marriage. The Brak Sluit had not been repaired since 1895, and he attributed the inaction of the parties interested to the dispute. The first pump was as effective as the second one. Sandy soil was fearfully bad for lucerne. Even if you had water, the wind blew the sand over the lucerne, and prevented its growth. The ten morgen which his son purchased for £2,800 was better ground than that of witness or the plaintiff. He could not say whether J. J. Mulder was in good health or not; he had heard from Mulder's wife that Mulder suffered from epilepsy. Witness did not recently try to get Mulder to sign a document in connection with this case. He did not know that Mulder was a man of weak mind, or that his father managed his affairs. Witness and plaintiff had to work together on the watercourse, but the latter would not condescend to speak to witness with regard to a sluit. The deviation was made without witness's consent.

Re-examined by Mr. Searle: It would be impossible to put the furrow in order without taking a great deal of witness's ground to make the embankments. Mr. J. J. Mulder was able to talk sensibly about things. There had been an alteration in the level of the river above the Kleinsluitje dam, owing to the



last flood, the effect of which was to make it more level above the Kleinsluitje dam. The widening of the furrow was commenced in 1892, and finished in 1894.

Andries Hermanus Olivier, son of the defendant, and a son-in-law of the plaintiff, said he was born and brought up on Armoed, and was thoroughly acquainted with the farm. He had been Field-Cornet of the district since martial law. He was a school-boy when the Kleinsluitje was taken out in 1883. In 1885, before the flood, the ground on the left-hand side was then irrigated from water from the Kleinsluitje. In 1891 and 1892 he had water from the Brak Sluit, sluit C, sluit A, and also from the Kleinsluitje. His father turned off the whole water from the Kleinsluitje whenever he liked. Several times witness conversed with the plaintiff about the Kleinsluitje, and suggested a servitude, as a man who worked on it deserved to get the water. In ordinary summers the water from the Kleinsluitje would not reach these lands. In times of scarcity it would require about twelve inches to be of any service to eight or ten morgen. He remembered the first pump being placed in 1899, and the water it took out could have been of no use to witness, whose farm was below. From March, 1901, after martial law had been proclaimed for a period of a year and nine months, he was unable to get any water on his land from the Kleinsluitje.

Cross-examined: Witness had not sought to make it appear that there was very little water in the Kleinsluitje. The Brak Sluit was the best sluit in the Oudtshoorn district in the summer months. In summer the Kleinsluitje had not water which was worth having. His brother Jan had about eleven morgen under the Kleinsluitje. Mr. Mulder had got, under the Kleinsluitje, about 20 morgen, and his son Jan got about 11 morgen. From 1902 witness farmed practically all the ground under the Kleinsluitje. After 1902 he told his father-in-law that his (witness's) father kept the water a long time on his ground. His father-in-law had then been complaining to him because they did not irrigate the land. Witness considered that his father had the right to use the water on the land where he was using it. He had heard his father say that the sluit was constantly being widened. The widening in 1902 was done by Mr. Ockert Olivier. His father did not complain to him about the men who cleaned the sluit digging under his hedge, and constantly widening the sluit. Some of the widening was done by his men. During 1902 witness had cut part of the hedge away on his father's property in order to widen the Kleinsluitje. His father did not make any complaint to him, but a complaint was brought by Van

der Westhuyesen. He had never since widened the sluit as he did in 1902. When witness began to farm in 1891 his father-in-law gave him land and about 60 ostriches. In 1901 witness did not make so much money as he had done during some years. He had earned enough to make a living. He had bought land in 1897 or 1898. Witness used to clean the sluitje right up to the dam twice a year.

Re-examined: Witness heard no objection to his using the water from the Kleinsluitje up to 1901. His father-in-law had told him that his father had a right to the water from the sluitje. He had never heard his father-in-law raise the case that he had the right to come and stop his (witness's) father from leading water out of the sluitje.

Philip Rudolf van der Westhuyesen (son-in-law of the defendant Olivier) said that during the last four years there had not been enough water in the sluitje to irrigate even the three morgen or land of his father. It was not often there was a depth of more than six inches in the sluitje in the dry season. Witness spoke as to the damage done to the banks of the sluitje by flood.

Cross-examined: Formerly he used to lead water every year from the Kleinsluitje to the land on the left, but recently it was difficult to do so, owing to the sluit being washed out, although it was not impossible to lead water on the left. During 1897 and 1898 was the last time he had led water on the left. With seven or eight inches of water in the winter time, he could irrigate the land on the left, as well as that on the right. The digging out of the sluit was bad business for both the plaintiffs and the defendant. Ockert Olivier commenced the widening of the sluit. He knew of times when the water did not run into the Kleinsluitje before he pumped. Between October and April the water of the Kleinsluitje was too weak for his father or Mr. Mulder. That was since 1892. The Zeekoegat was still deep enough in parts for a horse to swim in.

Re-examined by Mr. Searle: When he came there in 1890 he could see that lands on the left-hand side, looking down the Kleinsluitje, had been cultivated. He could not remember pumping the water when it would have been strong enough to reach the plaintiffs' lands. In ordinary summer times the water would not run down the Kleinsluitje to the plaintiffs' lands. The pumps were not erected with the intention of irrigating the whole, but only pieces near the homestead. If he used the oil pump all the day, it would cost him £1 10s.

W. G. Olivier, son of the defendant, stated that he formerly worked a portion of the ground now belonging to John Mulder, for which the plaintiffs

claimed the water. The plaintiff told witness that he must get the water from the Kleinsluitje or the Brak Sluit; but in the case of the former, he was only entitled to the surface water. He could not now get enough water from the Kleinsluitje to work this land—the water sank into the vlei.

Cross-examined by Sir H. Juta: The crops on the land were bad before he took it, and Bretenbach, the former owner, told witness, if he could get water from another sluit, he might get something in a good year.

Joseph M. Puren, farmer, of Armoed, stated that he hired a portion of land for five years, which he cultivated in 1903, from John Mulder. That was the piece of ground called lot 5. He was to get his water from the Brak Sluit, and he arranged that, by written contract from John Mulder. He was not to get any water out of the Kleinsluitje. He could not get water enough to cultivate the ground. When he complained to John Mulder, the latter said he must speak to the plaintiff about the surplus water in the Kleinsluitje. The plaintiff said he had no permanent water to give, and that the witness must see Andries Olivier. Mr. H. Muller said the water in the Kleinsluitje was only a "permission" water. During the time witness was there, the defendant turned off the water from the Kleinsluitje when he liked. Witness never had a turn in the Kleinsluitje water. He had a fair supply from the Brak Sluit. The Kleinsluitje when it came down came in small streams. When there were no pumping operations, he tried to irrigate some potatoes with water from the Kleinsluitje, but found it insufficient. The water from the Kleinsluitje disappeared in the sandy soil, and the defendant shut it off when he liked. On the instructions of Mr. Hendrik Muller, he excavated on the defendants' land to get the water from the dam. Shortly after the flood witness was asked by the plaintiff to repair it, but found that he was unable to do so. He saw the bushes thrown on the lucerne grounds of the defendant. The furrow could not be reconstructed without doing much damage to the defendants' ground, because the furrow would have to be remade in new places, and that would encroach on the defendants' land. When he went there in 1903, there was no lucerne on his ground. That piece of ground could not keep six ostriches alive.

Cross-examined by Sir H. Juta: With twelve years' knowledge of the ground, he hired it, and expected to get something out of it. Year after year he had seen the crops destroyed by the wind, and yet he hired it. He got the ground fairly cheap, and took it to grow lucerne for his ostriches. He never had any right of water out of the Kleinsluitje. He did not know that the others had turns at the Kleinsluitje.

He had a right out of the Kleinsluitje, but he had to find out what the right was. Mr. Hendrik Muller told him, if he could get water out of the Kleinsluitje, they would have to divide it among themselves. When he hired the ground, John Mulder said he had 24 hours' right from the Brak Sluit, and a little right out of the Kleinsluitje, but he could not say how much out of the latter.

Re-examined by Mr. Searle: When he went to see Mr. Hendrik Muller about the water coming from the Kleinsluitje dam, the plaintiff said he had no permanent right in that water, but the water Mr. Olivier allowed to come down, they would have to divide among one another.

By His Lordship: The water in the Kleinsluitje was also weak in winter time. Down in his lands they got no water. If there was a thunderstorm, the water might come down for a day or so, but it quickly disappeared. There was no quantity of water in the Kleinsluitje summer or winter.

Further evidence was given on behalf of the defendant by Herculaas Petrus Olivier, Carl Meiring, Nicholas Louwrens Fouche, Petrus Johannes Stefanus Meiring, and Frans Thomas Snygan. The evidence was principally directed to showing the condition of the Klein Sluitje. It was stated that the sluit was washed away so that a stranger was unable to find it in some parts. The level of the ground was 1 ft. 4 in. above the level of the intake.

H. Snyman, cross-examined by Sir H. Juta, said that he had been a day labourer, employed by Mr. H. J. Mulder, and he had been allowed a piece of land.

Sir H. Juta: It would not matter very much whether you got water or not?—No answer.

They were all using the water out of the Klein Sluitje?—Yes.

So that they did not give you much?—Yes, they gave me also a turn, to lead a few days.

You had to get what they would give you?—Yes, they did not give me a turn. Mr. Mulder did not say I could have a turn.

You just had to get what you could get?—Yes.

Mr. Searle closed his case subject to certain evidence taken on commission.

Maasdorp, J., said that he would read over the evidence taken on commission.

Mr. Schreiner said that certain facts were common cause between the parties. They were:

(a) The Kandelaar's River was a public perennial stream.

(b) In 1883 the defendant took water out of the lower end of the Zeekoegat.

(c) At a subsequent date the plaintiff acquired for value rights against the defendant in respect of the Klein Sluitje.

(d) Afterwards there was a deviation of the furrow by Willem Rooiberg, the water fiscal.

(e) The plaintiff caused the furrow to be widened.

(f) The plaintiff had for many years used the water from the Klein Slootje.

(g) That the water flowing into the Zeekoegat became weaker in the summer months.

(h) When the defendant was not pumping water out of the Zeekoegat he still laid claim to irrigate his land out of the Klein Slootje, in preference to the plaintiff's land.

(i) The defendant blocked up the Klein Slootje in July, 1905.

(j) In September, 1905, a flood occurred, which damaged the oil pump and washed away the Klein Slootje, and Mulder's men were prevented by Olivier from repairing it.

Upon those facts he said that he was justified, without going further into the case, in asking for judgment for the plaintiff. The first controversial point was, was there an agreement between the parties in 1892? Olivier did use water out of the Klein Slootje before and after 1892, but he had no right to do so after the deviation. The evidence and the probabilities were all in favour of an agreement having been come to in 1892. The deviation of the furrow must have been made with the consent and approval of Olivier. The plaintiff had a right to the water from the Klein Slootje, not merely a right to lead water. Counsel quoted from Farnham on Water and Watercourses (vol. II., pp. 1784 and 1718). The grantor could do nothing to prevent the grantee's enjoyment of the privilege granted. He cited Farnham (vol. III., pp. 2223, 2224, 2235, 2240), and 25, American Reports, p. 125.

Proceeding, Mr. Schreiner said that where a servitude was granted every right incidental to that servitude was also granted—Voet, (8-4-16), *Wolfaardt v. Pienaar* (C.L.J., vol. I., p. 345), Maasdorp (vol. II., pp. 168, 169), Grotius (2-35-13), 1 Menzies, p. 465, Nathan (vol. I., p. 456). These authorities would indicate the position the plaintiff took up in regard to his right to go on to the land of the defendant to repair the furrow.

Mr. Searle, for the defendant, did not admit that there was no dispute about the ten points which Mr. Schreiner said were common cause. Independently of agreement, the plaintiff had made out no right to the use of the water from the Zeekoegat, because the plaintiff's land was not riparian to the Kandelaaar's River at all. Counsel referred to the case of *Olivier v. Fourie* (9 C.T.R., 309). The real point in the case was, what was the contract between the parties?

He also quoted the case of *Lipschitz*

*v. Ferreira* (16 C.T., p. 122), and *Voet* (8, 6, 4).

Mr. Schreiner, in reply, quoted *Van Schalkwyk v. Haumann* (14 S.C., 214), *Roberts v. Gwynfai District Council* (81 L.T., 465), Maasdorp (Vol. II., p. 219).

*Cur. Adr. Vult.*

*Postea* (August 30th).

Maasdorp, J.: The main question in dispute between the parties to this case is with regard to their respective rights to the use of a certain furrow, and the water conveyed thereby from the Vandelaar River. It is admitted that these rights depend upon the terms of a contract entered into between them, with respect to which there is a very strong conflict of evidence. This conflict is of such a character that if I had nothing to guide me but the number of witnesses on either side, and the position and character of these witnesses, I should have had great difficulty in deciding between them. But it seems to me that the conduct of the parties during the many years that they worked under the conditions of the contract throws a strong light upon the true character of the agreement. The plaintiff claims that at the time of the grievance complained of, there was an agreement in existence between himself and the defendant whereby it was agreed that they should have the common use of a furrow leading water over the defendants' land from the Vandelaars River, and a joint reasonable use of the water conveyed by the furrow upon such of their lands as can be irrigated by means of this furrow. The defendant, on the other hand, alleges that it was agreed between them that for a consideration to be given by the plaintiff he should allow to the plaintiff the use of his furrow to convey on to his land such water as the defendant did not require for his own use, called the surplus water. I shall endeavour to ascertain first what the circumstances were under which the agreement was made. It appears that in about the year 1880 the farm Armoed, of which the lands of the plaintiff and defendant form portions, was divided by arbitration between the several owners, and water led by means of furrows from the rivers passing through the farm, was assigned for the use of the various sub-divisions. Amongst others, two dams were placed in the upper part of the Vandelaars River, in such a position as to divert by means of two water-courses all the water that was practically available for the irrigation of the farm from that source. I am satisfied that if there were any considerable flow of water in the Vandelaars River below the dams available upon the farm, the arbitrators would have found means of turning it to some use. On the other hand, it has been proved that as the result of percolations

from the banks, and ooziings and small springs in the bed of the river, a stream is gradually formed below the dams until it assumes useful proportions by the time it reaches the upper corner of the land of defendant, which abuts upon the Vandelaars River. This water, after passing through the deeper reaches of the stream, is at that point obstructed by the natural formation of the land, and rises there in such a way as to become available for use upon the land of the defendant. The defendant, observing this, made a dam across the river, and constructed a furrow three feet wide and one foot deep to lead water on to land suitable for the purpose, which, at the highest estimate, did not exceed three and a half morgen. The defendant says that after he had made the furrow he found that he could only get a small portion of ground irrigated under it, and for some time it was used principally for a little garden made by an old servant of his. The main difficulty of the defendant, after he had completed the furrow, was not in respect of the quantity of water, but the levels of his ground, and he had no means of diverting the water from the river at a higher level. Upon the evidence I come to the conclusion that by means of the furrow in question a fair quantity of water could be obtained from the river during portions of ordinary seasons, and that at times it would become so weak as to be of little use; then, again, in times of freshets, which might be expected annually, the water passing over the upper dams in the river would flow in considerable quantities down the furrow, and would be sufficient to irrigate much larger areas of land than were available on the defendant's ground. I am satisfied that the defendant felt that it was the want of land under the furrow rather than the want of water in the furrow during the course of the year, that prevented it being worth his while to concern himself much about the furrow. It was under these circumstances that the plaintiff, who knew that a good deal of land belonging to him could be irrigated from this water-course, came to interview the defendant. I wish, however, first to make this clear, that I am not influenced much in my decision by the evidence with regard to the weakness of the stream in the dry seasons, of which so much has been made by the defendant, as I am of opinion that during some portions of every year a pretty considerable stream could be taken by the furrow on to the plaintiff's land. The plaintiff states that when he made the first agreement with the defendant, the latter thought so little of the stream that for a consideration he gave up the whole use of it to the plaintiff, whereas the defendant states that he only sold to the plaintiff what he did not require him-

self. As I have said, this question must be decided by the subsequent conduct of the parties. I think it has been proved that immediately after the agreement the plaintiff set about improving the furrow, and constantly, wherever it was necessary, he sent his men on to the defendant's land to clean and repair the furrow, and that, although it may be quite true that the old Hottentot who used some of the water for a little garden on the defendant's ground did at times work at the furrow, the main work upon and supervision of the watercourse was under the control of the plaintiff. It is unnecessary to decide whether the furrow was once for all widened by the plaintiff to form a five feet or whether it gradually attained that width, but enough appears to show that the plaintiff at once set about making arrangements for diverting a larger stream of water from the Kandelaar River, and that whenever the widening took place it took place openly, and to the knowledge of the defendant. The evidence all goes to show that the plaintiff did not merely purchase surplus water, but a considerable share in the use of the watercourse and the water. What precisely the rights of the parties are must be decided under the subsequent agreement of 1892. At that time it was necessary, in consequence of damage from flood to the furrow, for the plaintiff to obtain some concession from the defendant in the reconstruction of the furrow, and the plaintiff says it was then agreed that the defendants, who had disposed of all his rights under the first agreement, should, in consideration of the concession, share in the use of the furrow water. The defendant denies that any further contract was made, and says that as before the plaintiff was only entitled to the surplus water. Here again I must refer to the conduct of the parties in order to ascertain the truth. I find that from this time there is clear evidence of joint user for many years by the parties of the water in the furrow, and I am satisfied that this joint user was in terms of their agreement, which gave to each a fair and reasonable share in the water, it being in the contemplation of the parties that almost three morgen of land was available for irrigation on the defendant's ground, and a considerably larger area on the plaintiff's ground. Now, the question arises, what water was it that they agreed to share. In my opinion it was contemplated by them when the agreement was made that they were dealing with all the water that came down from the upper dams in the bed of the river to the defendant's dam, which was at the disposal of the defendant, and could by means of that dam be conveniently directed on to the land of the defendant and plaintiff in the furrow, as it



was constructed in 1892. I also find that practically the furrow before the late flood was in the same condition as in 1892. The injury complained of by the plaintiff as done to him by the defendant in derogation of his grant in that the defendant erected a pump in the river above the dam, and used the water diverted from the river by that means to irrigate ground which could not have been irrigated from the furrow in dispute. The defendant admits the use of the pump, and says that by means of it he took all the water he could obtain whenever he liked. He asserts a right to use the water in this manner, but upon the evidence it was sought to prove that even if he had no such right he did no injury that caused damage to the plaintiff, because at the time he used the water by means of the pump there was so little water in the river that it could not have reached the plaintiff's land to be of any use to him. It follows from my finding as to the true conditions of the contract that the defendant had no right to use the water in this way in such quantities as to deprive the plaintiff of a reasonable share of it. I am also of opinion that although the water was weak at the time defendant used the pump, there was still sufficient to render the diversion a cause of some danger to the plaintiff. The question also arose at the trial whether the plaintiff, and his son, the second plaintiff, are claiming the servitude in respect of land in connection with which it was originally granted. It seems to me that although the plaintiff did not at the time of the agreement hold the land by precisely the same title as that under which it is now held by himself and his son, he had at that time sufficient right of ownership in the land to acquire a servitude in favour of it over the land of the defendant. I may also mention, although the question was not raised upon the pleadings or in argument, that it was not merely a personal servitude granted to plaintiff by the defendant, for the defendant admits that it was to pass to the children, but was a grant of a servitude against the land of the defendant in favour of the land then held by the first plaintiff, and now held by the two plaintiffs. In September last the furrow was partly washed away, and silted up owing to floods, and the plaintiffs complain that upon their setting about repairing the damage upon the land of the defendant, he refused to allow them to proceed with the work. The defendant justifies his action in this respect by the contention that the plaintiff has no right to enter upon his ground to execute repairs or relay the furrow without notice, and without any arrangement having first been come to between himself and the plaintiff as to the manner of executing the work, and even now the defendant will only consent to the furrow being

repaired provided it can be re-constructed in the same spot without damage to the defendant's property, and provided that it is not constructed to a greater width than 3 ft. I am of opinion that the width of the furrow, which is on an average from 4 to 5 ft., is practically the same now as it was in 1902, and was so made with the consent of the defendant, and that the plaintiffs are therefore entitled to go upon defendant's land to repair the furrow, and restore it to the state it was in before the flood of September last. The plaintiffs do not now claim any right to make any deviation in the furrow or to do anything in the re-construction of the furrow, which might damage the plaintiff. If the furrow cannot be re-constructed, as it was before, and if the plaintiffs are entitled to preserve their servitude by making deviations in the course of the furrow, for which they might have to pay compensation to the defendant, that matter would require a different form of action. While the plaintiff is entitled in cleaning the furrow to place the soil on to the bank thereof, as was done in the past, without doing any damage to the defendant's land, I do not now hold that if material is required for repairing the extensive damage done by the flood, that the plaintiffs are entitled to use such material from the land of the defendant without his consent. As to the defendant's claim in reconvention, I come to the conclusion that it has not been proved that any damage was done by soil being thrown on to his lucerne lands out of the furrow by the plaintiffs or their servants. It seems to me that when the defendant diverted the water by means of his pump, the quantity in the river was such that the plaintiff would not have benefited largely by the use of the water, and the plaintiffs sustained no serious damage. The Court will make a declaration in terms of prayers (a) and (c) of the declaration, and award the sum of £25 to each of the plaintiffs. Judgment is given for the plaintiffs on the defendant's claim in reconvention. Defendant is ordered to pay the costs.

Mr. Lourens applied for the plaintiff to be declared a necessary witness.

Maasdorp, J., said that a declaration would be made accordingly.

Mr. Howes (for defendants) said he was instructed that plaintiff was all the time of the trial in Cape Town in connection with his Parliamentary duties.

Maasdorp, J.: The Taxing Master will deal with that point. The Court only declares that the plaintiff was a necessary witnesses.



# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1906.  
( July 19th.

Mr. Pohl moved for the admission of Michiel Jacobus Pretorius as an advocate.

Application granted, and oath administered.

### *Ex parte* KOTZE.

Mr. Burton moved as a matter of urgency, on the petition of Johannes Erasmus Petrus Kotze, of Vredenburg, division of Malmesbury, for an interdict against one Pieter Hermanus Loubser. Petitioner said that he was the owner of certain land marked No. 37, situate at Vredenburg. On June 12 last Mr. Loubser, who was the present registered owner of the farm Witteklip, which adjoined the village of Vredenburg, wrongfully and unlawfully cut the fences enclosing petitioner's said property, and drove with his cart over both the erven numbered 36 and 37, and through the gardens and cultivations of petitioner, leaving the fences open behind him. Petitioner had instructed his attorney to call upon the said Loubser to refrain from so trespassing upon his property, and to re-erect the fences so cut down by him on the said erf; but respondent had refused to re-erect the fences or refrain from trespassing on the property, saying that he had a right of way through it. Petitioner denied that the respondent had any right of way through his property, and also said that he (Loubser) could get into the village of Vredenburg without passing through his (petitioner's) property. He prayed for an interdict restraining Loubser from cutting down the fences enclosing the erven Nos. 36 and 37, Vredenburg, or any of them, or from trespassing thereon, pending decision of an action to be instituted by petitioner for a declaration of the rights in regard to the matters in dispute. Counsel said he thought that at the present stage he could apply for a rule *nisi*.

De Villiers, C.J., said that it might save expenses if he granted an interdict, and gave leave to respondent to move to have it set aside. An order would be granted as prayed, action to be brought by petitioner during the August term, with leave to respondent in the meantime to apply for the discharge of the order.

### BAUERMEESTER V. BACK.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Paarl in an action brought by appellant against respondent for £20 damages alleged to have been sustained by reason of respondent improperly, negligently, and carelessly driving a cart and knocking down petitioner in Lady Grey-street, Paarl, on March 28 last. The decision of the Court below was absolution from the instance, with costs.

The Magistrate, in his reasons for judgment, said that from all the evidence before him, both from plaintiff's and defendant's side, it was very evident that at the time of the accident defendant was driving at a very moderate and reasonable pace—in fact, Mr. Doornbrack, who was one of the chief witnesses for plaintiff, said that defendant drove at a sharp walk. It was also admitted on both sides that plaintiff nearly got run over by a bicycle ridden at the time by a certain Baartman. In order to avoid a collision with this bicycle, plaintiff, according to all witnesses and her own evidence, went towards the middle of the street, which was very narrow at the time owing to certain repairs being in progress there. "I heard the case very carefully," the R.M. added, "and, considering all the circumstances I cannot but come to the conclusion that this was a pure and simple accident, which it was quite impossible for defendant to have avoided. . . . I must add that I consider that defendant gave his evidence fairly, and acted humanely in fetching and guaranteeing to pay for a doctor in this matter. . . . In my opinion, the plaintiff absolutely failed to prove any negligence on the part of the defendant in this matter."

Mr. Benjamin was for appellant (Magdalena Bauermeester); there was no appearance for respondent.

Mr. Benjamin submitted that the way in which this accident occurred was that plaintiff, in order to avoid the bicycle, which came upon her unexpectedly, ran into the middle of the street, and she was driven over by the defendant, who at the time was not looking where he was driving the cart. From the evidence it seemed to be perfectly clear that defendant was looking towards a shop at the side of the street, and was not looking ahead. It was very difficult, therefore, to see how the Magistrate, on the evidence before him, came to the conclusion that this was a "pure accident."

De Villiers, C.J. : I see no reason for disturbing the decision of the Magistrate. The accident occurred at a place where there were excavations on both sides of the street. A man named Baartman came up on a bicycle in an opposite direction to that in which the defendant was driving, and as nearly as possible drove

over this elderly lady. As usual, in these cases, with elderly ladies, she got confused, and did not know exactly which way to turn, and in the meanwhile, the defendant's cart was coming on at a slow trot, and, in my opinion, there is quite sufficient evidence to justify the view of the Magistrate, that there was no negligence on the part of the defendant. Of course, it is just possible that with the exercise of extreme skill and care he might have avoided the accident, but what is required of a driver is ordinary care and diligence, or, as some say, reasonable care and diligence. That certainly was exercised by the defendant in the present case. There is some conflict as to the distance at which the defendant was from this old lady, when first his attention was called to her being in the road, but I am satisfied that the first he knew of it was when he could not well have avoided hurting her. It is said, however, that two witnesses stated that the defendant was looking at the time towards a fruit shop, and not looking in the road. Well, even if it is true that two witnesses stated that, I should have thought that the defendant would have known better which way he was looking than the two witnesses, and he said that he was looking in the direction of the road. The man himself would certainly know better than others which way he was looking, and he states that he was looking down the road, and the Magistrate apparently believed his evidence. So that, on the whole, therefore, however much one might sympathise with this lady, it lay upon her to prove negligence on his part. *Prima facie*, of course, the very fact that the old lady was hurt would be evidence of negligence, but defendant has rebutted that by his evidence and the evidence given on his behalf. The fact that the defendant offered to pay the doctor, I think, should not be used against him. It was pure kindness of heart, he was sorry for the old lady, he heard that she was poor, and he offered to pay her doctor's expenses. That circumstance should not weigh in this case one way or another. A man may be perfectly innocent of any negligence, and yet he may feel that he has had a share, or some part in the accident, and say he would assist her. The Magistrate's decision seems to have been carefully considered, and I see no reason for disturbing it. The appeal is dismissed.

ADAMS V. MOCKE.

1906.  
July 19th.  
" 30th.

Vindication—Sale by bailee—  
*Mobilia non habent sequelam.*  
*It is not an unqualified rule of law that if any one to whom*

*a thing has been lent or otherwise entrusted, alienates it without authority, the owner has no action against the person who has obtained it by a just title and in good faith.*

*If, however, the thing has been so entrusted under circumstances which might reasonably lead others to believe that the ostensible owner was the true owner, or had authority from the true owner to dispose of it, the owner cannot claim it from a person, who has acquired it in such belief and for value, without tendering to repay such value.*

*A., being the driver of a post-cart owned by the plaintiff, who was a post contractor, left one of the plaintiff's horses, which became disabled on the road, in the charge of B., and borrowed a mule from B. to prosecute the journey. B. sold and delivered the horse to the defendant.*

*Held on appeal, that in the absence of proof of such circumstances as just stated, the Magistrate erred in granting absolution from the instance.*

This was an appeal from a judgment of the Acting Resident Magistrate of Fraserburg, in an action brought by appellant against respondent for delivery of a certain horse, or its value, £20.

From the record, it appeared that a certain iron grey horse, belonging to appellant, had been used for post-cart work. It was sent out with a driver from Beaufort West to Loxton, and the driver returned without the horse, but a mule was occupying its place. It was explained that the horse became ill at Loxton, that it was left there to be cared for, and a mule was brought back in its place, and this mule was substituted for another mule at Slangfontein. When the driver returned to Beaufort he was sent back to get the horse. He exchanged the second mule for the first mule at Slangfontein, but he failed to get the horse at Loxton. The man at Loxton, Mr. Esterhuizen, took up the position that he exchanged the first mule for the horse.

The Magistrate, in his reasons for judgment, said that, in granting absolution from the instance, he was of opinion that before proceeding for the recovery of the horse in question from

the defendant, the plaintiff should have taken steps to settle the dispute, which had arisen between himself and one Esterhuizen, of Loxton, in the district of Victoria West, from whom Mocke purchased the horse. It was clear, from the evidence of the plaintiff himself, that Esterhuizen claimed the property himself by an exchange of a certain mule. It also appeared that this mule was returned several times to Esterhuizen, but on each occasion he refused to accept it, and eventually it was sent to the commonage with other animals belonging to plaintiff. All this went to show that such a dispute did exist, and it should have been thrashed out by plaintiff in an action against Esterhuizen.

Mr. Louwrens was for appellant, Mr. J. E. R. de Villiers was for respondent.

The record of evidence led for the plaintiff was read, no evidence having been taken for defendant.

De Villiers, C.J. (to Mr. De Villiers): Is it your contention that the property passed to Mocke?—Yes.

[De Villiers, C.J.: If the statements made in evidence are true, is not the plaintiff entitled to vindicate his horse?]  
—Esterhuizen, I admit, had a bad title, but the defendant took the horse *bona fide* and for value. If a man entrusts his goods to a bailee, the question is, can he vindicate them from a man who has received them from the bailee *bona fide* and for value?

De Villiers, C. J.: I only want to know your position.

Mr. Louwrens (for appellant): See *Noonan v. Meyer* (15 C.T.R., 281), where the law as to vindication is fully stated in your lordship's judgment. The defendant should have called on Esterhuizen to defend his title. The Magistrate gave absolution from the instance, and therefore did not consider that the plaintiff was in the wrong. The Magistrate considers that the plaintiff ought to have sued Esterhuizen, but had he done so he might have found that Esterhuizen or any other middleman was a man of straw. The record does not show how respondent became possessed of the horse. The Magistrate ought to have decided on the evidence before him, *Coetzee v. Beukes* (11 C.T.R., 78).

De Villiers, C. J.: In a case like this the better course would be to remit to the Magistrate to take evidence for the defendant, or to make Esterhuizen a co-defendant.]

I do not see how we could make him a co-defendant.

[De Villiers, C.J.: The difficulty is that the plaintiff still has the mule.]

Plaintiff, defendant, and Esterhuizen are in three different magisterial districts.

Mr. De Villiers (for respondent): Julius, the driver, deposited the horse

with Esterhuizen. There was clearly a contract of deposit. An owner cannot vindicate from a bailee. Groenewegen *De legib. abrogatis* (4-1-16). He teaches that if an owner bails his goods, he must suffer from the dishonesty of the bailee.

[De Villiers, C.J.: That is on the ordinary principle that if I put a man in a position to commit fraud, I must suffer.]

Yes, but here Adams, the owner of the horse, by his agent Julius, deposits the horse with Esterhuizen. Mocke buys in good faith. Hol. Consultat (Vol. 4, No. 178) bears on the subject.

[De Villiers, C.J.: English law makes a distinction between a factor and an ordinary agent.]

Our law knows no such distinction. Even if Adams has a right to vindicate, he must first tender to Mocke what he had received for the horse.

Mr. Louwrens in reply.

[De Villiers, C.J. (to Mr. De Villiers): Is there any proof of valuable consideration and of good faith on the part of Mocke?]

Mr. De Villiers: There is proof of consideration, but not of good faith.

*Cur. Adv. Vult.*

*Postea* (July 30).

De Villiers, C.J.: The plaintiff was a post contractor at Beaufort West, and he authorised his post-cart driver to hire horses or mules in case any of his horses should become disabled on the road. One of the horses did become disabled at Loxton, whereupon the driver hired a mule from one Esterhuizen, but no terms as to the amount payable were agreed upon. According to the driver's evidence, it was arranged that Esterhuizen should be allowed to use the disabled horse until his mule was returned. Esterhuizen exchanged that horse with the defendant for another horse. The plaintiff returned the mule to Esterhuizen, who refused to accept it, and who was unable to return the horse in consequence of the exchange, whereupon the plaintiff sued the defendant for a return of the plaintiff's horse or its value. It would appear from the correspondence between the plaintiff and Esterhuizen that the latter justified his parting with the horse on the ground that the driver had not hired the mule from him, but had exchanged the mule for the horse. The driver, however, denies having effected such an exchange, and the plaintiff positively stated that the driver had no authority to sell or exchange any of the cattle in his charge. After the plaintiff's evidence had been closed, in the Court below, the Magistrate granted absolution from the instance on the ground that "before proceeding for the recovery of the horse in question from the defendant, the plaintiff should have taken steps to settle the dispute between himself and

Esterhuyzen, from whom the defendant had purchased the horse." If in law the plaintiff was entitled to vindicate his property, the fact that Esterhuyzen set up an untenable claim could not affect the plaintiff's right. The defendant, upon being sued for a return of the horse, should have called upon Esterhuyzen to defend the suit, and, even if Esterhuyzen did not join as co-defendant, any defence which he legally had could have been set up in the suit. No evidence whatever was given to show that the driver did exchange the horse for a mule, or that he had authority to make such an exchange. In the absence of such evidence, it is clear that the plaintiff never lost his property in the horse, and that he is consequently entitled to recover it, even from a person who was ignorant when he bought the horse that it belonged to the plaintiff.

In support of the Magistrate's judgment, counsel for the respondent relied upon a proposition of law laid down by Groenewegen (Ad. Inst., 4-1-15), to the effect that if any one to whom a thing has been lent or otherwise entrusted sells or in any other manner alienates it without authority, the owner has no action against the person who obtained it by a just title and in good faith. In support of this view he quotes a Dutch proverb, which, literally translated, runs thus: "Such a skipper should you choose, Ship and goods you'll have to lose," and he cites a decision of the Supreme Court of Holland, as reported by Neostad. (decision 85) in support of his proposition. On reference, however, to the case itself, I find that Groenewegen's general statement of the law is not by any means justified by the facts of that case. It was a case in which the owner of merchandise on board a ship entrusted it to an agent, with authority to sell the merchandise in a foreign port. The agent was arrested for a debt of his own, and in order to meet the claim he sold the goods and devoted the proceeds to the payment of his debt. The former owner of the goods sought to recover the money, but the Supreme Court of Holland held that he was not entitled to succeed, on the grounds that he had entrusted the free administration to the agent, and that there was no right to vindicate the proceeds in lieu of the goods themselves. Van Leeuwen, in his "Censura Forensis" (4. 7-15-17) does not agree with Groenewegen, and points out that according to the decided cases, including the one reported by Neostadius, the owner only loses his vindictory action where he has entrusted his goods to a person having the ostensible authority to sell them; as, for instance, where the owner or charterer of a ship has given full control to the master over the ship and cargo, or where the owner of merchandise has entrusted it to his *institor*—

that is to say, his agent, for the sale of his goods. Van Leeuwen seems, however, subsequently to have altered his opinion, for, in his Commentaries (4-12-4, Koetze's translation), he lays it down broadly that "in order that no one should in future be defrauded through the fault or omission of him who has entrusted his property to a dishonest person, it has been established that if a person has without authority sold, pledged, or in any other way alienated property entrusted or lent to him, the owner of such property shall have no further right against him who has *bona fide* acquired the same than that of redeeming the property at the price for which it has been sold or pledged." I have, however, been unable to find any decided case in the Dutch courts which supports this unqualified statement of the law. In the case of *Gerritz v. Dionys* (Boel's Loenius Dec., cas. 42), decided in 1629, it was held that the owner of goods who has delivered them for sale to a hawker was entitled to claim the goods from a third person, to whom the hawker had sold and delivered them in payment of his own debt, but the decision seems to have proceeded on the ground that the buyer knew that the goods had been entrusted to the hawker for sale. In the subsequent case of *Colen v. De Hoest* (Boel's Loen. Dec, cas. 80), it appeared that the plaintiff, a goldsmith at the Hague, had given two valuable bracelets to one Gilles to sell. Gilles handed over the bracelets to the defendant in payment of his debt, and the Court held that, in the absence of any collusion between Gilles and the defendant, the plaintiff was not entitled to recover the bracelets from the defendant. Another case reported by Boel (Boel's Leon. Dec., cas. 9) was that of a merchant who had placed merchandise in the hands of his factor in Amsterdam to sell. The factor converted the goods to his own use, and it was held that although the factor might be held to have stolen the goods, the merchant was not entitled to recover them from a third person, who had acquired them by purchase or otherwise, and that the merchant had only a personal action against his factor. This was found by the evidence of a large number of expert witnesses to be a custom of the city of Amsterdam, the reporter adding that the reason of the custom was that the merchant had entrusted the goods to his factor. Voet (Com. 6-1-12) discusses the question with some fulness, and he points out that under the Roman law, there was a right of vindication of stolen property, even if the theft had been committed by persons to whom the owner had entrusted the property, such as borrowers, bailees, hirers, and the like. He then refers to the maxim of the Dutch law *mobilia non habent sequelam* as having, in the opinion of many, the effect of depriving the owner of his vindictory



action, where he has thus entrusted the goods to others. He admits that in the case of agents for the sale of goods and factors (*institores ac proxeneta*) it is almost everywhere observed as a practice that if such persons sell or pledge goods entrusted to them the owners are not entitled to recover such goods without returning the price or paying the debt. Van der Keesel, who is the latest writer on the point, says (Thesis, 183): "The true owner of a thing, whether movable or immovable, which has been alienated without his consent, not only by one who has stolen it, but by one to whom it has been lent, given in deposit or let, or by any other like person not having authority to sell, may legally claim it from any one who is in possession of it without making restitution of the price paid by him. In his dictata that learned author elaborates the thesis, and maintains the accuracy of the proposition of law there laid down. It is unnecessary to quote from the several other authors and cases treating on the subject. They are in hopeless disagreement with each other; and even upon the question whether a person who has entrusted to another a negotiable instrument payable to bearer is entitled to recover it from a third person, who has obtained it *bona fide* and for value there is not complete agreement. In this Colony this last question was finally set at rest in *Woodhead, Plant and Co. v. Gunn* (11 Jura, 4). It was there held that as the owner, by placing such an instrument in the hands of another, leads others to believe that the holder is entitled to deal with it as cash in currency, it would be in the highest degree inequitable that he should be entitled to recover the instrument from a person who has honestly and for valuable consideration received it as cash. I cannot agree with those Dutch writers who have extended the principle of the decision reported by Neostadius to every case in which goods are entrusted by one person to another. But the underlying principle in that and in all the other cases I have found is this, that it would be inequitable that an owner, who has led others into the reasonable belief that the person to whom he has entrusted his goods is entitled to dispose of them should be allowed to recover such goods from a person who has acquired them honestly and for value, unless the owner tenders to repay such value. It must be admitted that this view is not consistent with the maxim of the Dutch law, *mobilis non habent sequelam*, if that maxim is to be regarded as a fixed rule Matthaeus, in his exposition of the maxim (paragraph 7), states that it had been introduced in the Netherlands in the interest of trade and commerce. He admits, however, that, in so far as it deprives owners of goods of the right to

vindicate such goods wherever found, it constitutes a serious departure from well-established principles of law, and that it should not be extended beyond the limits which have been sanctioned by custom or Statute. In this colony the maxim has been frequently applied to pledges of movable property—and it has been held that the pledgee loses his hypothec after parting with the possession. As applied, however, to the owner's right to follow up his goods into the hands of persons who have not acquired the same from him, the maxim is certainly more honoured in the breach than in the observance. The rule rather is that the owner has the right of vindication, and the cases where he is deprived of this right are really exceptions to the general rule. One of these exceptions is where the owner of money or of a negotiable instrument, payable to the holder, seeks to recover the same from a person who has obtained it *bona fide* and for value. Another exception is mentioned by Matthaeus (par. 7, 17), in the case of the owner of goods, which having been stolen from him, have been publicly sold *sub hasta* without his knowledge, for he could only recover the goods on payment of the price. It is not necessary now to decide whether the exception would apply to judicial sales of movables in this colony, where the formalities to secure the greatest amount of publicity are not so elaborate as they were in the Netherlands, or as they are here in the case of sales in execution of immovable property, although I would by no means suggest that our law differs from the law as thus stated by Matthaeus. In regard, however, to the case of a person who has lent, or let, or otherwise entrusted his goods to another, I am clearly of opinion that he does not lose his right of vindication if the goods are improperly parted with, unless he had so entrusted his goods under circumstances which might fairly and reasonably induce third persons to believe that the ostensible owner was the true owner, or had authority from the true owner to dispose of the goods. The burden of proving that such circumstances do exist lies upon him who resists the owner's right of vindication. In the present case, no such circumstances have been proved to exist. The fact that the plaintiff entrusted the postcart horses to his driver could lead no one reasonably to believe that the driver had the right to sell or exchange the horses. As to Esterhuyzen, there is no evidence whatever before the Court that he had ever acted as the agent of the plaintiff, or that he was a dealer in horses, or that the defendant had any other valid reason for believing Esterhuyzen's statement that he was the owner. The Magistrate, therefore, ought not to have granted absolution from the instance, but should have called on the defendant to sustain his de-



fence. If the defendant had proved such circumstances as I have indicated, the Magistrate would have been justified in rejecting the plaintiff's claim, except on payment by the plaintiff of the consideration paid by the defendant or its value. The appeal will be allowed, and the case remitted to the Magistrate for hearing and for judgment on the merits. The costs of this appeal and in the Court below will abide the result.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Walker and Jacobsohn.]

#### ESTATE BAUMANN AND ANOTHER V. DU PLESSIS AND ANOTHER.

##### Execution debtor—Ownership— Delivery.

*Sheep bearing the mark of an execution debtor and found in his possession were attached by the messenger. P. claimed the sheep as his, on the ground that they were the progeny of sheep which 18 years before had been leased to the debtor.*

*Held, that in the absence of satisfactory proof of P.'s ownership, the sheep were liable to attachment and sale in execution.*

This was an appeal from a judgment of the Resident Magistrate of Ceres in a certain interpleader action to determine the ownership of certain property found in the possession of the execution debtor one Esterhuizen. Dr. Greer was for appellants; Mr. Close was for respondents.

Dr. Greer said that there were really two records in this case. The appellants, as plaintiffs in the Court below, sued one A. P. Esterhuizen and got judgment against him, and certain goods were attached. Then one Izak du Plessis claimed two mules and 52 sheep, and his brother, Jacobus F. du Plessis, claimed a wagon, seven mules, 11 bags of corn, and a set of harness. Evidence was taken in each case, and the Magistrate declared that the goods were not executable. The appellants' case was that this was simply a collusive arrangement, these persons being brothers-in-law.

The Magistrate, in his reasons for judgment in the case of Izak du Plessis, said: In this case the documentary evidence and the evidence which was produced, in my opinion, was satisfactory.

There was *bona fide* delivery. In the case of Jacobus F. du Plessis, he said: In this case the evidence produced by applicant was given in a straightforward manner, and, although the witnesses were put to a severe cross-examination, I was of opinion that their evidence was not shaken, and that the transaction was bona-fide, and that the documents "A," "B," and "C" show that to be so. I was also satisfied that there was delivery.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: In the case of Izak du Plessis there is evidence of delivery of the articles alleged to have been sold. The things were in the possession of Izak du Plessis for some time, and the property had passed, and he, therefore, is entitled to claim the property as his own. In regard to the sheep, however, I am not satisfied as to the ownership. It relates to a transaction dating as far back as 1888. The evidence is very vague upon the point, and there is this important fact, that Esterhuizen, the man in whose possession the sheep were, had his own mark upon the sheep, instead of that of Du Plessis. Izak du Plessis should have taken care in his arrangements with Esterhuizen that these sheep which belonged to him should be duly marked with his mark, but at present the proof is very inconclusive as to the sheep belonging to Izak du Plessis. Therefore, in the case of Izak du Plessis, the appeal will be allowed to the extent that the sheep are declared to be executable. In the case of Jacobus du Plessis, there is no evidence that the wagon, mules, and set of harness were ever delivered to Jacobus du Plessis. They were delivered to Wolfaardt. Wolfaardt sold to Jacobus du Plessis, but there is no delivery to Jacobus du Plessis. Esterhuizen, in his evidence, said that he sold to Jacobus du Plessis. That is a different version to Wolfaardt's. He does not say that he delivered to Jacobus du Plessis. Now, these things were found in the possession of Esterhuizen. They were, therefore, liable to execution, unless any person could show that the property was his, and it lay upon Jacobus du Plessis to show that these things belonged to him, and his evidence is not satisfactory upon the question of ownership, and, therefore, in his case the appeal will be allowed to this extent, that the wagon, harness, and span of mules are declared to be executable. As to the corn, well, if the evidence is correct, and the Magistrate believed that evidence, then the corn was brought there for somebody else, I think for Abel, so that that will remain. In the one case, the mules will remain the property of Izak du Plessis, and in the other case, the corn will remain the property of Jacobus du Plessis. As to the costs, at all events the costs of appeal should be paid by the respondents.

respectively. The only question is as to the costs in the Court below.

Having heard counsel on the question of costs in the Court below,

De Villiers, C.J., said that the order would be that costs of appeal be paid by respondents respectively, but appellants must pay costs in the Court below.

[Appellant's Attorneys: Dempere and Van Ryneveld; Respondent's Attorneys: Moore and Son.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

*Ex parte* WOOD. { 1906.  
( July 19th.

Mr. Benjamin moved, as a matter of urgency, on the petition of Robt. Wood, for an interdict restraining the Auctions and Estates Co. from parting with the sum of £79 10s. to one Alexander Sinclair Mackinnon, of Plumstead. The respondent Mackinnon described himself as a mining engineer, and instructed the applicant to proceed to Mossel Bay to examine some manganese in the district. The applicant disbursed £25 7s. 4d., and he was entitled to £1 a day during the time he was away. In May applicant lent respondent £25, of which only 10s. had been paid. There was a sum of £59 10s. due, and there was an advertisement in the "Cape Times" that Mackinnon was putting up for auction his movable property and household effects. Petitioner understood that Mackinnon intended leaving the Colony with the object of delaying and defeating his creditors. In addition to the £59 10s., counsel also applied for £20 by way of costs.

An order was granted restraining the Auctions and Estates Company from parting with £79 10s., with leave to the respondent to move to set the order aside.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ESTATE SHAYLER V. { 1906.  
DEVENISH. ( July 20th.

Executor—Ordinance 104 of 1833, Sec. 32—Recovery of money improperly paid by executor.

*The firm of S. & Co., of which the plaintiff was a partner, was indebted to the defendant in a sum of money. The other partner died, and the plaintiff was appointed executor. The plaintiff, believing the firm to be solvent, paid the debt as surviving partner.*

*Held, that the plaintiff was not entitled, as executor of the deceased partner, to recover the amount from the defendant under the 32nd section of Ordinance 104 of 1833.*

This was an action brought by Edward John Tannock, of Prieska, in his capacity as executor dative in the estate of the late John Leonard Shayler, against John M. Devenish, farmer, division of Prieska, to recover a sum of £225 alleged to have been erroneously and improperly paid by plaintiff to defendant.

Plaintiff, in his declaration, said that he was executor dative in the estate of the late John Leonard Shayler, of Prieska, and he sued in his capacity as such, and the defendant was a farmer residing at Omdraais Vlei, in the division of Prieska. The deceased died intestate on or about the 15th May, 1903, and plaintiff was appointed executor-dative by letters of administration granted on the 23rd October, 1905. Previous to the death of the deceased, he (Shayler) and the plaintiff carried on business in partnership as forwarding and general agents at De Aar and Prieska, under the style or firm of Shayler and Co., and at the date of the deceased's death, the said firm was indebted to the defendant in the sum of £200, with interest thereon at 8 per cent. per annum, under a certain promissory note. The said firm continued to carry on the said business until shortly before the death of the deceased, when the said business was

sold, and the said partnership dissolved. In or about the month of April, 1904, the plaintiff, as executor dative of the deceased's estate, erroneously and improperly paid to the defendant out of the assets of the said estate the sum of £225, in settlement of the said promissory note, with interest thereon, the plaintiff, in doing so, acting in the *bona fide* belief that the proceeds of the estate would be found sufficient to satisfy all the just and valid claims to which it was liable, and that it was in the best interests of the estate that the said debt should be paid in order to save further accumulation of interest thereon. Owing to the impossibility of realising several outstanding accounts due to the said firm, the proceeds of the estate had been found insufficient for the payment of all the just and valid claims to which it was liable, as would appear from the administration and distribution account annexed to the declaration. The plaintiff was liable to pay to the creditors specified in the said account the amounts which they respectively would have been entitled to receive in respect of their said claims, if he had not paid the said sum of £225 to the defendant, and which said amounts the said creditors demand that the plaintiff should pay. The Master of the Supreme Court, acting in the interests of the creditors, had refused, and still refused, to accept the administration and distribution account. Amongst the claims of creditors other than those referred to in the annexed statement, were some claims based upon accounts against the said partnership, but the estate of the plaintiff, in his personal capacity, was provisionally sequestrated as insolvent, on or about the 4th April, 1905, and the final adjudication thereof was ordered on or about the 27th April, 1905. The plaintiff "was entitled, in his capacity as executor dative in the estate of the deceased, to recover from the defendants the said sum of £225 so erroneously and improperly paid as aforesaid, in order that the same may be brought up in the assets of the said estate and distributed *pro rata* amongst the various creditors thereof, including the defendant, but the defendant refuses to pay the said sum or any part thereof." Plaintiff claimed repayment of the said sum of £225, with interest *a tempore morae* and costs.

Defendant, in his plea, denied that the partnership between plaintiff and Shayler was dissolved before Shayler's death, and he said that he did not receive notice of the alleged dissolution. He said further that he received the payment of his money from plaintiff, not as executor of Shayler, but as surviving partner in the firm of Shayler and Co. The assets of Shayler were sufficient to satisfy his liabilities, but he alleged that plaintiff in his personal capacity, or as partner in Shayler and

Co., had allowed the estate to deteriorate in value through failing to collect the outstanding accounts, etc. He also said that plaintiff was solvent at the date of the payment of the sum of £225, and Shayler's estate was also solvent.

Mr. Burton (with him Mr. Roux) was for plaintiff; Mr. McGregor (with him Dr. Rainsford) was for defendant.

Mr. Burton stated that the matter had already been before the Court on an exception taken by defendant that the plaintiff's declaration showed no good cause of action. The Court, however, without deciding the question gave leave to defendant to raise the point at the trial.

Edward John Tannock (the plaintiff) said that he was an enrolled agent at Prieska. Prior to May, 1903, he was carrying on business with Shayler as a general and forwarding agent between De Aar and Prieska. On the 9th May, Shayler and Co. disposed of the assets and business to Mrs. Wilson. On the same day the partnership was dissolved. They did not draw up a deed of dissolution at the time, and before a deed could be drawn up Shayler died, as a matter of fact, six days after the dissolution. Witness drew up an inventory. Printed circulars were sent out at the time of the dissolution to the old customers. Witness produced copies thereof. Upon the dissolution of Shayler and Co., witness and Mrs. Wilson entered into partnership, and carried on the business as Wilson and Tannock. He was sure a copy of the circular was sent to Devenish. In February, 1903, the firm of Shayler and Co. incurred a debt of £200 to Devenish upon an advance. They gave a promissory note to Devenish, which matured in February, 1904. Witness published notice to creditors and debtors of Shayler's estate. Witness brought up a schedule of claims lodged within the time specified in the notice. Defendant had not filed his claim, but witness had his promissory note in his possession.

[De Villiers, C.J.: Did defendant at any time file his claim?]

Witness: No. Continuing, witness said that the promissory note fell due in February, 1904. Defendant asked for payment. Witness paid defendant by cheque for £225 given in the name of Mrs. Wilson. The cheque was made out to executor estate Shayler, but Mrs. Wilson afterwards altered it at the request of defendant to Shayler and Co. Witness's letters of administration were at Prieska at the time, and Mrs. Wilson altered the cheque for the convenience of the defendant, to enable it to be cashed at Britstown. At the time witness thought there would be sufficient assets to meet all the liabilities of the estate. Many of the debts were disputed. Witness did not take pro-

ceedings to enforce payment. The outstanding debts amounted to about £120. Witness filed his account in Shayler's estate with the Master, but the latter refused to allow it to go in until the dispute with Devenish was settled.

Mrs. Wilson and the defendant gave evidence.

Mr. Burton having been heard in argument, Mr. McGregor was not called upon.

De Villiers, C.J., said that under certain circumstances, executors who had paid accounts of deceased persons, which they ought not to have paid, might recover back the money so paid. It was an anomaly of the law that any person who had paid a debt that was due should recover the amount paid from the creditor, but if the present case had fallen within section 32 of Ordinance 104 of 1833, then the plaintiff, as executor, could have recovered. But it was necessary for the executor to show that the money had been paid by him as executor. As to the question whether Tannock paid as executor or as the surviving partner, the best proof of the capacity in which he paid was the cheque itself. The cheque given by Mrs. Wilson was not in favour of the plaintiff as executor, but in favour of the firm of Shayler and Co., of which he was a partner. There was certainly an alteration of the cheque, but Mrs. Wilson could give no explanation as to when she made the alteration. The defendant said that it had already been made when the cheque was handed to him. The Court is satisfied that the payment was made by Tannock as surviving partner, he at the time believing that the estate was solvent. The question of undue preference does not now arise. That was a question for the creditors of Tannock. Judgment would be given for the defendant, with costs.

Mr. McGregor asked that defendant be declared a necessary witness.

Defendant was declared a necessary witness accordingly.

[Plaintiff's Attorneys: Mostert and Son; Defendant's Attorney: P. de Villiers.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DE VILLIERS V. PHILPOTT { 1906.  
AND OTHERS. } July 23rd.

School Board election—Illegal regulation.

*At a School Board election, the applicant, being one of the candidates, had 92 less votes than the lowest successful candidate on the list. One of the Government regulations under which the election was held stated, contrary to the provisions of the School Board Act, that lessees would not be entitled to vote. In an application to set aside the election, about half a dozen persons who would have been qualified to vote, but whose names were not on the voters' list in consequence of the invalid regulation, stated that they had intended to vote for the applicant but did not vote at all in consequence of the regulation.*

*Held, that in the absence of prima facie proof that the applicant's defeat was caused by the invalid regulation, the applicant was not entitled to the relief sought.*

This was an application by Abraham Peter De Villiers, of Uitenhage, upon notice to the Civil Commissioner and members of the Uitenhage School Board, to show cause why the election held on the 15th December last shall not be declared invalid and illegal, and why the same shall not be set aside and a fresh election ordered to be held.

Mr. Close was for applicant; Mr. Howel Jones was for respondents.

Affidavits were read on behalf of the applicant, to the effect that he was one of 22 candidates nominated at the recent School Board election at Uitenhage, and that he was unsuccessful. The special voters' roll on which the election was conducted contained only the names of owners of property in the said district, and not the names of oc-

supiers. He called attention to the affidavits of four persons, who said that they were on the Divisional Council voters' list as occupiers. Applicant lodged a protest with the returning officer on the day of polling on the ground that the voters' roll had not been framed in accordance with the terms of Act 35 of 1905. He said that the four persons in question would have voted for him, but for the omission of their names from the roll, and that others, it had come to his notice, would also have voted for him but for this reason. It was further stated that the Divisional Council voters' list for 1905 contained 2,310 names, and that the list prepared for the School Board election contained only 1,235 names.

The affidavits of Mr. Lundie, vice-chairman of respondent School Board, and others, to the effect that applicant had produced no proof that, had occupiers as well as owners been allowed to vote, he would have been elected. The lowest number of votes recorded for any successful candidate was 312, and Mr. De Villiers was nineteenth on the poll, with 220 votes. Deponents believed that at none of the polling stations were votes tendered by Divisional Council ratepayers for any one of the candidates refused.

Mr. Close, after calling attention to the decision of the Court in the recent case of the Stutterheim School Board, went on to point out that the provisions in regard to the framing of the voters' list in the matter of School Board elections differed from the provisions governing the framing of lists for other elections, Parliamentary, Divisional Councils, Municipal Councils, and Harbour Boards, and that in this case no opportunity was given to those whose names did not appear on the lists to object and have the lists revised. Thus in regard to School Board elections a person may be disentitled from coming forward and saying that he should be on the list of voters. On that ground, counsel continued, the applicant should be granted relief in this matter.

[De Villiers, C.J.: Should you not produce some proof that if the law had been followed in particular, your client would have been elected?]

Mr. Close: I submit that it is not necessary. I submit that the fact of one-half of the voters having been kept off the list speaks for itself.

[De Villiers, C.J.: Yes, but they might have voted for the other candidates.]

Mr. Close: We have certain men who would have voted for one candidate.

[De Villiers, C.J.: But should not you produce 93 who would have voted for your client, and thus elected him?]

Mr. Close: That would raise a very great vista of questions. In this case, I submit that it is not necessary for the applicant to show that he would have

been elected. The Court has adopted this power of setting aside an election without proof that if the election had been conducted on regular lines, it would have resulted in favour of the applicant. Counsel cited the Port Elizabeth Municipality case concerning the election of an auditor, the *Mader v Fraserburg Municipality* (16 Supreme Court Reports, 505), and the *Claremont Municipality Case* (13 Supreme Court Reports).

Mr. Jones submitted that applicant had not shown sufficient ground or reason for upsetting the proceedings at the election altogether. It had been stated on previous occasions that the Court would not be likely to interfere with a corporate body unless very strong proof had been given that if the election had been otherwise held—there were, no doubt, irregularities in this case—the result would have been different. He submitted that the Court would not go into the possibilities or even the probabilities of what would have happened had occupiers been allowed to vote as well as owners. Furthermore, after the lapse of such a length of time, when the School Board had been at work for about seven months, it would require some very strong proof before the Court would upset the election, that the poll would have had a different result, and in this case there was not even an allegation in the applicant's affidavit or any other affidavit before the Court that the applicant would have been elected, or that there was any probability that he would have been elected. If the four persons in question did not vote in this election, it was their own fault, because they did not come forward and object. The applicant himself was a party to their *laches*, because it was a natural inference from the affidavits that he did not protest before the election took place. Applicant should not have lain by and taken his chance at the poll, but he should have protested before the poll was taken.

Mr. Close having been heard in reply.

De Villiers, C.J.: The School Board Act of 1905 contains no provision for the framing of voters' lists for School Board elections, but the 14th section of the Act provides that, in order to carry out the provisions of sections 10 and 11, it shall be lawful for the Governor, by Proclamation in the "Gazette," to frame and issue regulations for the elections of members of School Boards. Under this section, the Governor has published certain regulations for the election of members. The Court has already decided in the case of *Tierpin v. Stutterheim School Board* (16 C.T.R., 289, 295), that one of the provisions contained in the regulations was not in accordance with the provisions of the Act, and that is the provision which declares that only



owners of property are entitled to vote in Divisional Council areas, and that lessees or other occupiers are not so allowed to vote. In that case it was clear that the applicant would have been elected in case the law had been complied with, because he was only two votes behind the last on the list of elected members and it was shewn that more than two qualified voters whose votes had been rejected would have voted for the applicant. In the present case, the applicant does not anywhere in his affidavits state what the number of votes was which had been given to the elected candidate standing lowest on the list, but the deficiency has been supplied by the affidavits made on behalf of the respondents, which show that the applicant was 92 votes behind the lowest successful candidate, and if, therefore, in the present case, the applicant had produced 93 duly qualified electors to prove that they had tendered their votes for the election, that their votes were rejected, and that they would have voted for the applicant, then clearly he would have been entitled to relief. The question now is, whether he is entitled to relief in consequence of the general illegality, as it has been called, which has been occasioned by reason of the regulations framed by the Governor. I find in these regulations that provision is made for the framing of the voters' list, but that voters' list is not final: it is not final in the same way as the voters' lists for Parliamentary elections are final. The twenty-seventh regulation, which has been cited, provides "that if a voter comes to the poll to vote whose name does not appear on the voters' list supplied to the polling officer by the returning officer, such omission of the voters' name will not debar the voting if the voter can prove to the satisfaction of the polling officer his or her right to have such omission rectified, and in such cases the polling officer will ask the following question, in lieu of question, (2) above specified." Then certain questions are put: "Are you a ratepayer paying rates to this Divisional Council, or now liable to pay rates to this Divisional Council, and as such entitled to be placed on this list of voters, and thus to become entitled to vote, and can you produce proofs thereof to me? If the polling officer is satisfied with such proofs produced he shall proceed to take the vote of the voter as directed in paragraph 29 (B) of these instructions." Now, here, there is no question at all whether he is an owner, but only, "Are you a ratepayer paying rates?" I am inclined to think that the framer must have forgotten that in another part of the regulations the test had been not merely being a ratepayer, but an owner paying rates. Then 29 (B), to which it refers, directs

that thereupon the polling officer may: "(1) Add the full name, address, and qualification of the voter to the voters' list supplied by the Returning Officer; (2) assign a number on the voters' list to the voter thus added to such voters' list by giving the voter an a, b, or c, etc." So that the voters' list is not final. In that respect this list differs from the Parliamentary voters' list; it is not a final list, and it can even still be amended when the voter comes up for the purpose of recording his vote. It is clear, therefore, that throughout the School Board elections it would have been quite competent for any lessees or occupiers, whose names had been omitted from the list, to tender their votes, and it would have been competent under the sections I have just read for the polling officer to have taken them. In the case of *In re Hoptown Municipal Election* (2 Rosc, 46), it appeared that "a Resident Magistrate, who presided at a municipal election, erroneously held that only those voters who had paid their rates could record their votes, and he rejected the votes of those who had not paid their rates. Some voters, hearing of this ruling, abstained from voting. On motion to annul the election, held that the election should not be annulled, as the result was not affected by the erroneous ruling of the Magistrate, and as nothing was said in the notice of motion as to the irregularities at the election." There it was said, in my judgment, that "every one is presumed to know his legal rights, and the rumour which spread in consequence of the erroneous ruling of the Magistrate should not have deterred any one from tendering his vote." The case relied upon on behalf of the applicant, the case of *Maden v. Fraserburg Municipality* (16 Supreme Courts Reports, 503), in my opinion, does not really affect the point. There it appeared that "owing to the neglect of the chairman of the Municipal Council to give 21 days' notice of the election of Councillors, as required by the 49th section of Act 45 of 1882, the applicants, who had consented, at the request of several voters, to become candidates, were ignorant of the day and place of nomination, and were consequently prevented from being nominated. Ordered, that the election of the two Councillors who were elected unopposed be set aside, and that a fresh election take place." In that case the irregularity went to the very root of the election. Candidates who had been asked to stand were prevented, in consequence of ignorance, caused by the illegality, from appearing as candidates. They were simply ignorant of the day of the elections, they were unable to stand as candidates, and it was held that they were entitled to set aside the proceedings in order to become candi-

dates in the ordinary course. But in the present case there is nothing of the kind. The persons who had intended to vote for the applicant should have appeared before the polling officer and tendered their votes, and it is only upon a refusal on the part of the polling officer to take their votes that any illegality or irregularity could be said to have occurred. There is no *prima facie* evidence that the applicant's defeat was caused by the invalid regulation. One point in which the present case may be distinguished from the Stutterheim School Board case is that here the applicant on the day of the election issued his protest against the election. He did not clearly state his reasons for the protest, but he simply stated that it was illegal, and did not mention why it was illegal: "I hereby beg to lodge my protest against the election held this day, on the ground that the voters' roll has not been framed in terms of the Act 35 of 1905." He does not state when this protest was lodged, but I gather the protest must have been lodged after the election. "I hereby beg to lodge my protest against the election held this day"—not "to be held this day." He was one of the candidates, and I take it that it was only after the elections were over that this protest was lodged. If it had been lodged before, I am not prepared to say that it would have made a difference in my judgment, but it certainly would have made his case somewhat stronger. But I take it from the terms of the protest it must have been lodged after the election had been held. But, whether that be so or not, I am of opinion that the consequence has not been that the illegal portion of the regulations prevented his being elected. Consequently, he is not entitled to the relief now sought for, and the application must be refused, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

REX V. FORSYTH (1). { 1906.  
 { July 23rd.  
Liquor Acts—Penalty.

*Under the 75th section of Act 28 of 1883, the maximum penalty for a first conviction of certain offences is £25. Under the 2nd section of Act 28 of 1898, a person convicted of breach of a condition imposed by virtue of that section is liable, on conviction, to the penalties prescribed by the 75th section of Act 28 of 1883.*

*By the 5th section of Act 34 of 1904, the maximum pecuniary penalty under Sec. 75 of Act 28 of 1883 is increased.*

*Held, that by virtue of such increase there is not, without a special provision to that effect, a corresponding increase of the penalty for a contravention of a condition imposed under Sec. 2 of Act 28 of 1898.*

This was an appeal brought by the licence-holder of the Workman's Hotel, Maitland, from a judgment of the Resident Magistrate's Court at Woodstock.

The Assistant Resident Magistrate of Woodstock had convicted the appellant of a breach of the liquor laws by supplying intoxicating liquor to a native, named Simon, in contravention of the terms of his licence. The appellant was sentenced to pay a fine of £30.

The grounds of appeal were that the conviction was not in accordance with real substantial justice, and not warranted by the evidence, and that the monetary penalty was in excess of the amount provided by law.

Mr. Burton was for appellant; Mr. Howel Jones was for the Crown.

Counsel having been heard in argument,

De Villiers, C.J.: The second section of Act 28 of 1898 enacts that "any licensed person who shall contravene a condition imposed by virtue of this section shall be liable upon conviction, to the penalties prescribed by the 75th section of the Liquor Licensing Act, 1883." The penalty so prescribed is, for a first offence, a penalty not exceeding £25. Therefore, but for the provisions of the Act of 1904, to which I shall presently refer, the appellant in this case could not have been subjected to a penalty of more than £25. Now, the question arises whether the effect of the Liquor Act of 1904 is to increase the penalty which can be imposed under section 2 of the Act 28 of 1898. The fifth section of the Act of 1904 enacts "that the maximum pecuniary penalties under sections 73, 74, and 75 of the said Act are hereby increased as follows: (c) Contravening section 75, £50 for the first offence." If the Legislature had intended also to increase the penalty for a contravention of the Act of 1898, one would suppose that it would have been done in specific terms. It is, at all events, a recognised principle in the administration of criminal justice, that any fine or penalty should be imposed in clear and distinct terms, and in the same way any increase in the fine or penalty should be clearly and distinctly expressed, and not by

means of doubtful verbiage. It is true the 12th section of the Act of 1904 enacts that "This Act shall be read as one with the liquor laws, 1883-1893, and may be cited as the Liquor Law, 1904." Here all the laws from 1883 to 1898 are bundled together, and they are all to be read as one with the Liquor Law, 1904. I do not think it can fairly be held that this provision was intended to increase the penalty for a contravention of the Act of 1898, especially in view of the fact that the Legislature in increasing the penalties failed to mention the penalties under the Act of 1898 as the penalties which shall be increased. Therefore, it appears to me that the literal sense of the Act of 1898 should rule the present case. The literal sense of that Act is that a penalty of £25 is the maximum penalty for a first offence, and, therefore, the penalty must be reduced from £30 to £25. As to the question of fact in this case, I think it is a pure question of credibility. The witness Simon swore positively that he had been supplied with liquor, that he was a native, that he was not entitled to be served with liquor, and that he was served with liquor by the barman of the appellant. The defence raised was that it was not this Simon who was supplied, but a friend of his who was entitled to buy liquor. Well, it is not necessary now to decide whether that would have been a good defence, but there certainly seems no hardship in the present case if the Magistrate believed Simon, because it would, to my mind, be an evasion of the law, I do not say it would be a contravention of the law—that is another point—but it would certainly be an evasion of the law if a licence-holder could indirectly supply these persons, who are not entitled to obtain liquor. Persons who are entitled to obtain liquor, who are mere men of straw, who would not mind any imprisonment for the offence if they were found out, would bring in their friends promiscuously taking care that they have been supplied beforehand with the means of buying liquor and then buy liquor and supply their friends and the licence-holder would go scot-free. Then, it is said that it was a busy time, a Saturday, and it would be a great hardship upon a licence-holder that he should inspect persons who enter the bar, and see that they are entitled to buy liquor. But, I do not see that it would be a great hardship if he placed somebody at the door, so as to prevent anyone from coming in and drinking, who was not entitled to buy liquor. But that point does not really arise for decision, because, in my opinion, the Magistrate had sufficient justification for holding that Simon did not only drink the liquor at the bar, but that he also bought it from the barman employed by the appellant. So that the

appeal will only be allowed to this extent, that the penalty is reduced from £30 to £25.

REX V. FORSYTH (2).

Liquor Law Acts—Second conviction—Appeal.

*Under the 75th section of Act 28 of 1883, the penalty for a first conviction of a certain offence is £25, and for a second conviction £50. The appellant was convicted of the offence and appealed, and before the appeal was heard he was again convicted of a similar offence subsequently committed.*

*Held, that notwithstanding such appeal, the Magistrate properly treated the second conviction as subjecting the appellant to the increased penalty.*

This was another appeal brought by the same appellant as in the last case. He had been convicted by the Resident Magistrate of Woodstock of selling liquor to two native women, in contravention of the terms of his licence, and had been sentenced to pay a fine of £50.

Mr. Burton, for the appellant, argued that the conviction was against the weight of evidence.

Without calling upon counsel for the Crown,

De Villiers, C.J.: In this case I do not wish to hear Mr. Jones, because this is also a case in which the credibility of the two witnesses for the prosecution is the main question. Well, it is said that there was some contradiction between these two witnesses as to the amount of money which Margaret had in her possession after she had returned from the bar, but, of course, Margaret would know very much better than her friend how much money she had in her possession. A contradiction on a point of that kind would not be fatal to the credibility of these two witnesses. She might have had a different amount in her possession from what her friend said, but that would not make either of the two guilty of swearing falsely. But, upon the main point, the two are agreed that the liquor was bought by Margaret. No doubt, that is denied by some of the witnesses for the defence. One of the witnesses is a very disreputable character, and as to the barman—well, naturally, he would be very busy at the time, and all his inclination would be to support the defendant, whose barman he was. But the evidence is very clear that was given

by these women that the purchase was made by Margaret, and, as she was admittedly a native not entitled to buy liquor at that time, the conviction must be confirmed. I see that one of the points raised on the record is that, in sentencing the defendant, the Magistrate took into consideration the previous conviction, which conviction had not at that time become final, and that it had not been approved by a judge of the Supreme Court. Mr. Burton very properly does not rely upon that as a ground of appeal, because the conviction stood. The fact that it had not yet been approved by a judge of the Supreme Court did not prevent it from being a conviction so long as it stood. Of course, if at any time afterwards the conviction was set aside, then that would be a ground, no doubt, for the Governor remitting the penalty, but in law this conviction stood until it was set aside, so that that will not be a ground for altering the penalty. The appeal must be dismissed, and the conviction confirmed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### GENERAL MOTIONS.

*In re* THE GRAND JUNCTION { 1906.  
RAILWAYS. { July 24th.

Mr. Schreiner, K.C., moved for certain orders and for the confirmation of the second report of the Receivers of the Grand Junction Railways. Counsel asked the Court to affirm the action of the receivers in having paid a dividend of 5s. in the £ to the creditors transferred to the admitted list. These persons did not get the first dividend of 5s., their claims having been disputed, and as the dividends were withheld through no fault of the creditors, the Receivers asked for leave to pay interest on the amounts. The money had been lying in the A.B.C. at interest. In regard to Mr. Hills's expenses, it was now asked to extend the amount to £3,487 18s. 10d. on the production of vouchers. After providing for certain contingencies,

there was a balance of £31,545, which was sufficient to pay a further 1s. in the £ to all creditors on the admitted list, and the receivers also asked for authority to pay this.

[De Villiers, C.J.: Will not the dividend be largely increased after the judgment of the Privy Council confirming the judgment here?]

Mr. Schreiner: Yes, my lord. As regards the remuneration to the liquidators, that will be left in the hands of the Court. It is usual to allow them 2½ per cent. on the receipts, which have amounted to £10,784 14s. 9d.

De Villiers, C.J.: It is not necessary to go into all the items in the report. It will be sufficient to say that the Court will confirm the report on all of these proposals, with orders as applied for on the different points.

### ALLEN V. LIQUIDATORS B.S.A. ASPHALTE CO.

This was an application on notice of motion calling on the respondents to show cause why they should not be ordered to accept as proper claims against the liquidators of the company certain two bills of costs for £18 16s. 6d. and £127 3s. 6d., incurred on behalf of the company by Attorney A. J. MacCallum.

The affidavit of Andrew Allen set out that prior to the liquidation and thereafter he acted as managing director of the company. A. J. MacCallum was engaged to act as legal adviser. Prior to the date of the final order the company incurred certain costs to MacCallum amounting to £127 3s. 6d., and costs between attorney and client, and acting under instructions from deponent, A. J. MacCallum sent the bill to the liquidators. The directors instructed A. J. MacCallum to take the necessary steps to oppose the provisional order being made final, and the Court made the following order: "Provisional order made final, costs to be costs in the liquidation." The liquidators objected to pay on the ground that these costs were not included in the order.

Mr. Burton was for the applicant and Mr. Molteno was for the respondent.

Mr. Molteno said the applicant had no *locus standi* in the matter. The affidavit of Mr. Gibson set out that A. J. MacCallum was engaged by the applicant in his private capacity, and not by the company.

Mr. Burton submitted that both bills of costs should be accepted by the liquidators, and were fairly chargeable against the company. As far as the first item was concerned, there was really no defence.

[De Villiers, C.J.: But Mr. MacCallum is the creditor of the company.



He has done this work for the company. Why does he not bring this application?]

Mr. Burton: The reason is that Mr. Allen, as the managing director, guaranteed personally to Mr. MacCallum the payment of any balance.

Mr. Molteno said he took up the position that the applicant had no *locus standi*, and he had no right to ask the Court for an order of payment of debt for which he was not a creditor.

De Villiers, C.J.: The applicant in this case (Andrew Allen) calls upon the respondents to show cause why they shall not be ordered to accept as proper claims against the liquidators of the company two bills of costs incurred by the company to Attorney A. J. MacCallum. He does not state either in the notice of motion or in his affidavit, nor does Mr. MacCallum either, state that he (Allen) has paid these accounts, nor is there any statement that Mr. MacCallum has ceded his claims to Allen. Accordingly, there is a preliminary objection to this claim. The claim is brought by a person who has no *locus standi* whatever. The fact that he has guaranteed the payment does not give him a *locus standi*. Unless he has actually had the accounts or received cession of the debt as against the company, he has no *locus standi* to bring any claim for accounts against the company. Upon this simple ground, I think the application ought to be refused. But, assuming now that the application had been made by MacCallum himself, it is by no means clear to me—I won't express an opinion upon it—it is by no means clear that he would be entitled to have both these bills accepted as claims against the company. He would have to prove, so as to establish such a claim, that the work he did as attorney was work done for and on behalf of the company, and any work which he did for Allen so far as Allen's interests were opposed to those of the company would not be work for which he could make any charge against the company. But I have no doubt that a large proportion of the claims made in these bills of costs is in respect of work done by MacCallum for the company, and if he makes his claim I have no doubt that the liquidators will consider such a claim, and award to him a dividend in respect of such claim. So far as the bill of costs is taxable, the bill of costs ought to be taxed after due notice, not to Allen, but to the liquidators of the company. In the present case it appears that the only person to whom notice of taxation was given was Allen, and the persons primarily liable were left out of account altogether. It is an extraordinary proceeding, and that in itself, supposing Mr. Allen himself were proceeding, would be an objection to this claim being allowed.

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Mr. MacCallum now says that he had no objection to a retaxation, but that ought to have been considered before the application was made. It ought to have been made perfectly clear in the bill of costs that the Bill had been taxed in the manner required to be taxed, viz., after due notice to the persons who were to be primarily held liable. But I do not wish to pre-judge now any questions which might arise as between Mr. MacCallum and the liquidators. All I wish to remark is this, that any account which Mr. MacCallum might fairly charge as against the company, whether it be between attorney and client or otherwise, ought to be allowed by the liquidators when a claim is duly made against them. The present application must be refused, with costs.

WILLIAMS V. WOOD AND	{	1906.
WILLIAMS, LTD.		July 24th.
		" 27th.
		" 30th.

Director—Dismissal by co-directors—Articles of association—Company.

*By one of the articles of association of a company it was provided that if any director should owe the company £100 or upwards, he shall forfeit his seat. The plaintiff was a director and chairman, and the defendants were his co-directors. The defendants, without giving the plaintiff previous notice, resolved at a meeting, that as he owed the company more than £100, his seat was forfeited. In fact the plaintiff owed the company less than £100.*

*Held, that the resolution should be set aside.*

Dr. Greer moved for an order declaring the proceedings of a certain meeting of two directors of Wood and Williams, Ltd., as null and void, requiring their removal from the minute-book, declaring the petitioner was chairman and remained trustee of the company until removed from such office by a special resolution of shareholders, or by the order of a Court having competent jurisdiction, and for an order restraining the Standard Bank from acting upon the resolution adopted at the meeting. The petition set out that the petitioner was instrumental in forming Wood, Williams and Co., Ltd., which acquired certain assets of A. J. Coleman and Co., Ltd.,



of which the petitioner had been managing director. In September, 1905, it was decided to reconstruct the company, in order to reduce its capital, and a new concern was formed, and registered under the name of Wood and Williams, Ltd. He was the principal shareholder in the company until recently, holding over 8,000 out of 13,000 shares, the capital of the company. The reduced capital rendered it impossible to handle certain proprietary rough goods, whereupon the "Importing Syndicate" was formed, on an arrangement with David Ayr and Co., of Dundee. Ayr and Co. were the European buyers, and Wood and Williams the distributing agents here. Ayr and Co. nominated G. H. Rubenstein as their representative on the syndicate, and he was to receive 1 per cent. commission on the turnover of the syndicate, and a one-half per cent. out of the two and a half per cent. charged by Ayr and Co. as buying commission. The syndicate commenced operations in February, 1906, and the applicant, being satisfied that the arrangement was not to the best interests of the shareholders of Wood and Williams, Ltd., early in July notified Rubenstein that it was not his intention to renew the agreement with the syndicate, when it expired at the end of July, 1906. Rubenstein and Wm. Seale Wood had sole control of the syndicate, and were interested in continuing the agreement. Pursuant to the articles of association, of Wood and Williams, Ltd., petitioner was appointed chairman of the directors, and also trustee, for the purpose of holding the assets of the company and protecting the interests of the shareholders, the other directors being Wm. Francis Wood and his son, Wm. Seale Wood. Owing to the refusal of the petitioner to continue the agreement with the syndicate, and owing to other matters, there had been friction with W. S. Wood and G. H. Rubenstein, who brought pressure to bear upon W. F. Wood, the third director. On Wednesday, the 18th July, 1906, petitioner was in the company's offices until four o'clock, when he left as usual. On the morning of the 20th July, petitioner received in a registered envelope what purported to be a resolution taken by two of the directors of Wood and Williams, Ltd., after petitioner had left business on Wednesday, the 18th, deposing him from the directorate, depriving him of the appointment which he held as trustee for the shareholders, and proposing other arrangements with the bank. On Saturday morning, at eleven o'clock, petitioner called at the company's office for the purpose of attending the meeting of directors, which he had convened. Mr. Wood, sen., referred him to Mr. Wood, jun., but that gentleman refused to attend the meeting, and threatened applicant with violence if he did not leave the room at once. The

door of the Board Room was locked, and the name of petitioner erased therefrom. On Saturday, July 21, Mr. Wood, sen., came to petitioner's house, when the matter was discussed, and on being asked why he became a party to these proceedings, he said that owing to his deafness he did not understand what was happening, and that the minutes as adopted were produced by his son, who, it appeared, had framed them in consultation with Rubenstein. The meeting of directors, of which petitioner had no notice, it appeared, was held surreptitiously, after the usual hours. The last account rendered to petitioner from the firm, showed a balance in their favour of £12, and no account had been rendered since for goods which he, like the other directors, purchased from the company. He denied that he was indebted to the firm in over £100, and he was prepared to pay anything that could be found due. He took exception to the charge that he was issuing false balance sheets in connection with the company. He was apprehensive steps would be taken to carry out the arrangement with the syndicate which was not in the interests of the shareholders, but was manifestly to the profit of Rubenstein and Wm. S. Wood. Counsel submitted there should be a rule nisi in the case. It was clear that the two directors had gone beyond their powers. They held the meeting in a surreptitious manner, after the petitioner had left the office. It was not in the power of the co-directors to remove the applicant; that was only in the power of the shareholders.

De Villiers, C.J.: It would have been better if notice had been given the directors, but a *prima facie* case has been made out for the interference of the Court. Under the Articles of Association, the first directors are to be William F. Wood, Edwin James Williams (who shall also be chairman), and William S. Wood. The applicant was duly appointed chairman. Under the 8th article any director who shall be indebted to the company for goods supplied, or otherwise, in the sum of £100 or upwards, shall forfeit his seat on the directorate. It appears when the applicant was not present after he had left the meeting, the remaining directors at a meeting decided he owed £100, and that he should forfeit his seat on the directorate. It seems a very strong measure without giving the man any notice of forfeiture that such a resolution should be carried; at all events, there is *prima facie* ground for the interference of the Court. It is quite possible that the directors may put a different complexion on the case, but, as it now stands, I think certainly the onus lies upon the remaining directors to justify the course they have taken. There will be a rule granted calling

on the directors of Wood and Williams, Ltd., to show cause on Friday why the resolutions arrived at by them on July 18 should not be set aside, the rule to operate as an interdict in the meantime, restraining the respondents from carrying out such resolution, a copy of this rule to be served on the manager of the Standard Bank, as well as on the respondents.

*Postea* (on the return day July 27).

Mr. Benjamin appeared for respondents to show cause.

Dr. Greer said that applicant had that morning been served with answering affidavits, and he (counsel) had to apply for a postponement in order to enable replying affidavits to be filed. The parties desired to have this matter settled as soon as possible, and, if convenient, he would suggest that it should be postponed until Monday.

Mr. Benjamin said that he should raise no opposition to the application, provided that the order could be suspended so far as the Standard Bank was concerned, so as to enable the directors to draw on the funds to meet current expenses, salaries, and so on.

De Villiers, C.J.: If it has to stand over, matters must remain in *statu quo*. I could not very well set aside a part of the order. The matter will stand over until Monday.

*Postea* (July 30).

Dr. Greer was for applicant, Mr. Benjamin was for respondents.

Voluminous affidavits were read, and several witnesses were called.

Having heard counsel in argument on the facts,

De Villiers, C.J.: In this case the Court has already made a rule calling upon respondents to show cause why a resolution which was arrived at in regard to the summary dismissal of the applicant shall not be set aside. It appears that, without giving due notice to the applicant that the question of his directorship was to be considered, he was dismissed apparently on the ground that he owed a debt to the company in excess of £100. One of the Articles of Association of the company is to the effect that no director shall be indebted to the company for goods supplied or otherwise, and if there be at any time outstanding accounts against any director, and owing to the company a sum of £100, or upwards, he shall forfeit his seat on the directorate. Well, it is a serious matter for a man to be summarily dismissed from a directorate, but his two co-directors dismissed him from the chairmanship as well as from the directorate without giving notice that the question was to be considered, and without clear proof that £100 was owing by him. The Court has gone into the question as to this amount, and it

would appear that on the 18th July, when the resolution was passed, the applicant was indebted to the company in the sum of £101, and if that item stood by itself, no doubt he had just exceeded the amount for which he could be indebted to the company. But then, it further appears that at that time there was owing to him a sum of about £28 for his fees as director. It is true that he had got two cheques for the amount, but those cheques had not yet been paid, and when the cheques were presented for payment, owing to some informality, the cheques were dishonoured. So that in all fairness, considering in what amount the applicant was indebted on the 18th July, and that these two cheques had not been cashed, the £101, did not represent the amount of indebtedness. He had not been paid by the company the amount he was entitled to be paid, so that there was not £100 owing by him to the company. Then it is stated that there was some other transaction between him and the company which would have justified the respondents in declaring him to be indebted over and above the sum of £100. The entries upon which reliance is now placed had not yet been made on the 18th July. The entries were made in the books after this action had been commenced, and those entries, in my opinion, upon the evidence as it stands, ought not to have been made as against the applicant. There were fruit transactions apparently between plaintiff and Rubenstein. The applicant, however, says that, so far as he was concerned, he did not wish to act independently of the company, and he would have been bound to account to the company for any profits made from those fruit transactions. Well, if that is so, the company could not now charge against him the amounts which the company have paid in respect of these transactions. The company would have taken all the profits of the speculation, and therefore the amounts paid on behalf of the company were fairly paid. The cheques were drawn for the fruit upon the company's assets in the bank. The counterfoils of those cheques would show that these cheques had been so drawn. The entries were duly made in the books at the bank as having been payments made by the bank, so that it would have been quite impossible ultimately for the applicant to have said that he alone should have the profits and not the company. The transaction was on behalf of the company, the company would have made all the profits, and therefore the company would not have been entitled to claim this amount as it did as owing by the applicant to the company. Then the suggestion was made by Mr. Rubenstein in giving his evidence—his somewhat voluble evidence—that these entries must have been made after the

applicant knew that the speculation was a failure. Now, there seems to be no justification whatever for this suggestion, as the books, so far as one can gather, are in form, there was nothing to show that these entries were made after the date of the failure, and in any case the counterfoils of the bank-book would have been there to show that the payments were made on behalf of the company, and that the applicant was not entitled to claim the profits. For these reasons, I am of opinion that there is no ground whatever for this high-handed proceeding on the part of the remaining creditors in dismissing the applicant without giving him a hearing, and without proper evidence to satisfy them that he had contravened the regulation, and owed the company £100. The rule must, therefore, be made absolute, with costs.

On the application of Dr. Greer, and with the acquiescence of Mr. Benjamin, the rule was made absolute, with costs against Mr. F. Wood and W. S. Wood, the other director (Mr. Gardiner) having taken no part in the proceedings.

#### BRINK V. BRINK.

Mr. Lewis said leave had been granted to the applicant to sue *in forma pauperis*. He had been instructed to apply for leave to issue process in the usual abbreviated form.

Application granted.

#### DUNDAS V. BEUKES.

Mr. M. Bisset moved for an extension of the return day from August 1 to August 24.

Application granted.

#### SMITH V. TRELEAVEN.

This was an appeal from a decision of the Resident Magistrate of Woodstock, in which the appellant was sued for £1 for a premium of insurance, and £3, interest due on a mortgage bond. The plea was that he had paid the capital amount, and judgment was given for the plaintiff. The defendant pleaded that the bond was null and void, as it had already been paid to the plaintiff's agent. The capital had been paid to one Villet, and the Magistrate held that the defendant did not exercise sufficient care in paying the money to Villet, that the bond was still of force and effect, and that the plaintiff was entitled to receive the interest. Dr. Greer was for the appellant (defendant in the Court below), and Mr. Van Zyl was for the respondent. Counsel pointed out that, in the first instance, the defendant would have had the impression that Villet was acting for an undisclosed

principal, because the defendant went to him in order to raise the money. There was no mention in the bond where the capital had to be repaid.

[De Villiers, C.J.: Is this the same Villet the Law Society moved against the other day?]

Dr. Greer: I believe so.

[De Villiers, C.J.: Has he been prosecuted?]

Mr. Van Zyl: I believe he has disappeared.

De Villiers, C.J.: This is certainly a very hard case for the defendant. He apparently thought that Villet was the agent for the plaintiff to receive the capital of the bond, and when he was in a position to pay the amount — probably hard-earned money—he pays it over to this agent, and finds that the agent has appropriated it to his own use. The question is, whether it is quite clear that Villet was the agent for the plaintiff to receive the capital? He had been employed by the plaintiff to receive the interest, but it does not follow he was entitled to receive the capital. Now, what the defendant ought to have done when he paid the £50 was to see that the bond was handed over to him. That is what any business man would have done, and then he would have discovered Villet was not in possession of the bond. No doubt Villet gave some fraudulent excuse. The defendant ought to have kept the money in his own pocket until he got the bond. Therefore, it is his own fault, and he will have to suffer. The plaintiff took good care that Villet did not have the bond. The regret in this case is that the man who has committed this gross fraud upon the poor defendant should escape scot free. Some time ago an order was made striking him off the roll of conveyancers, and the Court intimated at the time that the matter ought not to rest there, that an example should be made of a delinquent of that kind, but a prosecution, it would appear, has not been undertaken, if it is said now he has disappeared. It is to be hoped he disappeared before the remarks were made by the Court, and that they did not lead him to make his escape. I hope some steps will be taken to arrest him elsewhere. There is a very gross fraud upon the unfortunate defendant. The appeal will be dismissed, with costs.

## UPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

*Ex parte* THE FEDERAL SUPPLY COLD STORAGE CO. OF SOUTH AFRICA, LTD. { 1906.  
July 25th.  
„ 27th.

Sir H. Juta, K.C., moved, as a matter of urgency, for leave to sue by edictal citation the Pietermaritzburg Cold Storage Company, Limited, and Sparks and Young, Limited, of Durban. The petitioners said: (1) That your petitioners, together with the Imperial Cold Storage and Supply Company, Limited, Sparks and Young, Limited, of Durban, Natal; the Port Elizabeth Cold Storage Company, Limited; the Pietermaritzburg Cold Storage Company, Limited, of Pietermaritzburg, Natal; and McArthur, Atkins and Co., Limited, entered into a certain agreement to form an association called the Cold Storage Association, *inter alia*: (a) To protect the interests of cold storage concerns in South Africa from undue competition, so as to ensure the earning of reasonable profits on behalf of the shareholders and the proprietors thereof; (b) to provide machinery for regulating competition between members of the association for contracts and ordinary trade without causing undue interference with the trade of each, and the constitution of the association is set forth in certain deed dated 28th October, 1905, and signed by the representatives of the parties thereto. (2) That the office of the association is at Cape Town, and it is provided that the committee, in whom the management of the association is vested, shall meet at Cape Town at least once a month. (3) That your petitioners are desirous of bringing an action in this Honourable Court against the other parties to the said association for the purpose of having it declared that the said association is an illegal association, or, otherwise, that the same, if legally entered into, has been conducted for illegal purposes, and that your petitioners are entitled to retire therefrom, or otherwise. (4) That they are entitled to retire therefrom on the grounds that their co-partners have refused them the rights and privileges of partners, or that they are entitled to retire therefrom on the 16th November, 1906, having given notice as required by the memorandum aforesaid of their intention so to do, and for an order on the other parties to the said association to join with them in stating an account and balance-sheet of the association, and to debate the same and pay to them such sums as may be due to them. (5) That the said Sparks and

Young, Limited, and the Pietermaritzburg Cold Storage Company, Limited, are companies carrying on business in Natal, in which colony their head offices are, and your petitioners are desirous of suing them by edictal citation, in order to join them as defendants in the said action. Wherefore your petitioners pray that your lordship will grant an order authorising them to sue the said Sparks and Young, Limited, and the Pietermaritzburg Cold Storage Company, Limited, by edictal citation in the said action and direct how citation may be served. Counsel also presented a further affidavit to the effect that the contract was entered into in this Colony, in order, as he explained, to show that the Court had jurisdiction.

[De Villiers, C.J.: Yes, but must not that jurisdiction be confirmed by an attachment? The mere fact that a contract was entered into in this colony is not enough to give this Court jurisdiction.]

Sir H. Juta: This gives the Court jurisdiction, because one could not very well confirm jurisdiction, unless it existed *ab initio*. The fact of the contract having been entered into in this colony gives the Court jurisdiction.

De Villiers, C.J., pointed out that there was no statement in the petition that respondents had assets here. The only thing, it seemed to him, that could be attached, would be the office furniture of the association in Cape Town.

Sir H. Juta admitted that there was no statement in the petition that respondents had assets here. He thought, perhaps, it would be better if his lordship would allow the matter to stand over, so as to enable him to produce affidavits in regard to that point.

[De Villiers, C.J.: As they have an office in Cape Town, I suppose they would have some assets here. The matter will stand over, and may be mentioned again later.]

*Postea* (July 27).

Mr. Searle, K.C., mentioned this matter. A further affidavit had now been made.

Mr. Schreiner said that he was instructed in this matter. There was opposition to the application, and there was a cross-motion, of which notice had been given that morning. There had, of course, been rather a rush from the other side, and notice could not be given sooner, because the affidavits for signature could not be obtained. He was going to suggest to his learned friend that the Court might take the matter some other time. He added that it might be desirable to put the position before the Court. The Federal Company, he understood, was desirous of obtaining an order to dissolve the Cold Storage Association. Now, resolutions to dissolve the association had been



passed by the association, the only dissenting party being the Federal. There was no need whatever for edictal procedure, because the companies referred to had their representatives in this colony, whereby proceedings could be taken, and service could be effected, if necessary. But what he would like to say was that there was no need for litigation at all on the subject. They were applying to the Court to appoint a receiver actually for the liquidation of the association so that it really would be no use asking the Court to make an order simply on this *ex parte* application, without hearing what the other people had to say.

Mr. Searle: I have no knowledge about that.

[De Villiers, C.J.: That is all you want. You would not require more than that—the dissolution of this association.]

Mr. Searle: Oh, yes, but that is all new to me. Perhaps the matter had better stand over under the circumstances.

[De Villiers, C.J.: The matter may be mentioned again if the parties are prepared before the Court rises.]

Before adjourning, his lordship asked if the parties were prepared to go on with the matter.

Mr. Schreiner said that his learned friend had not returned into court, and he presumed that the matter would have to stand over.

DU PREEZ V. DU TOIT. ( 1906.  
( July 25th.

Promissory note—Holder in due course.

*The payee of a promissory note, payable to him or order, not being able to write, got another person to sign his name on the back, which name was wrongly spelt. The payee gave this note, thus indorsed, to the plaintiff for value and before the due date.*

*Held, that the plaintiff was entitled to recover the amount from the maker, although the latter would have had a good defence if sued by the payee.*

This was an appeal from a judgment of the Resident Magistrate of Bredasdorp, in an action brought by appellant against respondent to recover £34, upon a promissory note. Mr. Louwrens was for appellant; Mr. Burton was for respondent.

From the record, it appeared that the note was made by respondent in favour

of one Aaron Brower, of Caledon. Brower had sold respondent a horse for £30, and the latter had also incurred a debt of £4. Defendant set up several defences. He said that the mare was not, according to warranty, and the Magistrate found for defendant as regarded the £30, holding that there was want of consideration. Judgment was given for plaintiff for £4, without costs.

Mr. Louwrens said that the effect of the judgment was that there was a breach of warranty between the two parties, and that the plaintiff was affected by it. There was no suggestion whatever that that he was a party to or aware of any irregularity.

[De Villiers, C.J.: He took the note before it was due.]

Mr. Louwrens: Yes. Counsel went on to deal with the several pleas set up by defendant, and said that the main question upon which judgment was given, and upon which respondent relied now was the question of consideration. The plea in the Court below was that there was no consideration.

[De Villiers, C. J.: I think, incidentally, the question is raised whether the endorsement was a proper one. The promissory note is in favour of "S. A. Broer." I see, though, that it is endorsed "S. A. Brewer."]

Mr. Burton said that he had the greatest difficulty in contending, as against the holder in due course, which apparently Mr. Du Preez said he was, that the question of warranty could clearly be raised. The only point he could bring before the Court was this question of endorsement. It was true that point was not specifically raised in the plea, but it did appear on the papers. He submitted that the Court would not be disposed to grant the plaintiff more relief than he was absolutely entitled to. Defendant told Aaron Brower that he had been cheated, and gave him notice that within 14 days he must return the note, and he would return the horse. After getting that notice, Brower got his brother to endorse the note, and take it from Caledon to Bredasdorp to Du Preez. The Magistrate found that the defendant had been "done." Du Preez gave cash for the note, charging a discount of 6d. in the £. The question was whether, upon the facts before the Court, plaintiff was the holder of this note in due course. He submitted that plaintiff was not the holder in due course. "S. A. Brower" was the endorser; the note was made to "S. A. Brower." This man's name was Aaron Broer. There was no partnership between the two Browers in this transaction.

Mr. Louwrens said that both the Browers went to the plaintiff to negotiate this promissory note, and that



proved conclusively that they were in partnership. The defendant was precluded from denying the capacity of Brower to negotiate the bill. He thought if any man had been deceived, the defendant himself was to blame for his own negligence.

De Villiers, C.J.: The plaintiff is the holder by endorsement of a promissory note made by the defendant. The promissory note is made in favour of "S. A. Broer," and it is endorsed by "S. A. Brower." The main defence in this case was want of consideration inasmuch as the note had been given as the purchase price of a horse guaranteed to be sound which proved to have been unsound. This would have been a good defence, no doubt, as against Brower, but it is no defence as against the plaintiff if he was the holder of this promissory note in due course. There is nothing to show that he was not the holder in due course. He took the note before it fell due, and the endorsement is, on the face of it, in order; it is endorsed by "S. A. Brower." True, the spelling is not exactly the same, but practically the pronunciation of the word would be the same. Then it is said now—a defence is raised which was not raised in the Court below—that this endorsement by Brower is not the endorsement of the man in whose favour the note was made. But the evidence of Brower himself is that it was his endorsement. He did not write his name himself, but he told his brother to write it. Aaron Brower said: "I reside at Caledon. I am a horse dealer. My brother and I, as partners, had a promissory note signed by D. P. du Toit, G. son. I cannot write. My brother endorsed the promissory note. It was endorsed over to H. R. du Preez about 10-12th March, 1906. We were both together; my brother, Samuel Brower, gave it over to Mr. Du Preez. We sign as A. S. Brower or S. A. Brower in all transactions. I cannot write. I can sign my name." No doubt that is a very slovenly way of doing business, but the point is, has the payee of the promissory note done everything necessary to pass his ownership in that note to the holder? That is the sole point. Clearly he has done everything. Supposing that the maker of the note is unable to pay, and Brower as endorser were sued upon that note, he would have no possible defence to such an action. Under these circumstances, I am of opinion that the Magistrate entirely erred in this case. He seems to have assumed that, because, as between Brower and the defendant, the defendant had a good defence, therefore his defence equally availed as against the *bona fide* holder for value. If it had been shown that plaintiff took the note after it fell due, or if anything else had been shown to the effect that the plaintiff was a

party to a fraud, that would, of course, have put a different complexion on the case. The appeal must be dismissed, with costs in this Court and the Court below, and judgment entered for plaintiff for the amount claimed.

[Appellant's Attorneys: Herold & Gie; Respondent's Attorneys: Moore & Son.]

BRAUDE V. LOUW. { 1906.  
} July 25th.

Liquid claim—Magistrate's jurisdiction.

*A summons in a Magistrate's Court on a promise to pay the sum of £44, with the feathers of certain ostriches, claimed the amount and further claimed delivery of the feathers.*

*Held, that although so far as the summons claimed the sum of £44, it was within the jurisdiction, yet, as it further claimed delivery of feathers exceeding £20 in value, an exception to the jurisdiction had been properly taken.*

This was an appeal from a judgment of the Resident Magistrate of Calvinia in an action brought by appellant against respondent to recover a sum of £44 on a promissory note, and also a sum of £5.

In the Court below, exception was taken to the first portion of the claim that the promissory note was not a liquid document, and, consequently, that it was beyond the Magistrate's jurisdiction. The exception was upheld. The item of £5 was not disputed, and judgment was given for that amount, with costs.

The Magistrate, in his reasons for judgment, said that the promissory note was for £44, or payment for certain 22 ostriches, according to the value of the feathers. The summons prayed for delivery of the sum or for delivery of the ostrich feathers. In his opinion, there was a distinct condition in the note, and that was that the payment might be varied according to the market value of the feathers at the time stipulated in the note. He maintained that the document was not, on the face of it, a liquid one, upon which judgment could be pronounced, without calling extrinsic evidence.

Mr. Close was for appellant, J. D. Braude. There was no appearance for respondent, Abraham Johannes Louw.

Mr. Close submitted that the test really was as to whether, in a case of this sort, the Supreme Court would give provisional judgment. The Court had, in similar cases which it had had before, given provisional sentence. Counsel relied on *Lettersteil v. Watney* (1 Menzies, 16), and *Koemans v. Van der Walt* (1 Menzies, 37).

[De Villiers, C.J.: If you had confined yourself to the payment of the money, I think your argument would have been conclusive; but your summons prays for the payment of £44, or delivery of the ostrich feathers.]

Mr. Close: Yes; but even supposing that a wrong prayer is put in, if there is a right prayer, a prayer on which we are entitled to get judgment, I submit that we are entitled to judgment on that prayer, and the Magistrate should have ignored the other.

De Villiers, C.J.: The action was brought upon an acknowledgment of debt, which is in the following terms: "The undersigned acknowledges to be indebted to J. D. Braude in the sum of £44 sterling, for value received. Promises to pay with the feathers of twenty-two ostriches (seven cocks and fifteen hens), according to the value of the feathers, to be delivered in April next, 1901, with the full crop of feathers." This is signed by defendant. If in this case the plaintiff had confined himself to the claim of £44 on the ground that there had been no tender of feathers in April, 1901, then the decision of this court in the case of *Norgub v. Fryer* (2 Juta, 218) would have been applicable. But the summons goes further, and prays not only that the defendant may be adjudged to pay the sum of £44, but also that he do deliver the ostrich feathers. Well, I suppose that is in the alternative for not paying. But in so far as the claim is for delivery of the ostrich feathers of a value exceeding £20, it is beyond the Magistrate's jurisdiction. On exception to the jurisdiction having been taken, the plaintiff could have amended the summons by striking out these words, "or deliver the ostrich feathers." On the face of the summons there was a prayer for more than the Magistrate could possibly have ordered and therefore I think, although the Magistrate's reasons are not exactly the same as those of this court, the Court should now dismiss this appeal.

Mr. Close having been heard on the question of costs,

De Villiers, C.J., said that the Magistrate had given costs in the Court below against defendant. The judgment of the Magistrate was for plaintiff for £5, with interest and costs. The appeal would be dismissed.

FORTUIN V. STEVE. ( 1906.  
July 25th.

Summons — Exception — Use of two languages.

*A summons in a Magistrate's Court for slander set out the words actually used in the Dutch language and contained an innuendo as to the meaning of the words, although not a literal translation.*

*Held on appeal, that the Magistrate had erred in allowing an exception to the summons, on the ground that it was partly in English and partly in Dutch.*

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This was an appeal from a decision of the A.R.M. of Robertson, upon an exception taken to a summons that it was partly in the English and partly in the Dutch languages. The summons was for £20 damages for an alleged slanderous statement spoken of the defendant by the plaintiff, and three exceptions were taken to it. The first was that the defendant was wrongly described, secondly that the summons was partly in English and partly in Dutch, and thirdly that the words did not bear the construction put upon them by the plaintiff. The second exception was upheld. The Assistant Magistrate, in his reasons for judgment, stated that section 2 of the Act 21 of 1884 was not in force in the district, and that according to it any summons, notice, or document not wholly in the English language must have a proper translation.

Mr. Burton was for the appellant, and there was no appearance for the respondent.

Counsel said it was a curious objection. It was quite clear in that locality that the vernacular would be perfectly understood. It would have been better, no doubt, to have appended a proper translation of the whole thing. The point of the exception, counsel submitted, was rather far-fetched. They did not seem to complain of not having a translation, and not having been told what the words meant.

De Villiers, C.J.: The summons was for damages and slander, and sets out the slanderous words in the language which was spoken at the time when the words were used, viz., the Dutch language. There is an innuendo as to the meaning of these slanderous words in the English language. At the trial an exception was taken to the summons that it was partly in English and partly in Dutch. Well, they could not set forth the words in the original without using the Dutch language, and therefore the Magistrate, in my

opinion, was wholly wrong in allowing this exception. Even if there had been a translation annexed to the summons of the words used, the exception would still have applied, because it would have been a summons which was partly in English and partly in Dutch. At the trial, no doubt, the parties will be quite prepared to give a literal translation of the words which were used, and perhaps it would have been better to insert such translation into the summons, but the exception was not that there was no translation of the words. The exception was that two languages appear on the summons. The appeal must be allowed, and the second exception overruled, with costs in this Court and in the Court below.

FRANCIS V. RUDMAN.

This was an appeal from a decision of the Resident Magistrate of Uitenhage, in which the appellant (plaintiff) unsuccessfully sued for £8 8s. for cart hire and cash paid on behalf of the defendant's wife. From the evidence it appeared that the defendant's wife informed the plaintiff that her husband had thrashed her and turned her out of the house, and the plaintiff took her by cart to Klein Poort, and subsequently to Steytler-ville, for legal advice. There was 8s. paid to a boy on another occasion to go to Klein Poort, when there was an attempt to break into the house during the husband's absence. The defendant did not dispute his liability, but said the charge was too much. The defendant and his wife had since become reconciled. For the defence, absolution from the instance was claimed, on the ground of non-liability, and this was allowed, with costs, by the Magistrate. The Magistrate, in his reasons, said that the plaintiff was not justified in entering into an agreement with the defendant's wife to hire the cart after being warned by the defendant.

Dr. Rainsford was for the appellant, and there was no appearance for the respondent.

Dr. Rainsford said the only portion of the expenditure which the defendant had previously repudiated liability for was the hire of the cart to Klein Poort. The Magistrate should not have granted absolution without calling on the defendant to deny the allegations of cruelty, and also his admission of liability.

De Villiers, C.J.: The plaintiff made a certain statement, which, if true, would have entitled him to judgment. He states what he had done for the wife; he had given her a cart, lent her money, the account coming up to eight guineas. "A few days afterwards," he said, "I saw the defendant with reference to my

account. He promised to pay me in three weeks' time." Well, if this statement is correct, then the judgment ought to be for the plaintiff. It is quite possible that the defendant might contradict this statement, but, so far, there is no contradiction. Therefore, I think the Magistrate ought not to have granted absolution from the instance. The appeal will be allowed, and the case remitted for trial on the merits, respondent to pay costs of appeal, costs in the Court below to abide the result of trial in the Magistrate's Court.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ESTATE SCHOLTZ V. ( 1906.  
CARROLL. ( July 27th.

Messenger of Court—Interdict—  
Attachment—Removal of  
goods—Contempt of Court—  
Costs.

*The respondent, the messenger of a Magistrate's Court, on executing a writ against the goods of an execution debtor, was informed by the debtor that the Supreme Court had issued an interdict at the suit of the landlord against the debtor, as tenant, restraining the removal of the goods. The respondent attached and removed the goods, which were sold in execution.*

*Held, that as the interdict was in a suit between the landlord and tenant, the respondent may have reasonably believed that he was not bound by it, but that it was his duty not to proceed beyond attachment of the goods after being informed of the interdict against their removal, and that he should, at all events, pay the costs of the application for attachment*

*as a penalty for contempt of Court.*

This was an application brought by Agnes Judith Scholtz, as executrix testamentary of estate late Dr. Charles Wm. Scholtz, upon notice to the Messenger of the Resident Magistrate's Court, Cape Town, to show cause why he should not be attached for contempt of Court, and ordered to restore 20 chests of drawers and a piano wrongfully removed.

It appeared that the executrix made an application to the Court on the 11th May last for an interdict restraining the removal of any movables from certain premises in Riebeeck-square, Cape Town, known as Leeds Houses, and occupied by Richard James Jubb. The landed property belonged to the estate Scholtz, and the application was brought in order to enforce the landlord's hypothec, the said Jubb being in arrear with his rent for four months. The applicant's claim amounted at that time to about £183. The matter came before Mr. Justice Maasdorp, who granted an interdict pending the hearing of an action for rent due, with leave to respondent to move to set it aside. Subsequently one Thompson, a deputy of the messenger of the Resident Magistrate's Court, went to Leeds Houses, and, in execution of a writ, he took possession of certain 20 chests of drawers and a piano, and had them removed from the premises. The messenger's deputy said that he had been granted an indemnity by the attorneys of the party for whom he was acting. The chests of drawers were afterwards sold by auction on the Parade. In the meantime certain negotiations had taken place between Jubb and the owner of the property, a certain payment was made to the applicant's estate, leaving £145 still due, and the applicant stayed her hand to enable Jubb to make efforts to liquidate his debt.

Mr. Schreiner, K.C., was for applicant; Mr. W. Porter Buchanan was for respondent.

Mr. Schreiner (in answer to the Court), said that, while the messenger was quite correct in attaching the goods, the moment he removed the goods he committed contempt of the order of Mr. Justice Maasdorp.

Mr. Buchanan said that there had been no attachment by the order of Mr. Justice Maasdorp. The messenger acted in this case under judgments obtained in the R.M.'s Court against Jubb. It was found that the piano was not executable, being in the hands of Mr. and Mrs. Jubb under a hire purchase agreement. The chests of drawers were sold by auction, and the proceeds were in the hands of Messrs. Syfret, Godlonton and Low, attorneys. After the order of Mr. Justice Maasdorp had been made, a fresh arrange-

ment was made by the applicant with the debtor, and a summons had not been instituted until quite lately. Counsel went on to read affidavits by the respondent and his deputy and others, in which Jubb's statements that he told them of the order of the Court were denied. It was alleged that Jubb was repeatedly under the influence of drink, and it was impossible to obtain satisfactory evidence of the existence of the alleged order, and that no copy of the order was brought under the notice of those who were acting until June 14, and that the messenger did not see a copy until that date.

Mr. Schreiner read replying affidavits to the effect that the messenger's deputy saw a copy of the order before the goods were removed. Counsel submitted that the order of the Court was not an interdict against Jubb, but it was an interdict against the removal of the goods. It was not a personal order against Jubb; but was addressed generally. The order was *in rem*. True, the Court granted respondent leave to move to set it aside but it was the usual order, and it might be set aside upon payment of the arrear rent. Respondents said they did not see the order. They did not deny that they knew of the order. But Mr. Jurriz was positive that Thompson came and saw a copy of the order at the Colonial Orphan Chamber before June 14. Applicants did not object to the attachment of the goods by the order of the Magistrate's Court, but the moment the goods were violently removed there was contempt of the Supreme Court order.

[De Villiers, C.J.: I have always looked upon these orders as more than personal. If it has not more than a personal effect, we shall have to consider whether we should not alter the terms of these orders, and interdict not only the respondent, but any person to whom these presents may come.]

Mr. Schreiner said that the position taken up by respondents was that Jubb was not their client, that they were acting against Jubb, and that the interdict of the Supreme Court restrained Jubb from removing the goods.

De Villiers, C.J., said that he did not think the respondents' attitude was wholly unreasonable.

Mr. Schreiner admitted that there was something to be said for respondents' position, but he contended that if others were allowed to remove goods which had been interdicted in protection of the landlord's hypothec, the whole object of such an order would be defeated. Counsel cited *In re Price* (3 Juta, 139), *Dommissie v. Theart* (4 Juta, 92), *Bushing v. Kinnear* (5 H.C., 254), *Lazarus v. Dose* (3 S.C.R., 42). He contended that under all the circumstances the conduct of the messenger was highhanded, that, without



any steps being taken to vary the order already granted by the Supreme Court, he should take the law into his own hands and remove these goods. He urged the Court to indicate to the messenger, who should show more respect, perhaps, than the average person for the orders of this court, that such conduct could not be allowed.

Mr. Buchanan contended that they must first consider what was the actual order given in this case. This was not an attachment order. There appeared to have been two orders given. The first seemed to be a short form, thus: "It is ordered that an interdict be granted, pending action, with leave to respondent to move to set it aside." In the other a portion of the prayer of the petition was set out. The order said: "Having read the petition praying for an order restraining the removal from certain premises, etc.," and it went on: "It is ordered that an interdict be granted pending the action, with leave to respondent to move to set it aside." Counsel submitted that there should have been an attachment in this case, otherwise the tacit hypothec, or landlord's lien, was of no use. Under an *ad fudandum* order there was an actual arrest and attachment, so it was in an Admiralty matter, and he claimed that in such a matter as this there must be an arrest and attachment. Counsel quoted from Voet, Groenewegen, Van der Kessel, Brunneman, and Kersterman, and cited *Reed v. Buckley* (7 E.D. Court, 12). He submitted that it was clear in this case that a second arrangement had been made between the applicant estate and the debtor, Jubb.

De Villiers, C.J.: It has been the practice of the Court for a great many years, certainly before I came on the Bench, to preserve the landlord's hypothec for rent by obtaining an interdict restraining the removal of the goods, and it was assumed that so long as the goods are in the possession of the tenant the landlord's hypothec is safe. It was never supposed that anyone, who received the notice of the order against removal, would presume to remove the goods because the order was not directed to him. It is a question for the Judges to consider whether in future they should not go further and order the attachment of the goods themselves, or make an order restraining the removal, to be directed not only to the debtor, but to all persons to whom knowledge of the order shall come. That is a matter for future consideration. At present we have to deal with the case which has actually arisen. Now, I am quite satisfied that, when the respondent attached these goods and was informed that there was an order of Court restraining their removal, he would have been perfectly justified in

staying his hand and informing the execution creditor that there was a prior order of the Supreme Court restraining the removal of the goods, and that would have been perfect justification for his not attaching these goods. I do not see, therefore, that the respondent was in the very difficult position which he is represented to have been in. His position seems to me to be very simple. He could say: "There is a prior order of Court restraining the removal of these goods, and I now decline to proceed further." It seems, however, he was induced by the attorneys employed in this case to attach these goods, and not only to attach these goods, but to remove them, and send them to the Parade sales, where they were actually sold. Now, I have some difficulty about ordering the return of the goods, for this reason that the execution creditor, whose interests are affected, is not before the Court. But, in regard to the question as to whether there should be an attachment of respondent for contempt of Court, if there had been an attachment of the goods, there would have been no doubt whatever that there was a contempt of Court, and I am satisfied also, that the defendant did not do his duty in disregarding the order of the Court. I will not say that he was guilty, in the strict sense of the term of contempt of Court, inasmuch as the order was not directed to him, but I think there is sufficient reason in the present case, while making no order for his attachment, to show that the Court does not approve of his conduct by ordering him to pay the costs of this application. It was a complete disregard of an order of Court, which had been brought to his notice, but he seems honestly to have believed that, as the interdict was not directed to him, he might legally remove the goods. Well, he occupies an official position, and he ought to have known that, although that order was not directed to him officially, it was his duty not to proceed beyond an attachment of the goods. There will be no order, except that the respondent do pay the costs of this application.

On the question of restoration of the property.

Mr. Buchanan informed his lordship that the amount of money realised by the sale would be paid back.

His Lordship: Very well.

CALEDONIA LANDING, SHIPPING AND SALVAGE CO., LTD. V. EAST LONDON HARBOUR BOARD.

COLONIAL FISHERIES CO., LTD. V. EAST LONDON HARBOUR BOARD.

Mr. Schreiner, K.C. (with him Mr. W. Porter Buchanan), moved for the appointment of a Commission to take cer-



tain evidence. He said that the two cases were pending in the court, and pleadings had been closed. The petition was to take evidence on commission, and he had also to ask the Court to consider the question of date of trial.

Mr. Benjamin appeared to consent to the application.

From the petition and statements of counsel, it appeared that these actions had been consolidated for the purposes of the hearing. A number of witnesses for both plaintiffs and defendants reside in East London, and with a view to saving expense petitioners were desirous of having evidence of such witnesses as they thought fit taken on commission.

De Villiers, C.J., asked counsel what the action was for.

Mr. Schreiner: Damages alleged to have been sustained to certain vessels in connection with a flood that took place in October last on the Buffalo River. It is a very intricate case. Counsel also applied for the hearing to be set down for another date than Friday, August 24. He suggested an earlier day in some week nearer the day of arrival of the steamer from the coast.

De Villiers, C.J., granted an order in terms of petition, appointing the R.M. of East London commissioner to take the evidence of such witnesses as plaintiffs and defendants might produce, costs to be costs in the cause. As to the date of trial, he ordered the case to be set down for the 29th August, and the Grand Junction Railways case to be removed to the 5th September.

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## SUPREME COURT

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### FIRST DIVISION.

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[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BLUMENAU V. NEETHLING. } 1906.  
( July 30th.

Policy of insurance—Acceptance  
—Premium—Consideration.

*The defendant, a farmer, agreed with the plaintiff, an insurance agent, for an insurance on the joint lives of the defendant and his wife, and gave to the plaintiff a promiss-*

*ory note for the amount of the first premium. The Company did not approve of the joint life insurance, and sent to the defendant a policy on his own life alone, crediting the agent, who had paid the premium to the Company, with the difference in the amount of the premium. The defendant returned the policy to the Company without any letter of explanation, and the Company returned it again to the defendant, who left it in his village residence and took no further notice of the matter.*

*Held on appeal in an action by the plaintiff on the promissory note, that the Court below was not bound to hold that there had been an acceptance of the policy, and that in the absence of clear proof of such acceptance the defendant was not liable on the note.*

This was an appeal from a judgment of the Resident Magistrate of Montagu. Mr. Burton was for appellant; Mr. Closo was for respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The defendant gave a promissory note, the consideration for which was that a policy on the joint lives of himself and his wife should be handed over to him. He was subsequently informed by the company that his wife's life had been refused. Thereupon he determined to have nothing further to do with the policy. Two months afterwards he received the policy. It seems the letter was returned unopened, but, anyhow, the defendant knew what was in the envelope. The ordinary business man would undoubtedly have written a letter saying that he repudiated the policy and refused to accept it, but he, in his ignorance, thought it would be quite sufficient for him to return the letter, so he accordingly gave directions that the letter should be returned to the company. After that he gets the policy again. Again, in his ignorance, the defendant leaves it lying in his "Zondags huis," in the village, and takes no further notice of the matter. Undoubtedly it was a risky thing for him to do, but I am perfectly satisfied from the evidence that there was no intention on his part to accept this policy. His idea was, that having once returned it, he was not bound to return it again. If the Magistrate had come to the conclusion that the retention was made

under such circumstances as to amount to acceptance, possibly the Court would not have interfered, but the Magistrate, in the performance of his duty as a juror, as well as a judge, came to the conclusion that what had been done did not amount to an acceptance, and I am not prepared to say that in law this was necessarily an acceptance. In deciding whether it is an acceptance, all the circumstances of the case must be considered. The defendant had already returned the policy, and the company should not have pressed this policy upon him, knowing that it was not his contract. His contract was for a policy upon the joint life of himself and wife, and I do not see what justification there was for the company to send him any policy at all, after it had refused to accept the wife's life. He exposed himself to the risk of its being ultimately held that there was an acceptance. I do not think in the present case, if all the facts are taken into consideration, the Court would be justified in holding that there was an acceptance. There is, no doubt, considerable force in the remark that if the man had died his executors might possibly have claimed the amount of the policy. I don't know how that really would be—whether they would have been entitled or not. If it had been proved that he had returned the policy and had kept the policy which was sent back to him in a place where he did not usually keep the documents which belonged to him, it might well have been held that there was no acceptance, and the company would not be bound. I am satisfied from the evidence that the matter was never considered from that point by the defendant. I am perfectly satisfied that the defendant did not retain the policy in the hope that should he die his heirs would get the amount. Nothing seems to have been further from his mind. He was simply an ignorant farmer, who thought there was no harm in not again returning the policy. He returned it once, and when it was sent to him again he took the view that he need not trouble about the matter any further. On the other hand, I think that the company went beyond what could have been expected of it in pressing upon him a policy which he did not want and which was outside his agreement. I think, upon the whole, the Magistrate's decision should not be interfered with, and the appeal should be dismissed with costs.

**BIDLI V. HENLEY.**

This was an appeal from a judgment of the Resident Magistrate of Butterworth. Mr Upington was for appellant; Mr. Benjamin was for respondent.

Counsel having been heard in argument on the facts,

De Villiers C.J.: The general principle in regard to the costs of agents in the same way as the costs of attorneys is that they should be taxed and that payment of such costs can only be claimed on such taxation. No doubt under certain circumstances the Court would, in regard to agents at all events, give effect to agreements made between the client and the agent, but such agreements should be clearly proved, and should not be extended beyond the actual terms of such agreements. In the present case the Magistrate has found that there was an agreement to pay £20, and that that should be regarded as "full and complete payment for all work done by the defendant in the matter of the two appeals, and, in view of the amount of work done, the Court is of opinion that the charge cannot be regarded as excessive." The Magistrate, however, lost sight of the fact that according to the evidence of the defendant he received back the sum of £7 2s. 6d. which he paid in respect of the appeal to the Circuit Court. He had paid £1 17s. 6d. and five guineas. That amount he had received back. That is clear from his own evidence, and his own statement in regard to that amount is: "He had paid me £12 10s. for the Circuit Court, and £17 re Findlay and Tait. Warren paid that amount, £12 10s." Further on he goes on to say: "I do not admit that the £6 17s. 6d.—I suppose he means £7 2s. 6d.—is to be paid back to the plaintiff. I say that should be set off against extra work I did in connection with the work in the Supreme Court and the money in Idutywa." But as to the work in Idutywa, that is paid for in the £7 allowed by the Magistrate. He goes on: "If he insists upon a refund, the amount he will be entitled to is £6 17s. 6d., but in common fairness he should not claim this." It is not a question of common fairness; it is a question of what he is entitled to. Legally, at all events, the Magistrate ought to have given judgment for this amount, which it was admitted by the defendant that the plaintiff would be entitled to claim from him. The appeal must, therefore, be allowed and judgment entered for the plaintiff for £7 2s. 6d., with costs in both Courts.

DE VOS V. SMITH. { 1906.  
July 30th.

**Insolvency—Action on promissory note made before insolvency—Revival of right of action.**

*The defendant, after giving a promissory note to the plaintiff,*

*became insolvent, and afterwards promised the plaintiff that he would pay the amount in full, upon which the plaintiff returned to the defendant some articles which the defendant had pledged with him.*

*Held in an action on the promissory note, that the promise after insolvency to pay the amount did not revive the note and that the suit should have been on the promise made after insolvency.*

This was an appeal from a judgment of the Resident Magistrate of Malmesbury in an action brought against appellant by respondent to recover a sum of £12 10s. upon a promissory note.

Mr. Benjamin was for appellant (Johannes Jacobus de Vos); there was no appearance for respondent (Thomas Joseph Smith).

Having heard counsel in argument,

Do Villiers, C.J.: The defendant in this suit was sued upon a promissory note made by him before the date of the sequestration of his estate. The Insolvent Ordinance indicates the course which creditors should take upon the insolvency of the debtor, that is to say, they should prove their debts to the satisfaction of the Master. If that rule applies to an ordinary case, *a fortiori*, it would apply to a debt such as the present one, which was a debt incurred for the purpose of obtaining the sequestration of this estate, incurred, therefore, before the date of the insolvency. The only manner in which the plaintiff could recover the amount of the promissory note was by proving his debt. Instead, however, of proving the debt, he made some arrangement according to his statement with the insolvent, after the insolvency, by which he was to be paid the amount in full. According to his statement, upon the promise being made, he returned to the insolvent a policy and a typewriter which he had received from the defendant. Now, clearly this policy and the typewriter, at all events *prima facie*, belonged to the insolvent estate. There is nothing to indicate here that these were things which the insolvent was entitled to dispose of. But there is a further objection. If the plaintiff relies upon the promise made after insolvency, then clearly he took the wrong course in seeking to recover judgment upon a promissory note which had been made before the insolvency. The action is not in respect of of a promissory note made after insolvency, but it is an action upon a promissory note made before insolvency. The action should be founded upon the

promise and not upon the promissory note, which had been made before the sequestration. The Magistrate's attention was not called to the case of *Quin Bros. v. Van der Merwe* (9 Juta, 217). He relied entirely upon the case of *Dick v. Potc* (7 Buchanan's E.D. Court Reports, 747), but there it was only decided that "a verbal promise by an insolvent after his insolvency to pay a promissory note made before insolvency gives rise to an illiquid cause of action only, and not to an action on the promissory note as a liquid document." So that, even according to that decision, the plaintiff was wrong in suing upon the promissory note, but he ought to have sued upon that illiquid claim which arose after insolvency. It appears to me, therefore, that the appeal ought to be allowed, with costs, in this Court and the Court below, and judgment entered for absolution from the instance.

[Before the Hon. Sir JOHN BUCHANAN.]

SHERWOOD V. HOWARD AND ( 1906.  
SCOTT. (July 30th.

Mr. McGregor (for the plaintiff) moved for judgment in terms of referee's report. Mr. McGregor said that the referee (Mr. Ransome) made a small addendum as to the amount still to be due. He was instructed that there was a mistake, and that a certain sum had been omitted, and he would ask the Court to give judgment for the amount found due on that reference.

Buchanan, J., said that judgment would be entered for the plaintiff for £234 17s. 2d.

Counsel having been heard on the question of costs,

Buchanan, J.: Plaintiff is entitled to the ordinary costs of suit, including costs of reference. The only question that remains open is the question of costs of the jury trial. As I remarked at the trial, this was about the worst possible case that could be submitted to a jury. There were some 30 or 40 items in the account, and two questions only were put to the jury. On one question, the jury decided in favour of the plaintiff, and on the other, in favour of the defendants. Judgment will be for the plaintiff, with costs, including costs of reference, each party to pay their own costs of the jury trial.

# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

REX V. HOFFMANN.  
REX V. SAACKS AND HOFFMANN. { 1906.  
July 31st.

Accomplices — Arson — Brandstichting — Burning house with intent to defraud or otherwise injure Insurance Company—Ordinance 72 of 1830, Sec. 12.

*While it is the duty of a judge presiding at a criminal trial at which accomplices give evidence against the accused, to warn the jury against convicting without corroboration on material facts, the Court will not interfere with the conviction, after such warning, if the jury believed the accomplices, and there was satisfactory evidence aliunde that the offence charged had been actually committed by some one, although there be no other corroboration.*

*On the trial of the appellant for arson, two accomplices, who had already been convicted, gave evidence that they had been employed by him to set fire to the house, and there was the independent evidence of two constables that there were clear indications of the fire having been wilfully caused.*

*Held, that there was not sufficient ground for disturbing the verdict.*

*Semle, that setting fire to a man's own house with intent to defraud or otherwise injure an Insurance Company, constitutes the crime of "brandstichting" or arson.*

This was an appeal upon certain points reserved at the trial of appellants on charges of arson and attempted arson at the May Criminal Sessions. There were two sets of prisoners. The first set—William Hoff-

mann and Blumenthal—were indicted for the crime of arson in setting fire to certain premises known as the Dominion Tobacco Factory, with intent to defraud certain insurance companies. The other two prisoners—Hoffmann and Saacks—were indicted for the crime of attempted arson in trying to set fire to another building with intent to defraud certain insurance companies. Of the first prisoners Blumenthal was acquitted, the jury apparently taking the view that Blumenthal was a sort of innocent agent, not understanding what he was doing, while Hoffmann was convicted. Practically the whole of the evidence which was given against the prisoners was given by two convicts named Bailey and Kline. The point reserved in Hoffmann's case was whether by the law of the Colony, as it at present stands, a conviction can be sustained upon the uncorroborated testimony of accomplices other than the corroboration of the fact that a crime had been committed, and, in case this question were decided against the prisoner, whether there was upon the record such evidence as corroborative evidence. Then there was another point reserved in Hoffmann's case, and it was this: that in order to prove that there was an attempt to defraud the insurance companies, it was necessary to put in the insurance policies. A copy was tendered and it was objected to, but the learned Judge (Mr. Justice Maasdorp) overruled that. The point then reserved was whether secondary evidence of the contents of the insurance policies should have been admitted under the circumstances proven.

Sir H. Juta, K.C. (with him Mr. Uppington) was for the appellants; Mr. Howel Jones was for the Crown.

[De Villiers, C.J.: What has the insurance to do with this case at all? If it is arson, then it is arson at another man's house. The house did not belong to Hoffmann. There is no evidence of insurance required in the case.]

Sir H. Juta: The crime charged is having maliciously set fire to the place, and in order to prove that there was some malice about the whole matter, it had to be shown that there was some reason why it should be set on fire.

[De Villiers, C.J.: If I set fire to another man's place it is presumed to be done maliciously. In this case, according to the indictment, the house was the property, not of Hoffmann, but of Mrs. Hall. Therefore, if the indictment stood as it had originally stood, then the insurance would have been of importance.]

Sir H. Juta: That is so, my lord. Counsel (proceeding) said that, with regard to the other case, the point taken was the same as in the first, viz., that there was corroboration required of the evidence of the accomplices, other than merely the fact that a crime was at-

tempted to be committed. Counsel went on to state the circumstances of the case, leading up to the first indictment. He submitted that on three important points the story of Kline was contradicted by the circumstances of the case. In the first place, the oil was not benzine, as was stated by Kline, and the tins were not there that Kline said he had put there. The oil found there appeared to have been machinery oil. Then there were signs of two persons having been there, whereas Kline said that he was there alone. Again, as to the way in which an entrance had been effected, his story was contradicted by the evidence of the persons who afterwards examined the premises, to see how the place was entered. In regard to the other case, the story was that Kline went up to a house some months later. In order to give due notice to the police, he drove up to the premises about 8 or 9 o'clock, and took benzine with him. The police arrested him.

[De Villiers, C.J.: At all events there is corroboration here. Here they find the benzine in the man's possession.]

Sir H. Juta: Well, he had benzine, it is true, and he drove up to this house, but surely nobody would call that evidence of a crime attempted to be committed—that a man between 8 and 9 o'clock drives up in a cab with some tins of benzine, he puts them into the premises and brings them out.

[Hopley, J.: Your argument is that it was not an attempt to commit a crime, but it was a sort of conspiracy to get somebody else into trouble?]

Sir H. Juta: That is my theory. Proceeding, counsel said that the question rested upon the Ordinance 72 of 1830. That Ordinance, when it was passed, was evidently intended to follow on the lines of the law of evidence prevailing in England at the time.

[De Villiers, C.J.: If this Court has four times decided this point can we go back upon those decisions? There must be some finality in these matters.]

Sir H. Juta: If the question is no longer open, there is nothing for me to say upon this point. I can only say that certainly different views have been taken at different times.

[De Villiers, C.J.: There are very few points of law on which different views are not taken at different times.]

Sir H. Juta: No doubt, but it is because these different views are taken in that way that I submit one can at any rate now ask, as there is a full bench, whether the question is not one, considering the high standing of some of the judges that have held in regard to this matter—

[De Villiers, C.J.: But has it not been decided by a full Court before?]

Sir H. Juta: I am not sure, but I think it has been.

[De Villiers, C.J.: Yes.]

Sir H. Juta: There is no doubt that the later decisions are to the effect that all that is required is proof *aliunde* of a crime. The question is whether the Act meant that. The main motif that runs through the whole of that Ordinance was to adopt the laws of evidence to those which obtain in England. There is no doubt, although it was not a rule of law in evidence, it was a well-established principle that there must be not only some corroboration, but something which would corroborate the evidence of an accomplice so as to identify or connect the prisoner with the crime.

[De Villiers, C.J.: I think the practice universally adopted by the Judges here is to warn the jury, to caution them against convicting upon the uncorroborated testimony of an accomplice, but if, notwithstanding such warning, the jury found the accused guilty, then the Court is bound under this Act if there is corroboration of the fact that a crime has been committed to confirm the conviction.]

Sir H. Juta submitted that the framers of the Ordinance had in their minds throughout the practice in the English Court. Counsel cited *Regina v. De Kock* (1 Roscoe, 441), *Queen v. Diedrich and Another* (3 Laurence's High Court Reports, 359), *Queen v. Bitterbosch and Others* (3 Laurence's High Court Reports, 495), *Regina v. Swart* (6 Shiel, 102), *Rex v. Twalatunga* (20 Supreme Court Reports, 425), *Queen v. Adams* (4 Shiel, 122), *Rex v. Charteris* (21, Supreme Court Reports, 441), and *Rex v. Matyolweni and Others* (21 Supreme Court Reports, 368). Counsel afterwards argued that there was no corroborative evidence of the commission or attempted commission of a crime. In the second case especially he submitted that there was no proof *aliunde* of an attempt to commit a crime. Kline could never have made an attempt in regard to the second building to commit arson. To prove crime an overt criminal act must be proved. *Queen v. Topken and Another* (1 Ap., 471).

[De Villiers, C.J., intimated that they would hear Mr. Jones on the last point.]

Mr. Jones said that he had not come into Court to meet this point. At the trial, the point was not raised as to whether there was upon the record corroboration of the fact that a crime had been committed. This point never arose at all during the trial, and he submitted that, by the Act of 1896, it could not now be raised. On the point of whether *aliunde* there was proof that a crime had been committed, counsel submitted that there was ample evidence that a crime had been committed.

[De Villiers, C.J., asked counsel to confine his attention to the case against Saacks and Hoffmann.]



Mr. Jones said that Kline took the benzine at the instigation of the accused, and he left the benzine on the premises, 65, Burg-street. The crime was complete, so far as Hoffmann and Saacks were concerned, when Kline went and took the benzine to the premises. If a man gave another man money to commit a crime, and that man made the attempt, surely it was sufficient to convict the instigator.

[De Villiers, C.J.: When was the attempt made to commit the arson?]

Mr. Jones: When he took the benzine to the premises.

[De Villiers, C.J.: But he took the tins out again.]

Mr. Jones: Yes, but he had left them there, and the jury had to consider the whole of the circumstances.

[De Villiers, C.J.: In the other case there was evidence of preparation for arson, but in this case there was no evidence of preparation for arson.]

Mr. Jones pointed out that it was in evidence that Hoffmann paid the expenses of the defence of Kline when he was charged with housebreaking with intent to commit arson.

[Hopley, J.: For breaking into Hoffmann's own property?]

Mr. Jones: Yes.

[Hopley, J.: That is a very curious proceeding.]

Mr. Jones having been heard further, and Sir H. Juta having briefly replied,

De Villiers, C.J.: In the case of William Hoffmann the following questions were reserved: "(1) Whether by the law of the Colony, as it at present stands, a conviction can be sustained upon the uncorroborated testimony of accomplices other than the corroboration of the fact that a crime has been committed." I think the form in which the question should have been put is not quite correct, for it should have said, "the crime has been committed," and in that form it will be answered. "And in case the first question is decided against the prisoners, (2) whether there is upon the record such evidence as corroborative evidence." That is again rather awkwardly put, but I take the question to mean this, whether there is upon the record corroboration of the fact that the crime had been committed. "(3) Whether secondary evidence of the contents of the insurance policy should have been admitted under the circumstances proven." As to the first question, the best answer is to quote the terms of the 12th section of the Ordinance 72 of 1830: "And be it further enacted and declared, that it shall and may be lawful and competent for any Court or jury in any case which shall or may be lawfully tried by such Court or jury respectively, to convict any person who shall be tried before any such Court or jury, of any crime or offence charged in the indictment, information or com-

plaint under trial on the single evidence of any such accomplice as aforesaid. Provided always that such crime or offence shall, by competent evidence, other than the single and unconfirmed evidence of such accomplice, be proved to the satisfaction of such Court or jury respectively to have been actually committed. Sir Henry Juta wishes the Court, in fact, to read this proviso as if the words had been added, "actually committed by the accused." Now, that is not what is said by the Legislature, and not a single case has been cited in which it has been held that this corroborative evidence must be evidence to the effect that the accused committed the crime. The Court has continually decided here that it is sufficient to prove that the crime which has been mentioned in the indictment has been committed. The cases which have been relied upon by Sir H. Juta do not, in my opinion, support his contention at all. In the case of *Regina v. De Kock* (1 Roscoe, 441), I think the remarks of the Chief Justice clearly show that he took the same view which the Court has afterwards taken. There the appellant was a sheep owner, and two of his shepherds were accused by him of taking, one a sheep and the other a goat. They gave information that the appellant, on the mountains in 1865, caught two stray sheep and marked them with his own mark. One Morkel gave evidence that he lost sheep on the mountains in 1865. If Morkel had given evidence that the sheep which were found afterwards with the mark of the accused were sheep which had been stolen from him, the case would have been in point. The Chief Justice, however, was of opinion that the unsupported evidence of accomplices should not be taken as proof of the committal of a crime, and the evidence of Morkel should not be considered as any corroboration. In the case of *Queen v. Bilterbosch* the learned Judge-President said: "Had these prisoners been tried before a jury, the Judge would have warned them that it was unsafe to convict on such evidence." And because in such a case the jury would have acquitted, the learned Judge-President held that as this was a case before a Resident Magistrate, the judgment should not be confirmed. Mr. Justice Laurence also thought it was the duty of the Magistrate as a Judge, to warn himself, as a juror, that it was unsafe to convict on such evidence as he had before him. He does not say that it would have been illegal for a jury so to convict. The warning mentioned by him is invariably given by Judges where the conviction depends upon the evidence of accomplices, but it has always been held by this Court that, as a matter of law, the jury may convict provided that evidence *aliunde* is given to prove that the crime charged in the indictment has been

actually committed by someone. Such was the effect of the decision of a full Court of three judges in *Regina v. Schwartz* (6 Sheil, 102), and it is really too late to question the correctness of that decision. Coming to the question raised in the present case, whether there is clear proof that the crime of arson has been actually committed, we have first of all the evidence of Bisset, of the Fire Brigade, who says it was evident that there had been a deliberate attempt to burn this place, and who speaks as to finding bundles of matches upstairs. Then there is the evidence of Grant, the detective head constable, who also was at the fire. He said he noticed footprints and bundles of matches, oil on the ground, and rags attached to the goods, with the apparent object of setting them on fire. Part of the things were actually burnt and traces of the arson were found in other parts. This evidence is quite independent of the evidence of the two accomplices, Kline and Bailey, so that the second question also raised in this case must be answered against the accused. Then there is the third question, as to the insurance policy. Well, I do not think it is necessary to go into that question at all, because evidence of the insurance policy was not required. This was a case in which the accused was charged in the indictment as amended with setting fire to a certain house there situate, and in the estate of the late Annie Sarah Hall, and it was therefore not necessary for the purposes of conviction in that case to prove that it was done for the purpose of the insurance at all. Where a person attempts to set fire to the house of another person he is guilty of an attempt to commit arson, whether there is any intent to fraudulently obtain insurance money or not. Where a person burns his own house the question whether he is guilty of "brandstichting" or arson must, under any law, depend upon the further question whether the deed was done with the object of injuring others (Van der Linden, Inst., 2, 4, 7). If the object be to defraud an insurance company the intent would certainly be to injure another so as to bring the offence within the definition. But here the house itself belonged to another person although the goods inside belonged to the appellant. The two first questions must be decided against the appellants.

Buchanan and Hopley, J.J., concurred.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### REVIEW.

REX V. THYS AND OTHERS. } 1906.  
 } Aug. 1st.

Native location—Private property  
—Act 45 of 1882.

Hopley, J.: A matter came before me in review from the Special Justice of the Peace of Vosburg, District of Victoria West, in which some dozen or so people who, by their names, I should say, were Hottentots, were charged with contravening Section 15 of the Municipal Act of 1882 in that on a certain day "they made a noise or disturbance upon private property within the municipality, so as to be a public nuisance in the neighbourhood of such property." The evidence is that some police constables hearing a distant noise, went up to a location and found these people shouting and dancing and making a great noise in the location. The first point that occurs to me is the question of whether a location would be private property within the meaning of the section. But that is not the only difficulty with regard to this record. There must be some regulation or other promulgated under the Municipal Act, because certainly the 15th section does not apply to such an offence as this. That section of the Municipal Act deals with persons who may be electors or who may be elected. Under the circumstances it seems to me that with the irregularities in this record, the doubts which it raises are so great that the proceedings must be quashed. Proceedings quashed.

### PROVISIONAL ROLL.

FRIEDLANDER AND DU TOIT } 1906.  
 V. STEPHAN. } Aug 1st.

Dr. Rainsford moved for an order of civil imprisonment to be stayed upon payment of £2 a month and costs, in terms of consent paper.

Order granted in terms of agreement contained in consent paper.

### KETS V. NORDEN.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be superseded, the debt having been paid. Provisional order superseded.

**REEDERS V. DALY.**

Mr. Toms moved for provisional sentence on a bill of exchange for £100, with interest.

Order granted.

**SUTHERLAND V. OWBRIDGE.**

Mr. Van Zyl moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £100, certain property having been attached and a payment made on account, leaving a balance owing of £36 4s. 6d. Counsel presented an affidavit by plaintiff, who said that the defendant could pay if he would.

Order granted.

**LEGGO V. BARNETT.**

Mr. Howes moved for the final adjudication of the defendant's estate as insolvent. It was stated that defendant had left the Colony.

Order granted.

**ATTWELL AND CLOETE V. VAN DER HEEVER.**

Mr. Burton moved for the final adjudication of the defendant's estate as insolvent.

Mr. Upington (for defendant) applied for a postponement owing to the dangerous illness of the defendant, and presented affidavits by her husband (J. D. Van der Hoeve) and her medical attendant. Defendant resides at Lady Grey, Aliwal North.

Mr. Burton presented a replying affidavit to the effect that the defendant was not ill when the summons was served, and that for some considerable time past her husband had conducted her business.

Ordered to stand over until tomorrow week.

**NORWICH UNION V. BARSDORF.**

Dr. Rainsford moved for provisional sentence on a mortgage bond for £500, due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and rents to be attached by the Sheriff.

Order granted as prayed.

**ESTATE OF HOOJSON V. UYS.**

Mr. Russell moved for provisional sentence on a mortgage bond for £875, with interest, being due by reason of the non-payment of interest, and also for the pro-

perty specially hypothecated to be declared executable. Counsel further applied for judgment under Rule 329d for £318 balance of moneys due for goods supplied, and £36, premiums of life insurance, and costs.

Order granted as prayed.

**PHILIPS V. LEA.**

Mr. Inghbold moved for provisional sentence for £550, balance of mortgage bond, with interest, and for the property specially hypothecated to be declared executable, and rents to be attached.

Order granted.

**ESTATE HIDDINGH V. GINSBERG.**

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. Alexander moved for the appointment of Mr. J. H. N. Roos, secretary of the Board of Executors, as provisional trustee of the insolvent estate, with power to collect rents falling due.

Order granted, appointing Mr. Roos as provisional trustee with the usual powers.

**STAAL V. DEENLER.**

Mr. Roux moved for provisional sentence on a mortgage bond for £2,000, with interest, being due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable, and costs.

Order granted.

**DOOVEY V. GANIE.**

Mr. Benjamin moved for a provisional order of sequestration to be made final.

Order granted.

**HOFMAN V. FISHER.**

Mr. Toms moved for provisional sentence on an acknowledgment of debt for £125, with interest.

Order granted.

**LAWRENCE V. LAWRENCE.**

Mr. Gutsche moved for a decree of civil imprisonment upon an unsatisfied judgment, the amount owing being £47 13s. 6d.

Defendant said that he had no means of paying. The matter arose out of costs in an action brought against him by his brother in regard to certain

ground over two years ago. He had paid £40 7s. 11d, and he owed this balance.

Decree of civil imprisonment granted, with costs, operation to be stayed upon payment of one shilling per month, with leave to plaintiff to move the Court for an increase of the order when so advised.

#### CLAASEN V. SWART AND NEL.

Mr. Roux moved for provisional sentence for £200, balance of a promissory note made at Oalitzdorp, and for interest and costs.

Hopley, J. pointed out that the promissory note was without date.

Mr. Roux said that the note was not paid at due date.

Provisional sentence granted, with interest as prayed.

#### HOLSTHUIZEN V. SWART.

Mr. Sutton moved for provisional sentence upon a promissory note for £600, with interest and costs.

Order granted.

#### FIRTH V. EXECUTOR ESTATE BROWN.

Mr. Toms moved for provisional sentence on a mortgage bond for £900, less £50 paid, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### BLAKE V. GOLDING.

Mr. Bailey moved for provisional sentence for £1,150, balance of a mortgage bond, due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### STEGMANN V. KLAASSEN.

Mr. Howes moved for provisional sentence on two mortgage bonds for £100 and £50 respectively, with interest. The bonds had become due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ESTATE GLYNN V. JACOB.

Mr. Swift moved for provisional sentence for £1,200, balance of mortgage bond, with interest, bond due by reason

of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted as prayed.

#### CROYDON ESTATES, LTD. V. BOTHWELL.

Mr. De Waal moved for provisional sentence on certain conditions of sale for £33, being instalments due in respect of the purchase of certain ground at Stellenbosch, with interest and costs.

Mr. Upington (instructed by the person holding defendant's general power of attorney) applied for a postponement pending the defendant's return from up-country.

Mr. De Waal said that he did not oppose the postponement, but he submitted that costs of the day should be paid by defendant.

The matter was postponed until the 23rd August, costs to be costs in the cause.

#### PENTZ BROS. V. BERMAN.

Mr. P. S. T. Jones moved for confirmation of a certain writ of arrest, on which defendant was arrested on the 27th July, and released on bail on the following day. The allegation was that defendant was about to leave the Colony, and that he owed plaintiff £105 on an undertaking or promissory note, and £300 on a promissory note.

Mr. Alexander (for defendant) submitted that unnecessary costs had been incurred by plaintiff in coming to court to obtain confirmation of the writ of arrest, seeing that defendant had furnished security, and that he intended to defend the plaintiff's claim, on the ground that he had received no consideration for the notes in question.

Counsel having been heard in argument on the facts.

Hopley, J., said that the Court would confirm the writ of arrest, question of costs to abide result of action.

#### MULLER V. CRAFFORD.

Dr. Greer moved for provisional sentence on certain promissory notes for two sums of £50 each, with interest and costs.

Order granted.

#### ILLIQUID ROLL.

GUSE V. WINTERBACH. { 1906.  
Aug. 1st.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £115 7s,

9d., with interest and costs, including costs of application, for leave to sue *in forma pauperis*. The amount sued for represented trust money.

Order granted.

LAWLEY AND CO. V. HUTTON.

Dr. Greer moved for judgment, under Rule 319, in terms of declaration for £68 4s. 8d., for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

BLEIBERG, GREENBERG AND CO. V. GOLDING.

Mr. Benjamin moved for judgment under Rule 329d for £26 2s. 1d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

HAMMERSCHLAG V. KUHN.

Mr. Van Zyl moved for judgment under Rule 329d for £47 10s. 11d., with interest *a tempore morae* and costs.

Order granted.

PREUSS V. ELSNER.

Mr. Van Zyl moved for judgment under Rule 329d for £121 9s. 6d., rent, with interest *a tempore morae* and costs.

Order granted.

WHARRAN V. WEIDNER.

Dr. Greer, for defendant, moved under Rule 330a for leave to sign judgment against plaintiff (Wharran) for not proceeding with his action within the time stipulated by the Rules of Court. The matter related to a claim for purchase price of certain land.

Order granted.

SCHWOB V. JOSEPH.

Mr. McGregor, for defendant, moved under Rule 330a for leave to sign judgment against plaintiff (Schwob) for not proceeding with his action within the time stipulated by the Rules of Court. Plaintiff, who was stated to be in New York, had proceeded against defendant by motion to recover a sum of £354, and had been ordered to proceed by action.

Order granted.

ZEEDEBERG AND DUNCAN V. DESAI.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £30 18s. 10d., less £10 paid on account.

Order granted.

ROSENBERG V. LUNTZ AND ANOTHER.

Mr. Benjamin moved for judgment under Rule 318 in terms of declaration for two sums of £57 17s. and £6 12s. on certain judgments of a Transvaal Court, defendants having been duly barred.

Order granted.

SELLAR BROS. V. EASTERN PENINSULA ESTATE WATERWORKS SYNDICATE, LTD.

Mr. Sutton moved for judgment under Rule 329d for £870, being the purchase price of plates and trucks, with interest and costs.

Order granted.

BLACK V. MCGREGOR.

Mr. Watermeyer moved for judgment under Rule 329d for £1,496 10s., price of certain consignments of horses and donkeys, with interest and costs.

Order granted.

DRUMMOND V. HAMMOND AND CO., LTD.

Dr. Greer (for applicant) moved for leave to sign judgment against Hammond and Co., for not proceeding with their action within the time stipulated by the Rules of Court.

Mr. Upington (for respondents) said that the respondents had given notice of motion for leave to purge default, and he now applied for leave to file plea.

Affidavits having been read, and counsel heard in argument,

Hopley, J.: The first application I have to deal with is one to remove the bar which has been filed against the plaintiffs proceeding with their action. It would appear that they had more than two months ago summoned the defendant Drummond in an action for debt. For some reason which they have not explained, they allowed the time fixed by the Rules of Court to go by, so that they may be barred, and the defendant become entitled to apply for judgment to be signed against them. He has now set such an application down for hearing to-day, but the original plaintiffs also put down a motion for the purpose of getting their default purged. Now, it is usual in such a case that the plaintiff or defendant, or whoever wishes to purge his default and get rid of the effect of his own *laches*, if he shows merits and cause for removing the bar,



to pay the costs so entailed. I think that the bar in this case should be removed, because, clearly, the plaintiffs have shown good merits and some good reasons why this matter should be reopened, and they should be allowed to purge their default. At the same time they have not given any reasons at all why they were in default. They may have good reasons. Certain things are within the knowledge of the Court, such as, for instance, that the plaintiffs have had to prosecute their local manager and remove their business back to London, and so on, and the circumstances may be such as to give them some sort of excuse, especially when the circumstances were known at the time to the defendant. He has lain by and tried to take advantage of the difficult position of the plaintiffs. Then there is the vast discrepancy between what is upon the documents and what the respondent puts on affidavit. That disinclines me from being too favourable to him in the matter of costs. The order of the Court will be that the bar be removed, and leave given to the applicants to file their declaration, costs to be reserved. The other matter, for leave to sign judgment, will therefore fall away. There will be no order on that application.

#### COLONIAL GOVERNMENT V. DUBOIS.

This was an application for leave to sign judgment against respondent for not proceeding with his action within the time stipulated by the Rules of Court. Sir H. Juta, K.C., was for applicants; Mr. Pyemont was for respondent.

Affidavits having been read,

Mr. Pyemont said he was instructed to crave the indulgence of the Court, so as to secure an extension of time for the filing of plaintiff's declaration, provided that the case be tried in the October term. He stated that respondent had proceeded to London, with a view of obtaining an appointment in Morocco or Algeria.

Counsel having been heard in argument on the facts,

Hopley, J.: In this case, if in any way I could see that according to the Rules of Court or commonsense I should be able to assist the respondent, I should be inclined to do so, because one does not like to make matters more difficult for a person who has a claim against a defendant like the Government, Government which is always here, which is part of the country, and which, unless there were some cogent reason shown, such as the loss of testimony, one cannot conceive, would suffer very much damage by the delay which the plaintiff might be lax enough to allow in the prosecution of his case. At the same time, the Rules of Court are made for everybody, and amongst others for the Government of this country to

abide by. If they break the Rules of Court, they suffer for it, and so they also have a right to take advantage of the Rules of Court. The respondent has made a claim for unlawful dismissal, apparently, from the Constantia Wine Farm, where, I think, he was manager, and more than a month after making such claims, by issuing summons to that effect claiming a large sum of money—£5,000—he left this country. It is now explained that he went away suddenly, because he saw some prospect—a prospect only, a hazy prospect, not founded upon anything apparently but hope—that he might get employment in Algeria or Morocco, and so he left this country, as far as one can see, without any definite instructions to his attorneys to proceed in the matter. At all events, nothing has been done, this claim for £5,000 is hanging over the applicants, they want to get rid of it, and they, therefore, come under the Rules of Court and say the requisite time has elapsed, and ask that this claim should be dismissed and judgment should be signed against the plaintiff. It is now said that I should accord some indulgence to him, because he went away for a *bona fide* purpose, and for the purpose apparently of getting funds to enable him to fight the action. But it is not explained to me how, if he gets this employment, he is going to be able to fight this action. It seems to me that the fact of getting employment somewhere in the North of Africa would rather have the opposite effect. I think an application like the present is very much strengthened by the fact of the person who is in default actually leaving the country and going thousands of miles away, whence it would be very unlikely that he would return for the purpose of prosecuting a doubtful claim. I do not say that this is a doubtful claim, but at all events there are always two sides to a case. So that, rather than let this matter be hanging on, I think this application should be acceded to. Of course, this won't debar Mr. Dubois when he comes back to this country, if he gets funds, from bringing his action afresh. He will then, I suppose, have to pay the costs incurred up to this stage, but he may start his action *de novo*. It seems to me that all the law, the procedure, and the equity of the case is in favour of acceding to the present application. Judgment, therefore, will be signed against the plaintiff (Mr. Dubois) as prayed.

Mr. Pyemont asked if leave would be granted to the plaintiff to move to set aside the judgment, instead of proceeding *de novo*.

Hopley, J., said that he did not see how any advantage would accrue to plaintiff if he gave such leave. The application of the Government would be granted, with costs.

*Ex parte* VAN LITSENBORGH.

Bail—Charge of murder.

*The Court admitted a woman charged with murder to bail; the Crown consenting thereto.*

This was an application upon notice to the Attorney-General for an order for the release of petitioner on bail. Mr. Burton was for petitioner; Mr. Nightingale was for the Crown.

Mr. Burton said that the applicant had been arrested on a charge of child murder. Her daughter had given birth to a child. The daughter had also been arrested on a charge of concealment of birth, but she had been released on bail. Counsel also applied for the release of applicant on bail.

Mr. Nightingale consented to the application, and suggested that bail should be fixed in personal recognisances of £500 and two sureties of £500 to the satisfaction of the Resident Magistrate of Piquetberg.

Order granted for release of applicant on bail, of her own recognisances of £500 and two sureties of £500, to the satisfaction of the Resident Magistrate of Piquetberg.

#### GENERAL MOTIONS.

COOPER V. MEYER. { 1906.  
 { Aug. 1st.

Mr. W. Porter Buchanan moved, in terms of consent paper, for the removal of trial to the ensuing Circuit Court to be held at George.

Application granted in terms of consent, costs to be costs in the cause.

#### ALGOA MILLING CO. V. BELL AND CO.

This was an application by the Algoa Milling Company for leave to purge default and file plea in an action brought against them by respondents, which is set down for hearing on the 10th August.

From the affidavits, it appeared that there had been correspondence between the parties with a view to a compromise, but that this had not been arrived at, and that eventually applicants were barred from pleading.

Mr. Schreiner, K.C. (with him Mr. Upington), was for applicants; Sir H. Juta, K.C., was for respondents.

Mr. Schreiner said it was really extraordinary that opposition should be offered to such an application as this, and he asked that the Court should mark its sense of the attitude of respondents by ordering them to pay wasted costs. It was impossible, after

the breaking off of negotiations to communicate with applicants, who were at Port Elizabeth, in a case of such a detailed and commercial nature within the time allowed by the Rules of Court. The case involved an important point of commercial law in regard to a c.i.f. contract. The respondents had never produced the charter party of the Benares, and there was no basis upon which applicants could make a tender.

Sir H. Juta submitted that in this case there was absolutely no *bona fide* desire to deal with the matter at issue, but that it was merely a question of gaining time and nothing more. Defendants had admitted that they were liable. The matter arose out of a contract for certain Australian wheat to be shipped to the Milling Company on certain terms. Plaintiffs alleged that they complied with the contract. The declaration went on to say that thereafter defendants gave notice that they refused to carry out this contract, and thereupon the wheat was sold, as plaintiffs alleged, at the best possible price in the market, and they now sued for the difference in price. Defendants now pleaded non-liability.

Hoploy, J.: In this matter it seems to me that there is a considerable amount of money involved; as far as I can see, there are also some points of law involved, and there seems to have been considerable correspondence between the parties, starting with a view of avoiding litigation, and upon which correspondence it might possibly be said that one or other of the parties would not be too strenuously pushed. Every party has a right to take advantage of the wording and strict letter of the Rules of Court; but still, in the application of such rules, the Court is always guided by equitable principles to see that they are not made use of for the purpose of obtaining an unfair advantage. I do not say that there has been such an attempt in the present case, but, at all events, the correspondence has been prolonged until after the 11th July; there are statements on the 17th July asking the applicants to be quick, or they would be barred, and I have no reason to suppose that the present applicants are misstating the facts when they say that between the 17th, when they knew they would really be required to plead or suffer the consequences of not pleading, and the 24th July, they had no opportunity of satisfactorily drawing and filing their plea. On the 24th July they were able to tender and put forth a plea, the merits of which I cannot estimate, but it is one which eminent counsel in this court consider to be a statement of their case upon which they are entitled to defend this action. The question is whether, under the circumstances, the tender of the 24th July was not a reasonable tender, especially in view of the fact that

it was accompanied with an offer to pay wasted costs. The Court is always loth to shut out a defendant, who says that he has a genuine defence—and here I am told he has a genuine defence—from setting his case forward, simply because he has allowed a certain time to elapse. Relief is almost constantly given in such cases, and I think this is a case where relief should be given. The order will be that the bar be removed, and defendants have leave to file their plea. Defendants, however, I think should be kept to their offer to pay wasted costs, in terms of their tender of 24th July, costs after that date to be costs in the cause. The set down of the action for the 10th August will, therefore, be removed from the list.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROBAART V. ESTATE { 1906.  
PROBAART. { Aug. 2nd.

Husband and wife—Mutual will  
—Election.

*Husband and wife, married in community, directed by mutual will that three-fourths of the joint estate should be invested and the interest thereon paid to the survivor, and that, on the death of the survivor, the respective heirs of the testators should take their respective shares. After the death of the husband, the wife, who is plaintiff, received a fourth of the joint estate, unencumbered, and received interest on the remaining three-fourths; and she now claimed to be entitled to receive another unencumbered fourth share, and to continue to receive interest on the remainder of the joint estate.*

*Held, that having elected to enjoy interest on more than she was entitled to by virtue of community, she was not entitled to claim during her life time that her full half share of the community should be paid to her unencumbered.*

This was a special case submitted for the judgment of the Court. The case was stated in the following terms:

1. The plaintiff is the widow of the late Gilbert a'Beckett Probart, to whom she was married in community of property. The only child of the marriage died before his father and whilst still a minor.

On the 25th April, 1901, Mr. and Mrs. Gilbert a'Beckett Probart executed the will, and Gilbert a'Beckett Probart died on the 29th April, 1901, leaving the will of full force and effect, and the defendants are the duly-appointed executors testamentary and assumed—the plaintiff having been nominated as an executor under the will, but having refused to act.

3. By the will it was provided that within six months of the death of the first dying an inventory should be made of the whole of the joint estate, and at least three-fourths of the sum ascertained should, upon recovery of the outstanding debts, or after realisation of any of the property, be invested upon security, and all interest accruing therefrom should be paid to the survivor, and the capital so invested should remain the property of the joint estate until the death of the survivor, when it should be divided amongst the respective heirs of testator and testatrix, as provided in the will.

4. The will further provided that the survivor should be at liberty to retain the household furniture for her use during her life, and to live in a certain dwelling-house free of any rent or charge for same, but, should the survivor elect to sell or dispose of the furniture and dwelling-house, she was authorised and empowered so to do, provided the price for the landed property was approved of by the co-executors. But should she not sell during her lifetime, then the same, with all the other assets of the joint estate, should be realised by public auction after the death of the survivor for the benefit of the said heirs. The remaining landed property was to be realised by auction within six months of the death of the first dying, and all outstandings were to be collected, and the capital obtained should be invested as aforesaid. The testators bequeathed to the survivor all jewellery, to be disposed of at her entire discretion.

5. The will lastly provided "in appointing their respective heirs to all their estate which shall be left at the death of either of them" . . . the testa-

tors declared . . . that the testator appointed certain persons his heirs and the testatrix appointed certain different persons her heirs, and "the said persons respectively nominated by the appearers shall be the sole and universal heirs of the respective shares of the testators, provided, however, that such heirs shall not be entitled to claim their inheritance until after the death of the survivor."

6. The executors have framed and filed five liquidation accounts, which have been accepted by the Master, and copies of which are annexed.

7. According to the accounts, the executors have awarded and paid the plaintiff one-quarter of the joint estate and the interest on three-fourths of the joint estate as realised, exclusive of the value of the dwelling-house in paragraph 4 mentioned.

8. The plaintiff has received and enjoyed the possession of the dwelling-house, which is in need of repairs. The plaintiff is desirous of selling the same and disposing of the proceeds as she pleases, but the defendants refuse to allow her to dispose of the proceeds.

The plaintiff contends: (a) That she is entitled to one-quarter of the joint estate by virtue of her husband's will; (b) that she is entitled to one-half of the joint estate by virtue of the community as her absolute property; (c) that she is entitled to receive the interest arising from the remaining quarter of the joint estate; (d) that she is entitled to alienate the quarter and the half by will or otherwise, as she pleases; (e) that the proceeds of the sale of the dwelling-house can be alienated by her as she pleases.

The defendants contend: (a) That plaintiff is not entitled to be paid one-half of the joint estate; (b) that plaintiff, having adiated under the joint will and taken benefits thereunder, her half-share of the joint estate consists of the one-quarter share already paid to her, and of another quarter share which must be administered in terms of the joint will, by which plaintiff is bound and which she cannot alter; or (c) that at the most the plaintiff's share consists of the quarter share already paid to her, and a half share of the balance of the three-fourths invested, which will have to be distributed eventually according to the joint will; (d) that the proceeds of the dwelling-house, if sold during plaintiff's lifetime, must be dealt with according to the five liquidation and distribution accounts already filed, that is, one-quarter to be paid to the survivor and the balance of three-fourths to be invested whereon plaintiff is entitled to the life interest. If the dwelling-house is sold only after plaintiff's death, then the whole of the proceeds should be distributed as in paragraph (b).

Sir H. Juta, K.C., for plaintiff. Mr. Searle, K.C., for defendants.

Sir H. Juta: The question to be decided is whether there has been a massing of the estate. The language is very clear, and his lordship would find that first of all they left certain rings to certain persons, and they said the cost of these should be borne by the joint estate. As regards that no doubt there was a massing, but all the elements which went to make up a massing of the estate, namely, the joint disposition to some common heirs were entirely wanting in the case. From the way the parties appointed their heirs, each meant to deal with his or her own half. If the will was to be read simply as the will of the first dying, then the plaintiff was entitled as widow to the benefits. If it was clear, on the other hand, that the will of the first dying was dealing with property other than the property of the first dying, then he would admit that it was a question of election. Counsel submitted that the testator was not dealing, and did not intend dealing, with more than his own half.

Mr. Searle said it was not so much a question of massing as it was one of election. It was difficult to argue that there had been a consolidation of the joint estate after the death of the survivor. Counsel submitted it was quite clear from the first page of the will that they intended dealing with the whole of their joint estate. Mrs. Probart could not take her clear half now because she has had benefits under the will. She had had the usufruct of the three-quarters but she could still dispose of the quarter share to other heirs if she wished.

De Villiers, C.J.: This will is in many respects an extraordinary one, but one point is perfectly clear, and that is that during the lifetime of the survivor the will itself disposes of more than the deceased testator was entitled to dispose of. The parties were married in community of property. Therefore, without the consent of the plaintiff the testator could not have directed an investment of three-fourths of the joint estate, of which one-half belonging to him. He, therefore, directed by his will an investment of one-quarter which did not belong to him at all. It does appear that after the death of the survivor the shares are to come back to the respective heirs, but that does not affect the point which I am now considering. It would be a perfectly intelligible contention if, even now at the eleventh hour, the plaintiff said: "I now demand my one-half of the estate." That would be perfectly intelligible, and there is nothing in the case of the *South African Association v. Mostert* (Buch. 1868, p. 286-1869, p. 231-1873, p. 31, L.J., P.C. 1872, p. 41), which would prevent her setting up that claim. In that case it was held there was a general disposition, but as the survivor had not accepted benefits, she was entitled to repudiate the will. In the

present case—I do not decide the point—it may well be argued that as the property is not here consolidated into one mass for the purposes of joint disposition one of the conditions fail, and that, therefore, she is entitled to revoke the will. The plaintiff's proposition is that she can take the benefit of the interest to which she is not entitled, and yet she is entitled to claim her half-share. Here the doctrine of election comes into play. If she does not repudiate the will, but accepts benefits to which she is not entitled out of the joint estate, she cannot retain those benefits and at the same time reject a portion of the will. That being so, I am of opinion that the plaintiffs' contentions cannot be upheld in full, nor does it appear to me that the defendants' contentions can be upheld. The view I take of the case is that there should be a declaration as follows: (a) That the plaintiff is entitled to one-quarter of the joint estate under the will; (b) that having elected to take interest on more than her one-half share of the estate she is not entitled during her lifetime to claim any portion of the three-quarters of the joint estate directed by the will to be invested; (c) that she is entitled during her lifetime to interest on such three-quarters; (d) that she is entitled to alienate one-half of the joint estate by will; (e) that one-quarter of the proceeds of the dwelling-house, if sold during the plaintiff's lifetime, must be paid to the plaintiff, and the balance of three-quarters invested as directed by the will. If sold after her death one-half of the proceeds to belong to her estate, and the remaining half to the estate of the testator. The costs to come out of the joint estate.

[Plaintiff's Attorney: H. G. Wilmot;  
Defendants' Attorneys: Walker and  
Jacobsen.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.                      { 1906.  
   { Aug. 2nd.

Mr. Close moved for the admission of Aubrey Thomas Sanders as an attorney. Counsel stated that applicant had been admitted to practise in the Supreme Court of Ireland and the Supreme Court of the Transvaal.

Application granted, oath to be taken before the Resident Magistrate of Libode, Pondoland.

## PROVISIONAL ROLL.

### SMITH V. SCHELTEMA.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### CAMROODIEN V. MAYMON.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### THURSTON AND CO. V. RICHES.

Mr. Toms moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### FEDERAL SUPPLY AND COLD STORAGE CO. V. GOLDSMITH AND CO.

Mr. Bailey moved for the final adjudication of the defendants' partnership and private estates as insolvent.

Final order granted.

### FEDERAL SUPPLY AND COLD STORAGE CO. V. GAFFNEY.

Mr. Watermeyer moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### IMPERIAL COLD STORAGE AND LAWRENCE AND CO. V. COMAY.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

### BERGHUYS V. ROSENBERG AND SWIRSKY

Mr. Bailey moved for provisional sentence on a mortgage bond for £900, with interest, the bond having become due by reason of notice given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### HOME V. AMERICA

Mr. Roux moved for provisional sentence on a mortgage bond for £100, with interest, the bond having become due by reason of non-payment of interest; counsel also applied for the property



specially hypothecated to be declared executable.

Order granted.

LOUW V. LEWIS.

Mr. Roux moved for provisional sentence on a promissory note for £15 10s., payable at Prince Albert, with interest and costs.

Order granted.

LAWRENCE V. KAHN.

Mr. Pyemont moved for provisional sentence on a promissory note for £483 2s., payable to W. H. Lawrence or order at the Standard Bank, Cape Town.

Mr. Roux (for defendant) read an affidavit by his client, who said that he was not liable for any larger sum than £33 2s. at present, and for a promissory note for £450, payable in October next. Defendant said that he was a publican carrying on business at the United South African Hotel, Cape Town, and the matter in dispute arose out of the terms on which he took over the hotel.

Mr. Pyemont read a replying affidavit by plaintiff, who denied that the position was correctly stated by defendant, but said that he had no wish to resume the business of publican, and he would accept defendant's proposal to pay £33 2s. and give a promissory note for £450, provided that he (Kahn) paid the costs.

Buchanan, J.: There is no dispute really between the parties now. Provisional sentence will be granted for £33 2s., defendant within three days to give renewal for balance of promissory note sued upon, with interest, in terms of contract between the parties. As to the costs of the suit, the plaintiff was clearly entitled to come into court in this case, and he must have his costs. Judgment for plaintiff, with costs.

ILLIQUID ROLL.

WRENSCH V. MOSKOWITZ. } 1906.  
Aug. 2nd.

Mr. P. S. T. Jones moved for judgment under rule 329d for £55 1s. 9d., balance of account with costs.

Order granted.

BRIGHT V. THOMSON.

Dr. Rainsford moved for judgment under rule 329d for restoration and delivery of scrip of certain 200 fully paid-up shares in the Saldhana Bay Harbour and Estates, Ltd.

Order granted.

REHABILITATIONS.

Mr. J. E. R. de Villiers moved for the discharge from insolvency of Jacobus Petrus Hough.

Granted.

Mr. De Waal moved for the discharge of Gideon Scheepers van der Westhuisen.

Granted.

GENERAL MOTIONS.

MYBURGH V. MYBURGH.

Mr. Pohl moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute.

ROUS V. ROUS.

Mr. Benjamin moved for a decree of divorce, plaintiff to have custody of the child, with maintenance at the rate of £2 10s. a month, in default of defendant's compliance with an order of restitution of conjugal rights.

Rule absolute.

*Ex parte* DAVIES.

Mr. Roux moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* VAN DER SPUY.

Mr. Pohl moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

FLUCKIGER V. FLUCKIGER.

Mr. Rowson moved for a rule *nisi* to be made absolute, calling upon petitioner's husband to show cause why she should not be granted leave to sue him *in forma pauperis* and by edictal citation.

Rule absolute, Mr. Rowson to be counsel and Mr. W. G. Coulton to be attorney of the petitioner. The citation was made returnable on the 20th October, personal service, failing which one publication in German in a newspaper circulating in Berne, Switzerland.

MYBURGH AND ESTATE MYBURGH AND THERON V. WALTER.

Mr. De Waal applied for costs of both applications respondent having deliver-

ed certain two documents in respect of which he had failed to obey orders of Court.

Judgment granted for costs.

*Ex parte* VAN RYNEVELD.

Mr. P. S. T. Jones moved to make absolute a rule *nisi* authorising presumption of the death of W. H. de Villiers.

Rule absolute.

DE KLERK V. DE KLERK.

Dr. Greer moved for rule *nisi* to be made absolute, authorising petitioner to sue her husband *in forma pauperis*, and by edictal citation.

Rule absolute, Dr. Greer to be counsel, and Messrs. Dempers and Van Ryneveld to be attorneys of the petitioner. The citation was ordered to be served personally, failing which, publication once in the "Somerset East Budget," and once in the "Government Gazette," and to be returnable on the 12th September.

OOSTHUIZEN V. SAUNDERS.

Mr. Toms moved for a certain rule *nisi* to be made absolute, authorising the attachment of certain property.

Rule absolute.

DISTRIBUTING SYNDICATE V. GARDINER AND EASTON.

Dr. Greer moved for a certain award of arbitrator to be made Rule of Court.

Award made Rule of Court, with costs.

DELPORT V. DELPORT.

Mr. Sutton moved, on the petition of Catherina Delport, of Oudtshoorn, for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Respondent had not heard of her husband for several years, and his whereabouts were unknown to her.

Leave to sue granted, citation to be returnable on the 12th September, personal service, failing which publication once in the "Government Gazette" and once in the "Oudtshoorn Courant."

*Ex parte* BESTER.

Mr. Van Zyl moved for the appointment of a trustee in the insolvent estate of Constant Johannes Benjamin Laub-scher, of Vlamink's Vlei, Malmesbury division, to enable certain erven to be

realised. Petitioner had a claim against the estate.

Order granted, authorising the Master to call a meeting of creditors for the appointment of a trustee in the insolvent estate, costs to come out of the estate.

*Ex parte* CRONJE.

Mr. Van Zyl moved for the appointment of H. Jacobus Cronje as *curator ad litem*, to represent petitioner's minor children in the partition of certain property in the Riversdale district.

Order granted as prayed.

*Ex parte* RICE.

Mr. Louwrens moved for the appointment of George Wallace, junior, as *curator ad litem*, to represent petitioner's minor children in the partition of certain property at Oudtshoorn.

Order granted as prayed.

KLEYHAUS AND ANOTHER V. KLEYHAUS

This was an application for leave to purge default in an action instituted by respondent (Theodorus Bernardus Kleyhans) against his wife for divorce by reason of her alleged adultery with the second named applicant (Jacobus Johannes Parsons), against whom damages in the sum of £1,000 are claimed. Applicants asked for leave to file their pleas to the plaintiff's claims. Mrs. Kleyhans also applied for an order against her husband to pay her a sum of £250, to enable her to defend the action and payment of alimony at the rate of £20 per month, pending determination of the suit.

It was stated that Mrs. Kelyhans also counter-claimed for a divorce from her husband by reason of his alleged adultery, with several women, and the second defendant (Parsons) also counter-claims against him for damages for slander. The parties reside at Barkly East, plaintiff being owner of the farm Branksome.

Mr. Burton was for applicants; Dr. Greer was for respondent.

Affidavits having been read, and counsel heard.

Buchanan, J.: The present application involves three points. As to the first there is no difficulty at all, the parties being willing to meet each other. Defendants in this case wish to have leave granted to purge their default, and file their pleas. Plaintiff is quite willing that they should have leave. Applicants will be granted leave to file their pleas on or before Saturday, the 4th inst. The

question of costs of purging default may very well stand over until the trial. An action is brought by Kleyhans against his wife, and the co-defendant and the co-defendant is defending, and he may or may not have to pay costs of this default. The trial will be fixed for the 28th inst., which will give the parties plenty of time to get their witnesses ready. That disposes of the second question. The third application is for an order upon Kleyhans to pay his wife a sum of money to enable her to defend the case, and also for alimony. The parties, it is alleged, are married in community of property, and when that is the case it is not unusual to grant the wife, who is otherwise unable to defend the action, some means to enable her to do so. But in this case it is clear that the wife has money; it is not denied that she received recently £193 from her father's estate, and she has got £100 odd still in her possession. Then, again, the co-defendant is joining in the defence. As to alimony, the trial will take place this month, and it is unnecessary to make any order; but, as the witnesses live in the country, I think the plaintiff should pay to the first defendant's solicitors a sum of £50 for the purposes of the defence. I think the sum of £250 is altogether out of the question. The plaintiff will, therefore, be ordered to pay a sum of £50 to the defendant's solicitors within fourteen days.

*Ex parte JANSSEN.*

This was an application by Roelof Andries Jansen, in his capacity as trustee in the insolvent estate of Annie S. Priest, of Graaff-Reinet, for an order cancelling the commission granted by this Court for the examination of the insolvent and other persons concerning the dealings of the insolvent. Mr. M. Bisset was for petitioner; Mr. P. S. T. Jones, for certain creditors, opposed the application.

Mr. Jones submitted that the whole matter demanded a public inquiry.

Buchanan, J.: These creditors who are opposing can, if they choose, go on with the inquiry at their own cost. The other creditors do not wish to indulge in further costs, and they cannot be compelled to do so. The commission will be re-called, unless the opposing creditors are prepared to furnish the costs for the commission within one month. It was unnecessary for the trustee to come to court with this application, and he might have folded his arms and done nothing further.

Mr. Bisset applied for costs of the present and a previous application.

His Lordship: The costs of both applications will come out of the estate.

*Ex parte BOTHA.*

Mr. J. E. R. de Villiers moved for leave to pass transfer of certain property in the Graaff-Reinet district, in the estate Theron, in which petitioner is one of the executors.

Order granted as prayed.

Buchanan, J., intimated that in cases of this kind it was necessary to present the fullest possible information to the Court.

*Ex parte UYS.*

Dr. Rainsford moved for leave to pass transfer of certain property, in the district of Swellendam, in the estate Uys, in which petitioner is executor testamentary.

Order granted as prayed.

*Ex parte SWART.*

Mr. De Waal moved, on the petition of the brother and tutor of certain minors, for leave to sell a certain farm, situate in the district of Humansdorp, so as to save the expenses of partition. The major brothers and sisters of the minors had accepted the offer made for their undivided shares.

Buchanan, J., said he did not think the offer of the purchasers was sufficient. However, in the interests of the minors, and in order to save further expense, he thought it would be better to grant the order. An order would be granted as prayed.

*Ex parte CLOETE.*

Mr. Upington moved, as a matter of urgency, for the attachment of a certain inheritance, which has become due to one Carl Jacobus Steyn, and for leave to sue the respondent by edictal citation for £34 on an overdue promissory note, with interest. It was stated that respondent was living on Christian de Wet's farm at Heilbron, O.R.C.

Leave granted to attach and to sue by edictal citation, personal service, citation to be returnable on the 12th September.

FLETCHER V. FLETCHER.

Mr. Watermeyer moved, on the petition of Sarah M. A. Fletcher, for leave to sue her husband *in forma pauperis* for divorce.

Ordered to stand over pending petitioner's appearance before the Court in person.

Petitioner afterwards appeared in person.

The matter was referred to Mr. Watermeyer for the usual certificate.

*Ex parte* NEL AND OTHERS.

Mr. Watermeyer moved, on the petition of certain heirs in the estate Ferreira, for leave to mortgage certain landed property in the division of Uniondale, and for the appointment of a tutor to a minor.

Order granted as prayed; Marthinus Petrus J. Ferreira appointed curator to the minor, and authorised to assist the minor to take all necessary steps.

## KAPLAN V. RADEMEYER AND OTHERS.

Dr. Rainsford moved for an award of arbitrators to be made a rule of court.

Award made a rule of court, with costs, as provided in deed of submission.

*Ex parte* VERSTER.

Mr. Payne moved to make absolute a certain rule *nisi*, authorising petitioner to sue his wife *in forma pauperis*.

Rule absolute, Mr. Payne to be counsel, and Messrs. Syfret, Godlonton and Low attorneys to the petitioner.

*Ex parte* MARAIS.

Mr. Watermeyer moved to make absolute a certain rule *nisi*, authorising the Registrar of Deeds to issue a certified copy of certain bonds.

Rule absolute.

*Ex parte* THE ZUID AFRIKAANSCH RYTUIG EN BOUW MAATSCHAPPY BEPERKT.

Mr. Watermeyer moved to make absolute a certain rule *nisi*, authorising reduction of the company's capital.

Rule absolute.

*Ex parte* KLOPPER.

Dr. Greer moved for leave to petitioner to sue in her own name one Robert Russell Hunter for arrears maintenance of a child. Petitioner said that she was deserted by her husband in 1901, and she was unaware of his present whereabouts. She intended to sue her husband for divorce. The Registrar refused to issue a summons against Hunter, seeing that she was married in community, unless she had the assistance of her husband. Counsel cited authorities for the application.

Buchanan, J., said that in this case the debt was due to petitioner's husband, and was incurred before the desertion. An order would be granted authorising petitioner to sue Hunter without the as-

sistance of her husband on condition that one-half of any amount recovered be paid to the Master, pending further orders.

*Ex parte* INSOLVENT ESTATE GOLDSMITH AND CO.

Mr. Alexander moved for the appointment of Ralph Fernandez as provisional trustee of the insolvent estate of Goldsmith and Co., carrying on business at the corner of Buitenkant and Roelandstreets.

Order granted, appointing Ralph Fernandez as provisional trustee, with power to carry on the business pending appointment of permanent trustee.

## OCHBERG V. COLONIAL GOVERNMENT.

*Pro Deo* suit—Conditions—Jury trial.

*The plaintiff, who had obtained leave to sue the Colonial Government in forma pauperis, now applied to have her case set down for trial by jury.*

*Held, that while the Court might attach such conditions as it pleased to the privilege of suing pro Deo, as in this case no conditions had been imposed, the plaintiff had a right to demand a jury.*

Mr. Alexander moved for a day to be fixed for trial by jury of an action brought by applicant to recover £10,000 damages for loss of her husband, owing to the alleged wrongful, unlawful, and negligent conduct of servants of the Railway Department at Salt River Station while deceased was alighting from a train on the 7th October last.

Mr. Howel Jones read an affidavit in opposition to the application for trial by jury on the ground that petitioner had failed to give the notice stipulated in the Act 23 of 1891 (section 5). Counsel admitted that he could not really rely upon the point raised in the affidavit. He pointed out, however, that petitioner was suing *in forma pauperis*, and said that in any event considerable costs would fall upon the Government, and he submitted that she should not be granted privileges which would result in a great increase of costs. The case was a simple one, which could be very easily be tried before a Judge without the assistance of a jury.

Buchanan, J.: When the plaintiff originally applied for leave to sue *in forma pauperis* it was a privilege which the Court could give her, and the Court

in granting the leave to sue *in forma pauperis* could have attached to that any reasonable conditions which the Court thought fit. Leave was granted without any condition at all, and now that the case has proceeded as far as the closing of pleadings, the plaintiff has, as Mr. Jones is forced to admit, within due time demanded the trial of the case by a jury. Therefore, under the law she is entitled to have a jury. It is too late now, I think, to ask the Court to attach a condition to the leave to sue *in forma pauperis*. This ought to have been asked for at the time of application for leave to sue. I do not see why the plaintiff should be deprived of the right that she has by law and she must therefore be granted a trial by jury. The case will be set down for trial by jury on August 22

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

LINDLEY V. JONES (ARCH-  
BISHOP OF CAPE TOWN) } 1906.  
AND RECTOR AND CHURCH- } Aug. 3rd.  
WARDENS OF ST. JOHN'S, }  
WYNBERG.

Church of England—Church of  
the Province of S. Africa—  
Amendment of title deed—  
Act 9 of 1891.

*Certain persons having sub-  
scribed towards the purchase  
of ground and the cost of the  
erection of a church at K.,  
received transfer of this land  
to the Rector and Church-  
wardens of S. John's, W., in  
trust for the parish of S. John's.  
Applicants now desired to have  
inserted into the title deed the  
words "subject to the provisions  
of Act 9 of 1891, and accord-  
ing to the rites and ceremonies  
of the Church of England as  
by law established." The  
Court granted a rule nisi,  
calling upon all persons inter-  
ested to show cause why the*

*words "S. John's Church, W.,"  
should not be substituted for  
"the parish of S. John's," and  
why "subject to the provisions  
of Act 9 of 1891" should not  
be inserted.*

This was an application brought by Mrs. Mary E. Lindley, of Claremont, for an order authorising amendment of trust deed of certain land at Kenilworth, acquired for church purposes. Mr. Schreiner, K.C. (with him Mr. Burton) was for applicant; Sir Henry Juta, K.C., was for Dr. West Jones (Archbishop of Cape Town) and the Rev. G. Nuttall Smith (rector of St. John's, Wynberg).

Mr. Schreiner briefly stated the object of the application.

[Buchanan, J.: Was this lady the founder?]

Mr. Schreiner: This application is by the lady who got up the whole thing.

[Buchanan, J.: Does she represent the original contributors?]

Mr. Schreiner: No; she does not represent all the contributors. There is one dead, there is one absent in England, and there is one that has taken no part in the present application one way or another, but all the others are with her.

[Buchanan, J.: I hope that we shall not have any *odium theologicum* coming into this matter.]

Mr. Schreiner: I hope not, my lord; it is purely a question of making the title of certain land clear.

Mr. Burton read the petition of Mrs. Lindley, who said that she received and contributed certain funds during 1896 and previously, with the object of purchasing a piece of land at Kenilworth for the erection of a church. Petitioner and other persons had conducted a Sunday-school in connection with St. John's Church, Wynberg. In 1897 she had raised by her own contributions, and by donations, sufficient funds to purchase such land, which belonged to one Herbert Wilman, and which was adjacent to land which he had previously allowed them to use for the Sunday-school. A question arose at the time as to the persons in whom the land should vest, and to whom it should be transferred, and eventually it was suggested by the rector of St. John's, Wynberg—a suggestion which petitioner adopted without fully understanding the import thereof—that the land should be transferred to the rector and churchwardens of St. John's in trust for the parish of St. John's, and subject to the condition contained in section 6 of the petition. She annexed to her petition a copy of the deed of transfer conveying the land to the rector and churchwardens aforesaid, and specially directed the Court's attention to the condition



appearing in the transfer, to wit, "that the land and any buildings erected thereon shall be used for educational and church purposes in connection with the work of the parish of St. John's, Wynberg, aforesaid, and for no other purposes whatsoever."

Petitioner prayed for an order authorising the amendment of the deed of transfer aforesaid by inserting after the words, "In trust for the parish of St. John's, Wynberg," the words, "and subject to the provisions of Act No. 9 of 1891," and after the words, "purpose whatsoever," to add the words, "always subject to the provisions of Act No. 9 of 1891, and according to the rites and ceremonies of the Church of England, as by law established."

Counsel also read affidavits by Wm. Templer, Buissinne, Herbert Willman, John D. Cartwright, and others to the effect that they contributed to the funds on the understanding that the church at Kenilworth was to be a chapel-of-ease in connection with the rites and ceremonies of the Church of England, as by law established.

Sir H. Juta read a replying affidavit by the Archbishop of Cape Town, who, while leaving the matter to the discretion of the Court, adduced a number of reasons why the title deed should not be altered. He said that if at any time Kenilworth should become a separate parish it would be bound by the Act of 1891 if the prayer of the petitioner were granted, which might lead to unhappy differences, as the petitioners might wish to have the Church unencumbered by an Ordinance binding them to St. John's, Wynberg. He was not aware that the services conducted in the temporary place at Kenilworth and the Wynberg Church were not in accordance with the rites and ceremonies of the Church of England, nor did it appear that there were any grievances existing in the said parish on that account.

Counsel also read affidavits by David Tennant, Alex. Bell, E. F. Kilpin, and T. J. Anderson, mainly to the effect that they had worshipped at St. Saviour's Church, Claremont, they had attended services at Kenilworth, and they had not regarded that Church as an overflow from St. John's. The Rector of St. John's (the Rev. G. Nuttall Smith) said that his consent had not been sought to the present application. The Rector and churchwardens of St. John's were, he urged, the proper parties to make such an application as this. He said that the majority of the parishioners were in favour of close union with the Church of the Province of South Africa.

Mr. Burton read affidavits by Sir C. Abercrombie Smith and C. W. Dowthwaite (churchwardens at Kenilworth), who said that they left the matter entirely to the discretion of the Court.

He also read an affidavit by Mr. Cartwright, who said that the church at Kenilworth was a chapel-of-ease of St. John's, and was licensed as such, and it was on a different footing from other places mentioned by respondents, such as the Ottery-road School-room and the church at Diep River. He went on to say that there was a good deal of discord already in the parish of St. John's, owing to the fact that the Rev. G. Nuttall Smith was strongly advocating union with the Province of South Africa. A very small section of the parishioners would be in favour of joining the Province unconditionally.

Mr. Schreiner said that the petitioner was by no means wedded to any reference in the deed to the Act of 1891, provided it were made clear what were the provisions in relation to the purposes to which the church may be put. His lordship had expressed a hope that there would be no *odium theologicum* in this matter. One did not see any place for *odium theologicum*. Surely nobody could wish to keep vague and indeterminate what could be and should be made clear. The church had got as far as the foundations. Now, anyone asked to contribute to the funds would inevitably ask what they meant by "church purposes." Counsel proceeded to quote from the Privy Council case, *Merriman v. Williams* (47, Law Times Reports, 57), in order to show how necessary it was that the point should be made clear. The gist of the present application was, he said, that such an amendment should be made of the title as would put this church on the same footing as St. John's, Wynberg. Speaking for those who had moved in the matter, no one wished for a moment to overlook the very tactful, considerate, and, one might say, generous way in which the Archbishop, the head of the Church of the Province, had exercised his Episcopal functions in trying to overcome difficulties and dissensions and differences that subsisted. Since the decision in *Merriman v. Williams*, one could not overlook the fact that there were two churches."

[Buchanan, J.: We cannot overlook it, and the Church at Wynberg is one of the few that stood out.]

Mr. Schreiner said that, speaking with very great respect of the Archbishop, it was most desirable that the doubt in this matter should be removed.

Sir H. Juta said it was quite clear that this land was bought, and the building on it was partially erected by persons who were worshippers at St. Saviour's, Claremont, and St. John's, Wynberg. Some of them said that they contributed their money for one purpose and some of them said they contributed for another purpose. His lordship was now asked, at the request

of some of these people, to amend on motion the trusts in this title deed of 1897. There was no allegation that those trusts were being broken; there was no allegation that the church or the land was being used for any other than the purposes of the trust. The Act of 1891 simply dealt with the church and burial ground of St. John's. It had nothing to do with the parish of St. John's, nor had it anything to do with the rector. Both land and buildings in this case were subject to the trust. The question arose whether the Court could, upon motion of certain people, who had contributed funds towards the purchase of this land and the erection of the church, alter the trust? He submitted that it was unprecedented to have such an application by only a portion of the contributors against the wish of the trustees and without anything to show that the trust had been broken.

Buchanan, J.: I must regard this matter from a strictly legal point of view, and here are the persons selling land and a set of persons buying land, and they have given transfer of this land, and the sellers and purchasers come to the Court and ask the Court to remedy what they say was a mistake in the deeds of transfer to make it clear what was intended to be the contract between them. The purchasers acted on behalf of a body which, though it is an ecclesiastical body, has certain rights, that body being called the St. John's Church of Wynberg. The seller also contributed to the purchase price, and he says that when he so contributed he intended the transfer to be made to St. John's Church at Wynberg. The only difficulty that arises in this case is what all the persons who contributed to the purchase of this property are not now before the Court. All who contributed at the time of the purchase of the land are before the Court, except two, one, Mrs. Anderson, unfortunately since deceased, and another, a former curate of St. John's, Wynberg, who is now in England.

Sir H. Juta (interposing): Also the De Jong family, my lord.

Mr. Schreiner: But they have not made an affidavit.

His Lordship (continuing): As I think it is clear that it was intended by these parties that this property should be vested in the St. John's Church of Wynberg, they are entitled now to a rectification of the title deed. It is argued that there has been no breach of the trust which is expressed in the title deed as it stands now. I think that is a very strong argument why it is a suitable and fitting time now to amend the deed in accordance with the wishes of the parties, before any dispute arises. It may prevent

any differences and unpleasantness in the future, and especially feelings which run very high when it comes to a question of religion. I do not wish to affect the parties more than is absolutely necessary, and I think the amendment which the Court, on the affidavits before it, should make, are these, that wherever the words "the parish of St. John's" appear in the deeds, the words should be substituted, "St. John's Church, Wynberg," and that, after the words "conformably to local custom," the words "subject to the provisions of Act No. 9 of 1891" should be inserted. I propose granting a rule nisi calling upon all persons interested who may have contributed to the purchase of the land or of the buildings to show cause why the deed of transfer should not be amended by substituting the words "St. John's Church, Wynberg," for the words "Parish of St. John's, Wynberg," and the insertion, after the words "conformably to local custom" of "subject to the provisions of Act No. 9 of 1891." I shall not go further into the matter. I do not think the parties are entitled to go into the particulars of the Act, and say whether the Church of England or the Church of the Province of South Africa is to be inserted in the title-deed. I think the object was, that this ecclesiastical body, viz., the Church of St. John's, Wynberg, should have transferred to it this adjacent property for its own convenience and for the extension of its own good work. I think sufficient time should be given to enable all persons to come, and a period of three months will not be too much to allow. The rule will be made returnable on the 14th November. I give this rule in order that everybody who may object shall come and be heard before the Court. A rule will be granted calling upon all persons interested to show cause on the 14th November why the title-deed should not be amended, as I have indicated, service to be effected upon the Rev. G. Litchfield, of Sidmouth, England, by registered letter, and one publication to be given in the "Cape Times," "Cape Argus," and "South African News." It would be advisable on the part of applicants to send printed slips to everybody they know of who may be concerned. I do not, however, make that part of the order.

[Applicants' Attorneys: Van Zyl and Buissinné. Respondents' Attorney: D. Tenant.]

*Ex parte* THE FEDERAL SUPPLY AND COLD STORAGE, LTD.

*Ex parte* THE COLD STORAGE ASSOCIATION.

Partnership—Winding-up order—Companies' Act.

*A certain association, formed for the purpose of controlling the trade in imported frozen meat, applied for a winding-up order.*

*Held, that as the association was not an ordinary partnership and had power to dissolve itself, no order could be granted.*

These matters were heard together.

The Federal Company petitioned for leave to sue Sparks and Young and the Pietermaritzburg Company by edictal citation, so as to join them as defendants in an action which petitioners propose to institute against the Cold Storage Association to have the association declared illegal. This matter had previously been before the Court, and was standing over for production of an affidavit as to property belonging to respondents which might be attached to found jurisdiction.

The other matter was an application by the Cold Storage Association for an order dissolving the association, and appointing a receiver.

A considerable number of affidavits were read, from which it appeared that at a meeting of the association on the 13th July, presided over by Mr. Francis Oats, the following resolution was put: "That inasmuch as it has been agreed by all parties to this association that, owing to breaches of the rules and regulations thereof by members, the position has been rendered untenable, it is hereby agreed and resolved that the association be dissolved from this date, the parties agreeing to indemnify each other against expenditure and liabilities incurred for or on behalf of the association." Mr. Anghern objected, as representing the Federal Company, on the ground that arrangements should also be made for the dissolution of the Cape Town Cold Storage Association.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.), was for the Federal Company; Mr. Schreiner, K.C., was for the Cold Storage Association; and Mr. Burton was for Sparks and Young, Ltd., Durban (Natal), and the Pietermaritzburg Cold Storage Company.

Mr. Schreiner now stated that he produced consents for the dissolution of both associations. Some difficulty had arisen because claims had

been brought against the association, and it was impossible to touch the funds, a sum of about £4,000 lying in the bank on fixed deposit, without first obtaining the signature of the Federal's representative, in addition to the signatures of the other representatives, which had been given.

Counsel having been heard in argument on the facts.

Buchanan, J.: There are two applications before the Court. The first is an application for leave to sue by edictal citation, founded on the fact that two of the alleged intended defendants carry on business out of the Colony. These two defendants have now, however, submitted to the jurisdiction of the Court, and it is not necessary to make any order in respect of that. The plaintiff is now in a position to sue all the persons he chooses to sue, they having submitted to the jurisdiction of the Court, and having a *locus citandi* in the Colony. As to the costs of that application, they will abide the result of the action. If there is no action brought, then the applicants will pay the costs. There is, however, a second application for the dissolution of the association, and for an order for the appointment of a receiver. This application is opposed on the ground that this is not a partnership. It is common cause between the parties that the Cold Storage Association does not come within the purview of the Companies Act, and that no order can be made under that Act affecting them. The question is whether at common law the applicants have a right to an order for dissolution, and for the appointment of a receiver. When I look at the memorandum of association, I see that the objects of the association are stated to be as follows: "(a) To protect the interests of cold storage concerns in South Africa from undue competition, so as to ensure the earning of reasonable profits on behalf of the shareholders and the proprietors thereof; (b) to provide machinery for regulating competition between members of the association for contracts and ordinary trade without causing undue interference with the trade of each; (c) to form a committee with the requisite power and authority to frame regulations and to supervise the affairs of the association, and to settle disputes or differences between the members thereof; (d) to create a fund for the purposes of the association, and to authorise the committee to administer the same, and to impose fines on defaulting members; (e) to arrange for the determination by arbitration of matters in difference, and to make provision for the enforcement of the rules and regulations of the association; (f) to collect such fines and apportion the same in such manner as may be decided by the committee, and to enforce such other penalties as may be inflicted by the com-

mittee; (f 1) to provide that, in addition to matters before mentioned, the public shall not be unreasonably charged for supplies." I take it there is great force in Sir Henry Juta's contention that this is not, in the ordinary acceptation of the term, a partnership, and so far as private partnerships are concerned the Court is always loth to interfere unless there is some necessity for so doing. In this case I do not see that there is any such necessity, or that it is a case in which the Court should grant assistance to dissolve and liquidate the association. It is not, properly speaking, a trading association—it is a controlling association, and a certain number of cold storage companies are joined together for the purpose of regulating one another's business, also others could be admitted to this association, or the committee of association could expel any member they chose, and I do not think that under these circumstances it can, properly speaking, be called a partnership. It is competent for the association to dissolve itself, and I do not see that there is any cause in these circumstances for the Court to interfere to assist them in the course of their dissolution. This association is not like an ordinary trading association—it may go on or not as the parties like, and it may expel all the members. They may take in any new members, or go on as they like. I do not think it is the kind of association that a Law Court would go out of its way to assist in any way in this case. If the parties wish to take any further steps, then an action should be brought. There is no necessity for giving any order, either for dissolution or the appointment of a receiver. No order will be made on the second application. As to the costs of this application, they should be paid by the applicants unless there is an action brought, and in that case they should be costs in the cause.

Having heard counsel further on the question of costs,

His Lordship added: I think that the costs in the second application must be paid by the applicants.

#### ADAMS V. MOFFAT HUTCHINS AND CO.

This was an application calling upon the respondents (plaintiffs in the action) to show cause why they should not be attached for contempt of Court in failing to obey certain discovery order made on July 5, and be directed to file further affidavits, saying which of the documents relate the evidence obtained in preparation of the trial, and why bar should not be removed. Mr. Burton was for the applicants; Mr. Searle, K.C., was for respondents.

It was stated that the bar had now been removed,

After affidavits had been read, and counsel had been heard in argument,

Buchanan, J.: This is an application mainly for the committal of the respondents for contempt of Court. Well, when an application for contempt of Court is made it must be shown that there is a deliberate, intentional disobedience of an order made by the Court. Instead of deliberate and intentional disobedience by the respondent of the order of court in the previous application, I think he has complied with the order of court. The application for commitment is refused, with costs. As to the bar, that has been removed already, and there is no need to make an order.

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BRUNT V. BRUNT. { 1906.  
Aug. 3rd.

This was an action brought by Hester Brunt, of Somerset Strand, against Wm. Henry Brunt, England, residing at present in Staffordshire, England, for a decree of divorce on the ground of his adultery. Mr. Benjamin was for the plaintiff, and the defendant was in default.

The plaintiff, Hester Brunt, said she was married to the defendant at Prince Albert in October, 1901, and at the time of the marriage her husband was a sergeant in the Staffordshire Regiment. He promised to leave the regiment after the war. The defendant went to England with witness, and got his discharge. Witness returned to South Africa, and the defendant failed to keep his promise to follow her.

The evidence of the adultery was taken on commission, and it appeared that the plaintiff had been living with one Alice Goodwin, and he admitted that he was the father of Miss Goodwin's baby. He further told one of the witnesses if she wrote and told the plaintiff in South Africa what had happened she would be doing him a great favour.

Decree of divorce granted, with costs.

#### JUST V. JUST.

This was an action brought by Mary Emma Just, of Queen's Town, against her husband George Just, of Johannesburg, for restitution of conjugal rights, failing which, a decree of divorce.



The parties were married in community of property, in Cape Town, in June, 1883, and there was issue of the marriage—one child (a girl), now a major. From 1885 to 1889 the defendant had not provided a home for the plaintiff, or contributed to the support of the plaintiff. In June, 1892, the defendant deserted the plaintiff, and had not since contributed to her support.

Mr. Russell was for the plaintiff, and the defendant was in default.

Mary Emma Just stated that during the defendant's absence, when he failed to support her, she maintained herself by teaching at Mossel Bay, Tarkastad, and Queen's Town. She had been supporting herself since 1892. Until 1903 she supported the daughter, the accounts since then had been sent to the defendant. In 1893 the defendant came to see plaintiff, and witness supported him for six months. On one occasion witness visited Johannesburg, and found the plaintiff living in a boarding-house, and when witness suggested remaining with him there he replied she could do so "in the future." The defendant was a partner in a produce business, and his junior partner was able to maintain his wife and family in Johannesburg for ten years.

The defendant was ordered to return to or receive the plaintiff on or before August 31, or show cause by the 12th September why a decree of divorce should not be granted.

*Postea* (September 12th). The rule was made absolute.

#### HANSLO V. HANSLO.

This was an action for restitution of conjugal rights, failing which a decree of divorce brought by Solomon Hanslo, of Camp's Bay, against his wife, by reason of her desertion. Mr. Watermeyer was for the plaintiff, and the defendant was in default.

Solomon Hanslo stated that three months after the marriage there was a row between witness and defendant, after which the defendant left, and did not return.

His Lordship: What was the row about?

Witness: We could not agree; we were always having a row. I thought she was not doing things properly.

Decree granted, to be complied with on or before August 31, failing which cause to be shown on the 12th September, why a decree of divorce should not be granted.

*Postea* (September 12th). The rule was made absolute.

MACKENZIE V. ESTATE  
MACKENZIE. { 1906.  
Aug. 3rd.  
„ 7th.

Will—Trustee—Administration—  
*Fidei commissum*.

*M., married out of community, bequeathed all his property to his wife with fidei commissum in the event of her death or re-marriage to his trustee or executor for the behoof of his children living at the time of his death. One L. was appointed executor testamentary, and now claimed as against the widow (the plaintiff), who had not re-married, the right to administer the estate; or in the alternative that the plaintiff should be ordered to give security for due administration.*

*Held, that L. having completed his duties as executor, was now functus officio, until the plaintiff should either re-marry or die.*

*Held further, that the plaintiff, as being the mother of the fidei commissory heirs, could not be called upon to give security, and was entitled to the administration of the estate until her re-marriage.*

This was a special case stated by the parties as to the true intent and meaning of the will of the late Alfred John Mackenzie.

The special case was stated in the following terms:

1. The plaintiff is the widow of the late Alfred John Mackenzie, to whom she was married in this colony without community of property. The defendant is Peter William Leach, who is sued in his capacity as the executor testamentary of the estate of the late Alfred John Mackenzie, and as the trustee under the last will of Mackenzie (hereinafter called the testator).

2. The testator died on the 4th September, 1904, leaving of full force and effect a last will, dated 20th May, 1896.

3. Under the will all the property of the testator is bequeathed to plaintiff, "but without power of disposition save for purposes of reinvestment," until her death or remarriage. The plaintiff has never remarried.

4. The will further provides that after the death (or re-marriage) of plaintiff the property shall go to the "execu-



tor and trustee," subject to a trust in favour of the children of testator, upon terms and conditions as in the will provided. The defendant is by the will appointed "executor and trustee of this my will, with all powers known in law." There are four children of testator, whose respective ages are 25, 22, 20, and 13 years.

5. The defendant as executor has filed the first and second accounts of the administration of the estate; and these have been confirmed.

6. The memorandum hereto annexed marked "B" shows the present position of the estate. All the debts due to creditors of the estate have been paid so far as is necessary, and all administration expenses have been settled; and the balance, thereafter remaining, of the cash proceeds of the realised assets has been or is being invested in mortgage bonds passed in favour of the defendant as executor, or in favour of the said estate.

7. The assets of the estate are now available for payment and delivery to plaintiff under the will, should this Honourable Court uphold plaintiff's contentions in this regard.

8. The plaintiff contends: (a) That she is entitled to a declaration of her rights under the said will; and that, upon a true construction of the will, she is further entitled (b) to an order declaring her to be entitled to have, receive, possess, and administer under and in terms of the aforesaid will all the property, estate, and effects of the testator aforesaid; (c) to an order authorising and compelling defendant to deliver, cede, and transfer to plaintiff in due form of law all the property, estate, and effects of the testator aforesaid.

The defendant contends: (a) That according to the true intent and meaning of the will he is entitled, as "trustee of the will, with all powers known to law," to continue to control, manage, and administer the present property, estate, and effects of the testator for the use and benefit of the plaintiff until her remarriage or death, whichever shall first happen; and thereafter for the use and benefit of the children of testator, subject to his duty to pay out each child's share according to the terms and conditions of the will, provided that, in case any funds shall require reinvesting during the period in which the plaintiff is to have the use and benefit of them, she shall be consulted by him in making such reinvestments; (b) alternatively, and in case this Honourable Court shall uphold plaintiff's contentions herein, that such orders shall only be made subject to plaintiff giving due and approved security that she will duly and properly preserve and administer the present property, estate, and effects (subject to such reinvestments as may become necessary),

to the intent that the property, estate, and effects shall pass to him or his successor in the office of trustee on her death or earlier remarriage, in terms of the will. Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions, and pray that the costs of these proceedings may be adjudged to come out of the estate.

Mr. Close (with Mr. Roux) for plaintiff. Mr. W. P. Buchanan for defendant.

Counsel having been heard in argument,

*Cur. Adv. Vult.*

*Postea* (August 7).

Maasdorp, J.: The question raised in this case is whether the plaintiff or the defendant is entitled to the possession and administration of the estate of the late Alfred John Mackenzie. By his last will the testator bequeathed all his property to his wife, the plaintiff, for her own use and benefit, but without powers of disposition, save for the purpose of reinvestment, until her decease or re-marriage, whichever may first happen, and immediately after her decease or re-marriage, he bequeathed his estate to his trustee or executor upon trust to administer until such time as his eldest child shall attain the age of twenty-five years. The will then provides for the division of the estate equally between all the children of the testator, who may be living at the time of his death, and who shall attain the age of twenty-five years. The defendant is appointed by the will as executor and trustee of the estate. Unless there is some provision in the last will giving express directions to an executor with regard to the liquidation and administration of the estate, the powers and duties of such executor are clearly established under our law. For the purposes of this case it is only necessary to say that it is the executor's duty to liquidate the estate, by collecting debts, paying creditors, reducing the property belonging to the estate into possession, render the requisite accounts, and distribute the property among the heirs and legatees. After liquidation the heirs are entitled to possession in terms of the will. Upon these points there is no dispute between the parties, and it was admitted that upon the true construction of this will the plaintiff was appointed fiduciary heir to the estate, and no mere usufructuary. In the absence of anything in the will depriving the fiduciary heir of the right to the administration of the estate, the plaintiff is entitled to the possession and management thereof, upon the completion of the executor's duties as liquidator. It is admitted that the defendant as executor has duly liquidated the estate. The defendant, however, con-

tends that under the title of trustee, he was virtually appointed in terms of the will as administrator of the estate until such time as it shall have been distributed amongst the *fidei commissary* heirs. But it seems to me that the express terms of the will are clearly against such a contention. After bequeathing the estate to the plaintiff, the will provides that she shall not have the power of disposition or alienation, and this provision would hardly have been necessary if the plaintiff had no power of administration. Then, again, the right to deal with the funds of the estate for the purposes of reinvestment is expressly conferred upon her. But it is the next clause of the will which places the issue between the parties beyond dispute. It is there provided that the powers and duties of the trustee as executor in respect of the rights of the *fidei commissary* heirs shall commence after the death or remarriage of the plaintiff. In my opinion, therefore, the defendant having completed his work as executor, is now *functus officio*, until such time as, upon the death or remarriage of the plaintiff, he may resume his duties as administrator. The defendant claims that, in case the plaintiff is allowed the administration of the estate, it should only be done subject to her giving security in the interest of the *fidei commissary* heirs. It is clear from the authorities that, as a rule, a mother entering into possession as fiduciary heir, or as usufructuary, is not liable to give security, and no special grounds have been established in this case to satisfy the Court that security is necessary for the protection of the *fidei commissary* heirs. There are four *fidei commissary* heirs in this case, of whom three have obtained their majority, and it will be open to them, if occasion should arise, to apply to the Court for protection of their interests, in the event of their being endangered. A declaration will, therefore, be made in terms of contentions (b) and (c) of the plaintiff. The defendant was justified in coming to the Court in the interests of the estate to have a doubtful point settled, and it is therefore ordered that the costs shall come out of the estate.

[Plaintiff's Attorneys: Zietsman and Bosman; Defendant's Attorneys: Syfret, Godlonton and Low.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

### REVIEW.

REX V. CLOETE. { 1906.  
Aug. 6th.

Liquor licence — European employer.

*A coloured labourer having purchased liquor, thereafter gave a certain Hottentot, without consideration, a portion of this liquor. He was charged and convicted with having acted as the agent of the Hottentot in purchasing the liquor. Conviction quashed.*

De Villiers C.J.: A case came before me as Judge of the week, in which one Klaas Cloete, a coloured labourer, was charged before the Magistrate that he "did wrongfully and unlawfully, as the agent or on behalf of a native named Kivido Gal, a Hottentot, and not being the European employer of such native, buy or receive liquor from John Louis d'Oliviera, a licensed dealer, which liquor could not have been legally bought or received by the said Kivido Gal under the conditions of the said licence." The prisoner pleaded not guilty, and was found guilty, and sentenced to a fine of £25. The only evidence against accused was that he bought some liquor from a licensed dealer, and, meeting this old man Kivido, who was a pauper, and who had no money whatever, he offered him a drink. Kivido took the drink. But there was not a title of evidence that Kivido had employed the accused to buy the liquor; in fact, Kivido could not have done it, for he was a pauper. I sent the case to the Attorney-General to ask whether he would be prepared to support the conviction. He said he could not support the conviction, and accordingly it will be quashed.

REX V. SAACKS AND HOFFMAN.

Accomplices—Attempt to commit arson.

*On a trial of the appellants for an attempt to commit arson, two witnesses, who had already*

*been convicted, swore that they had been employed by the appellants to set fire to the house. A police constable deposed that he saw one of the two witnesses at the time of the attempt enter the house with some parcels, and then come out with the parcels, which, on his being then and there arrested, were found to contain benzine, while the other witness had been watching outside; and the accused, as well as other witnesses for the defence, admitted that the offence of attempt to commit arson had been actually committed by some one.*

*Held, on a question reserved, that there was not sufficient ground for disturbing the conviction of the appellants by a jury.*

De Villiers, C.J.: In this case, at the trial before my brother Maasdorp, at the request of Mr. Upington, of counsel for the appellants, the Court reserved the following questions of law for the consideration of the Court on appeal in criminal cases: "(1) Whether the prisoners could be convicted on the evidence of an accomplice alone, uncorroborated by any evidence except evidence that the crime had been committed; (b) whether there was corroborative evidence of the fact that the crime had been committed." As to the first question, that has already been disposed of in the case of William Hoffman, in which the Court gave judgment at the hearing on Tuesday last. After quoting from the evidence of Police Constable Lambourne, His Lordship proceeded: There can be no doubt that these two convicts, Kline and Bailey, had the benzine in their possession, and that they had carried it into the house at night-time, and the jury probably concluded that the reason why they left the house again was because they believed they were watched. There is the undoubted fact that these two men have been convicted of the offence of attempting to commit arson, and then when we refer to the evidence given by the witnesses for the defence in this case, there is on the part of every one of them an admission that there was an attempt to commit arson on the night in question. There is the evidence of Hoffman himself, one of the accused. Now, the question is whether, where the accused themselves and the witnesses for the accused as-

sumed throughout that the offence had been committed, the Court should now hold that the jury were not justified in saying "it is proved to our satisfaction that the offence was committed." I do not think that the Act of 1896 would justify the Court of Appeal in interfering with the verdict of the jury in such circumstances. Of course, if there were no evidence whatever which would justify any jury in concluding that the particular offence had been committed, the Court would be justified in interfering, but where there is evidence from which it might reasonably infer that the offence has been committed, the Court should not now interfere with the verdict of the jury. The proviso to the 12th section of the Ordinance (No. 72 of 1830) clearly leaves the matter to the decision of the jury. The proviso is as follows: "Provided always that such crime or offence shall, by competent evidence, other than the single and unconfirmed evidence of such accomplice, be proved to the satisfaction of such Court or jury respectively to have been actually committed." In this case I am informed by the learned Judge who presided at the trial that he impressed upon the jury how unsafe it was to convict upon the evidence of two witnesses, who, according to their own account, had a most disreputable character. In spite of that warning, the jury convicted, and I think that, as there was evidence to justify the jury in concluding that the offence of attempted arson had been committed, this Court should not interfere with this verdict. The appeal will, therefore, be dismissed. His Lordship added that Mr. Justice Buchanan agreed in this judgment.

Hopley, J.: I am of the same opinion. In the present case the evidence on the record that a crime had been committed was very slight, but the fact remains that, without reading the evidence of the accomplices at all, both for the prosecution and the defence, the witnesses speak of this attempted fire as an admitted fact, a fact that everybody admitted. Both Honikman and another Crown witness speak of an attempt to fire the premises in Burg-street on that date, and there is this fact, that such statements were not subjected to any cross-examination. When one turns to the evidence for the defence, Hoffman himself treats it as an admitted fact that there was a fire attempted at this place. There is this further fact, that those two men, Kline and Bailey, were seen in the yard at night with tins of benzine in their possession.

## CAPE DIVISIONAL COUNCIL V. MARAIS.

Divisional Council—Arrear rates  
—Receipt—Transfer of land.

*The applicant, being the purchaser of land on which arrear Divisional Council rates were due, tendered payment of the rate last due, which the respondent Council refused to accept, unless all the arrears were paid.*

*Held, that as the applicant did not owe the arrear rates, and only tendered the last rate, in order to enable him to comply with the 275th section of Act 40 of 1889, the respondent Council could not, by refusing to give a receipt for the money, extend the protection conferred upon it by that section beyond the last year's rate.*

This was an appeal from a judgment of Mr. Justice Buchanan, sitting as a Divisional Court of the Supreme Court, in an application by the present respondent for an order upon appellants to grant receipt for rates on certain property so as to enable respondent to obtain transfer.

From the record it appeared that Marais bought certain property in Cape Town from one Pinkus. There were rates due to the Divisional Council in respect of the property—for 1904 £37 11s. 1d. and for 1905 £33 10s. 10d. Marais tendered the last rates due on the property, viz., for 1905, and upon so doing claimed to have a receipt from the Divisional Council so as to enable him to obtain transfer of the property. An application was made to the Court for an order on the Divisional Council to receive the last rates due and give a receipt in respect thereof. Mr. Justice Buchanan, before whom the matter came on motion, granted an order, with costs, and from that order the present appeal was brought.

Mr. Benjamin was for appellants: Mr. Upington was for respondent.

Mr. Benjamin: There is no obligation on Marais for any rates. There is no contractual obligation (see declaration of purchaser and seller, in which there is no mention of rates), nor is there any statutory obligation. The case of *Smuts v. Cathcart Divisional Council* (13 S.C.R., 359), does not apply. Smuts had been the occupier of the land. Here the seller of the land was liable for arrear rates and not the purchaser.

[Hopley, J.: If Marais had waited for a year the Divisional Council would

have had to give transfer on payment of one year's rates.]

The Divisional Council might have sued in the meanwhile. A man cannot discharge his liabilities in part unless the creditor accepts of part payment (Voet, 46-3-11).

[De Villiers, C.J.: That is clear, but Marais could pay in full for Pinkus. Should a third person offer to pay the whole debt, cannot he compel the creditor to accept?]

I am not prepared to argue that point.

[De Villiers, C.J.: That is the whole point.]

I submit that Marais could not compel the Divisional Council to accept payment unless he were himself liable.

[Maasdorp, J.: You say that the man who is liable for rates must pay them himself?]

Yes.

[Maasdorp, J.: Should an auctioneer sell to A.B., cannot a third interested person come in and claim to pay?]

I submit that he could not. Pinkus is bound to make the property transferable and therefore he is bound to pay the rates.

[Hopley, J.: Pinkus is still liable.]

Yes, and hence the Divisional Council is entitled to claim the whole of the rates due, and cannot be compelled to take part of them. See Pothier on Obligations (3-1-3). If a payment be not made in the name of the real debtor it is not valid. This payment was not so made. Pinkus could not have claimed a full receipt on payment of the rates for last year, and so neither can Marais.

[Hopley, J.: Rates are not an ordinary debt; they are a tax on property.]

They are debts, and Voet does not in any wise qualify his statement.

Mr. Upington (for respondent): Appellant's contention is that Pinkus was bound to pay all arrear rates, and Marais could pay only as agent of Pinkus; but see *Bousfield v. Stutterheim Divisional Council* (19 S.C.R., 64), particularly the judgment (p. 70). There a tender was made by the purchaser in his own name, and here Marais had a *bona fide* interest in the payment of the rates and hence could do as Bousfield did and pay in his own name. Can, then, the Divisional Council compel Marais to pay arrear rates? Before the passing of the Divisional Councils' Act of 1889 the Council had no lien on property for rates and therefore but for Sec. 275 of that Act they could not have claimed any rates whatever from Marais. The claim of rates, for each year, is a separate cause of action for each year the rates may vary and do not amount to a definite ascertainable sum like interest.

[De Villiers, C.J.: Would Pinkus have been entitled to pay one year's rates and demand a receipt?]

Yes, the Divisional Council has a hypothec for only one year's rates, and now they claim a right *in rem* for all arrears. If a purchaser wants to get possession of the property surely he can do so by discharging the claim for which the Divisional Council have a lien. In the case of a private creditor a receipt for the later portion of a debt may raise a presumption that the former portion has been paid. As to the case of *Smuts v. Cathcart Divisional Council* (13 S.C.R., 359) the *ratio decidendi* is set out in the earlier portion of the judgment; and see p. 362 of the judgment.

Mr. Benjamin (in reply): No authority has been shown for the proposition that Divisional Council rates are divisible. *Voet (loc. cit.)* does not limit his doctrine, and then there is the authority of *Smuts' case*. Marais could not tender on behalf of Pinkus because he was not liable.

Mr. Upington referred to the cases of *Riversdale Divisional Council v. Pienaar* (3 Juta 252).

De Villiers, C.J.: The applicant bought the land now in question from one Pinkus, and at the time of the purchase arrear rates were owing by Pinkus to the Divisional Council. The applicant thereupon tendered to the Divisional Council the rate which last became due, and asked for a receipt for the amount. The Divisional Council refused to accept the amount unless the arrear rates were also paid. It is quite clear that, before the passing of the Divisional Councils Act of 1889, the applicant would have been entitled to receive transfer of the property without giving any proof that any Divisional Council rates had been paid. Until the passing of that Act, the Divisional Council had no tacit hypothecation in any shape or form for any portion of the rates. The 275th section of the Act, however, does give the Divisional Council a hold on the land, but only in respect of the last year's rate (section read). It is unnecessary, for the purposes of the present case, to decide whether Pinkus could have tendered the last year's rate without tendering all arrears due. There was a dictum in the case of *Smuts v. Cathcart Divisional Council* (13 Supreme Court Reports, 359), which would be somewhat opposed to his having such a right, but the question does not now arise, because no tender was made on behalf of Pinkus, but the tender was made on behalf of the applicant, the person who purchased the property. He has a very important interest in the matter, because he is the purchaser of the property; he is the person who seeks to obtain the transfer, and who is in no way to blame for the non-payment of the arrear rates. For such non-payment the Council is more to blame than the appellant, but if the contention of the

Council were to prevail, the effect would be that the Council would have a kind of lien in respect of arrear rates in every case except in a case like that of *Smuts v. Cathcart Divisional Council*, where the person who tenders the rates is the one who has been in occupation during the last year. The Act assumed that there would be vigilance on the part of the Divisional Councils of the country in the collection of rates, but protected them in respect of the rates last due on land sought to be transferred. This protection would be practically extended to all arrear rates if the *bona fide* purchaser of land is not to have a receipt on payment of the rate last due. Upon the whole, I come to the conclusion that the applicant has sufficient interest in the matter to take advantage of the 275th section, and to claim that, upon payment by him of the last year's rates, a voucher shall be given to him so as to enable him to get the benefit of the 275th section, viz., to obtain transfer of the property from the Registrar of Deeds. For these reasons, I am of opinion that the appeal must be dismissed, with costs.

Maasdorp and Hopley, J.J., concurred.

[Appellant's Attorneys: Moore and Son. Respondent's Attorneys: Syfret, Godlonton and Low.]

REX V. ABOUROFF AND ( 1906.  
OTHERS. ( Aug. 6th.

#### Public Health Acts—Cemetery.

*The appellants, being members of the committee of management of a cemetery which had been closed by Proclamation under Sec. 64 of Act 4 of 1883, attended the funeral of a still born child, who was buried in the cemetery.*

*Held, that there was sufficient evidence to justify a conviction under the 65th section of the Act.*

This was an appeal from a judgment of the Resident Magistrate of Wynberg, who had convicted the appellants of a contravention of the Public Health Act of 1883 in burying the body of a child in the Palmyra-road Cemetery, Claremont, which had been closed by Government Notice No. 1,258 of 1894.

The Magistrate found the accused guilty, and sentenced each to pay a fine of £5.

The grounds of appeal were: "(1) That the conviction is against the weight of evidence; and (2) that, if in



other respects correct, the sentence is vindictive and excessive, and not in accordance with substantial justice."

Dr. Greer was for appellants; Mr. Howel Jones was for the Crown.

Dr. Greer admitted that a technical offence had been committed, and that the graveyard had been properly closed by Government proclamation. As to the second and third appellants, he submitted that they took no active part in the proceedings, and that they should not have been convicted. On behalf of the first appellant, who was a Malay priest, he urged that there had been a *bona fide* misunderstanding, as these people thought they had a right to go on burying, because the adjacent Christian burial ground had not been closed. At any rate, the penalty imposed upon the first appellant was excessive.

Mr. Jones said he took it that he had nothing to meet in regard to the first appellant. As to appellants two and three, they were members of the Management Committee of the burial ground, and they were present at the burial. He submitted that there had been a deliberate attempt on the part of these Malays to violate the law.

De Villiers, C.J.: As to the first appellant, counsel for the appellants candidly admitted that it would be difficult to hold that he was not properly convicted. There is the proclamation of the Governor, which has been issued under the Act of Parliament. If the appellants were dissatisfied with the Proclamation, their proper course was to apply to the Governor, who would have had the power, I presume, to withdraw the Proclamation if he found that it was a real hardship upon these people. Their complaint is that Christians have been allowed to bury their dead in the neighbourhood, and Mohammedans had been refused to allow their dead in their Cemetery. Well, that is a matter for the Governor, and I have no doubt that if they can make out a good case, and submit it to him, he will, through his Minister, come to their assistance, but when once the Proclamation was issued, it was the duty of these Moslems, as it is the duty of every subject in the country, to obey the law. They could not, by way of protest against what they thought to be an improper proclamation, insist upon burying this child at that particular place. As to the two other appellants, if they were there merely as spectators, or merely as persons attending that funeral, then there would no doubt have been considerable force in Mr. Greer's argument on their behalf, but it now appears that they are on the committee of management, and I think that if members of that committee of management tacitly consent to the burial of a young per-

son there, and do not raise a protest at all, the Court below was quite justified in holding that they did assist in, or suffer, or permit the burial of the dead in the burial ground. so that I do not see that any distinction can be made between these two appellants and the first appellant. Again, I would advise these people, instead of taking the law into their own hands, to appeal to the Government, and I have no doubt that, if it is at all possible, the Government will help them. The appeal must be dismissed.

Maasdorp, J., concurred.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REX V. JEBINS. { 1906.  
{ Aug. 6th.

Appeal — Remitting case for further evidence — Resident Magistrate's Court.

*On an appeal in a criminal case from a Magistrate's Court, it appeared doubtful whether the proceedings were in accordance with real and substantial justice.*

*Held, that the Court had the power to remit the case for further evidence as if the case had been laid before the Court by a Judge under the 48th Sec. of Act 20 of 1856.*

This was an appeal from a judgment of the A.R.M. of Fraserburg, sitting at Williston, who had convicted the appellant (Johannes Jobius) of stealing a sheep and sentenced him to a term of three months' hard labour and to receive ten lashes.

Mr. Van Zyl was for appellant; Mr. Howel Jones was for the Crown. It was stated that appellant had been released on bail.

Counsel having been heard in argument on the facts.

De Villiers, C.J.: Under all the circumstances the Court will treat this case as though it had come before a Judge in chambers. There would certainly seem to be serious doubts as to whether the proceedings are in accordance with real and substantial justice. There is something apparently unexplained in the matter. This boy, who lived with an aunt (Lydia Klaascus), took away the sheep in daylight, and he was found afterwards skinning the sheep. The trial took place in

a great hurry. Apparently no summons had been served upon the boy; he did not know before he left his aunt that he was going to be tried, and it seems extremely likely that he really did not know what he should do, and he did not know that he might cross-examine the witnesses, and that he might call his aunt. On the whole, this case appears to me to be one in which the Court should exercise the powers conferred on it by the 48 Section of the Resident Magistrates' Court Act, and that it should be sent back to the Magistrate to take further evidence for the defence, as well as for the prosecution, and to report to the Court what his finding would have been in case such evidence had been given before he gave judgment.

Maasdorp, J., concurred.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset.]

SCHMIDT V. BARNADO. } 1906.  
Aug. 6th.

Principal and agent—Liability of agent on contract.

*The defendant, in the capacity of a forester employed by Government, sold a tree to the plaintiff, but failed afterwards to issue the necessary licence authorizing the plaintiff to fell the tree.*

*Held on appeal, that the proper party to be sued was the Government, which had employed the defendant as forester.*

This was an appeal from a judgment of the A.R.M. of Humansdorp in an action brought against appellant, who is the Government forester at Storm's River, by the respondent to recover £20 damages for alleged refusal to issue a license to him (Barnardo) to fell a certain tree in the forest of Knysna. The Magistrate found for plaintiff for £6 with costs. Mr. Benjamin was for appellant; Dr. Greer was for respondent.

Mr. Benjamin in argument cited Bowstead on Agency (Art. 114), Smith's Leading Cases (Vol. 1, 296); and argued that Government is liable for breach of contract entered into by their servants. See also *Thompson v. Barkly West Municipal Rinderpest Committee* (14 S.C.R., 393), *Binda v. Colonial Government* (5 Juta, 284); this was before 1888, and at that time the Government was not responsible for the torts of its servants. Also *Marona v. Blackbeard* (21 S.C.R., 436) and the Forest Act No. 28 of 1888,

Section 41. This man was a gratuitous bailee and was liable for misfeasance, but not for non-feasance.

[De Villiers, C.J.: The attendant gave back the money?]

Yes, I have that in the affidavit. We contend that the magistrate was wrong.

Dr. Greer: The money for the tree was paid on March 1st and the receipt given on March 6th. The respondent had not the licences at hand, but he ought to have had them. The defendant says that on the 8th of March a licence was issued for a valuable tree. Defendant refused further information. The evidence of his *mala fides* runs all through the case. He did not know who had sold, what was sold or to whom it was sold. He brought no books into Court, although he had had 14 days' notice to produce them. He, being a public servant, refuses to issue the licence and therefore he, and not the Government, was guilty of the tort; see *Thompson v. Barkly West*. One who commits a tort is personally liable even though he be acting in a representative capacity.

[De Villiers, C.J.: There is no regulation throwing upon him the duty to issue licences.]

The Government sells the wood. The forester is the delegate of the Government and therefore, I submit, that should he fail in his duty he is liable. In point of fact these licences are issued by the Forest Department, but the defendant could have issued the licence. He was acting *mala fide*. See *Sciama and Co. v. Table Bay Harbour Board* (17 S.C.R., 121), especially the judgment in the case.

[Maasdorp, J.: Was he a gratuitous bailee?]

No, he took money in his personal capacity.

[De Villiers, C.J.: You say that you paid money for the licence?]

Yes.

Mr. Benjamin (in reply) referred to *Wright v. Williams* (8 Juta, 166) and to *Fairbairn v. Pepper* (21 S.C.R., 154).

De Villiers, C.J.: The summons in this case is entirely upon a contract alleged to have been made between the plaintiff (a wood cutter) and the defendant (a forester). The summons claims the sum of £20 for damages sustained by the wrongful refusal of the defendant to issue to him (plaintiff) a licence to fell a certain stinkwood tree, which the defendant, in his capacity as forester, sold to him at public auction on the 1st March, together with certain other trees, the purchase price whereof the plaintiff paid the defendant on the same day. The summons, therefore, is entirely founded upon a breach of contract on the part of the defendant in his capacity as the forester. It is clear from the evidence that the defendant was not the principal dealing with the

plaintiff, but he was acting as the agent for the Government in the sale of the trees. As such agent, he failed in fulfilling the contract which he had made, and the question now is, whether he can be held personally liable. In *Wright v. Williams* (8 Juta, 168) certain cases were mentioned in which the agent can be sued personally, such as where the agent was believed to be the principal, when he had no authority to act and where he had expressly bound himself on behalf of the principal. In the present case nothing of that kind was proved. The Magistrate, in his judgment, treats the case as if it were really a case of a bailee who has been guilty of a *delict*, or a breach, or a tort, but there is nothing of that kind in the present case. There is no *delict* charged against the defendant; there is no statutory duty cast upon him to issue licences such as are described here. Therefore, it is impossible to treat the case in any way as one of *delict*. It is entirely one of contract, and the principle in such cases is that it is the principal who should be sued, and not the agent. For these reasons, I am of opinion that the Magistrate erred in giving judgment for the plaintiff for the amount of £6. But then, as to the question of costs, this is one of those cases in which the Court would not have interfered with the decision of the Magistrate if he had given costs against the defendant, although he did not give judgment of any amount in favour of the plaintiff. An objection was not raised in the Court below; the objection is only now raised by counsel. The plea of general issue was raised, which certainly would not lead the plaintiff or his advisers to suppose that objection would be raised, that the wrong person was sued. It is quite clear that until the case came into this court, this question was never seriously raised as between the parties, and, therefore, in allowing this appeal, the Court will say nothing as to the costs of the Court below, but will allow that part of the judgment to stand. As to the costs of appeal, I am afraid that the Court must give costs to the appellant. There is another reason why the Magistrate was justified in ordering that the defendant pay the costs, and that is the whole conduct of the defendant. I think he treated the plaintiff very badly. He gave no excuse for not delivering the tree or for not giving the licence to this man, and now that the case comes in appeal, he raises this exception, which the Court is bound to allow. It is certainly a very hard case for the plaintiff, and I do hope that when the plaintiff proceeds against the Government, as I suppose he will, the Government will bear in mind all the circumstances of the case, and give the plaintiff ample compensation for what he seems to have suffered at the hands of

the Government agent, the defendant in this case. The form of the judgment will be appeal allowed, and judgment of absolution from the instance entered, but appellant to pay costs in the Court below, respondent to pay costs of appeal.

Maasdorp, J., concurred.

[Appellant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Dempers and Van Rynveld.]

## REHABILITATION.

*Ex parte* THOROGOOD.

Mr. Payne applied for leave to mention the application of E. and A. Thorogood for discharge from sequestration. Counsel explained that notice of the application had been erroneously given for to-day.

De Villiers, C.J., said that, under the special circumstances, the Court would allow the application to be made.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

	1906.
STANDARD BANK V. HOTZ.	{ Aug. 7th.
	" 8th.
	" 9th.
	" 10th.

Guarantee — Forgery — Undertaking not to prosecute — Immoral consideration.

This was an action brought by the Standard Bank of South Africa, Limited, to recover from Marcus Hotz, of Oudtshoorn, £3,378 on a promissory note, and £890 on a guarantee.

The plaintiff's declaration was as follows:

1. The plaintiff is a duly registered company, with limited liability, carrying on business at Cape Town, Oudtshoorn, and elsewhere in this colony. The defendant is a general dealer carrying on business at Oudtshoorn.

2. On the 18th August, 1904, the defendant made a certain promissory note, to which the plaintiff craves leave to

refer when produced at the trial, whereby the defendant promised to pay six months after date to a certain firm known as Israelsohn Brothers, or to their order at the Standard Bank of South Africa, Limited, Oudtshoorn, the sum of £3,578 10s. 5d. for value received.

3. Thereafter, but before the due date of the said note, the said firm of Israelsohn Brothers, for value, endorsed the said note to the plaintiff, and the plaintiff is now the legal holder thereof.

4. The defendant has paid on account of the amount of the said note the sum of £200 10s. 5d., but prior to the date of the judgment in paragraph 5 herein referred to had failed to pay the balance, to wit, £3,378.

5. On the 26th October, 1905, this Honourable Court granted provisional sentence against the defendant for the said sum of £3,378, together with interest thereon at the rate of 6 per cent. per annum from the 18th February, 1905, and costs of suit.

6. The defendant has paid the amount of the said judgment, and has required the plaintiff to go into the principal case.

7. On the 18th August, 1904, the defendant executed a certain written guarantee, to which the plaintiff craves leave to refer when produced at the trial, whereby, in consideration of the plaintiff allowing the aforesaid firm of Israelsohn Brothers certain banking facilities, the defendant guaranteed and bound himself as surety and co-principal debtor *in solidum*, for the repayment on demand, provided such demand were not made within three months of the said date, of all sums of money which the said firm might at the said date or from time to time thereafter owe or be indebted to the plaintiff, provided that the total amount to be recovered from the defendant under the said guarantee should not exceed in the whole the sum of £890, together with such further sum for interest charges, and costs as should accrue up to date of payment of principal. The defendant, further, in terms of the said guarantee, renounced the *beneficium ordinis seu excussionis*, and agreed that the said guarantee should be in addition and without prejudice to any other securities then or thereafter to be held from the said firm.

8. Thereafter the plaintiff did allow the said firm banking facilities.

9. On or about the 23rd September, 1904, the estate of the said firm was placed under sequestration. At the said date the said firm was, and the insolvent estate still is, indebted to the plaintiff in a sum far exceeding the amount of the said guarantee.

10. The plaintiff, on or about the 12th September, 1905, duly demanded from the defendant payment of the sum of £890, the amount of the guarantee afore-

said, but the defendant refuses to pay such sum or any portion thereof.

Wherefore the plaintiff claims: (a) Judgment for £3,378, with interest thereon at the rate of 6 per cent. per annum from the 18th February, 1905; (b) judgment for £890 with interest thereon at the rate of 6 per cent. per annum from the 12th September, 1905; (c) costs of suit.

The defendant's plea was as follows:

1. Paragraphs 1, 4, 5, and 6 are admitted. Paragraph 9 is admitted down to the word plaintiff. Paragraph 10 is admitted saving the word "duly." Jacobus J. de Kok was at all times material to this action, the manager and duly authorised agent for the plaintiff at its branch at Oudtshoorn.

2. The defendant admits that on the 18th of August, 1904, he signed the promissory note and the guarantee in paragraphs 2 and 7 referred to.

3. Prior to the said date the firm of Israelsohn Brothers, which consisted of Meyer, Isidore, and Barnard Israelsohn, brothers-in-law of the defendant, was indebted to the plaintiff through its said branch upon certain promissory notes purporting to have made and signed by those parties and which had been discounted by the plaintiff for the said firm. The said promissory notes were forged, and subsequent to September, 1904, the said Meyer Israelsohn was convicted of forging the same and uttering them, knowing them to be forged to the said De Kok.

4. Before the said promissory notes fell due, and at a time when the said firm was indebted to the plaintiff through the said branch, both upon promissory notes, including the said forged notes, and upon another account, the said Kok threatened the said defendant that if he would not sign the said promissory note for £3,578 10s. 5d., and the said guarantee, he, the said De Kok, would take criminal proceedings against the aforesaid members of the firm in respect of the said forgery and promised that if the defendant did so sign as aforesaid he, the said De Kok, would not take such proceedings against any of the said members, and the defendant thereupon, in consideration of the said De Kok promising not to take criminal proceedings against the said members or any of them, signed the said promissory note and guarantee now sued on.

5. The defendant has received no legal consideration for the said obligations, the consideration for the said note at the time of the making thereof and of the endorsement thereof, and for the said guarantee, was an illegal and immoral agreement, contrary to public policy to pervert the ends of Justice, and the plaintiff is not entitled to enforce his claim against the defendant on the said note and guarantee.

The defendant admits that the said note was endorsed by the said firm, but



he denies all the other allegations in paragraph 3, and he denies the allegations in paragraph 8, and save as aforesaid, denies the allegations in paragraphs 2, 3, and 7.

Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

Mr. Schreiner, K.C. (with him Mr. McGregor), for plaintiffs; Mr. Searle, K.C. (with him Mr. Upington), for defendant.

Mr. Schreiner said it would be very difficult for the bank to prove the negative, and he submitted that the onus rested upon his learned friend to prove his case. That seemed to him to be the more expeditious course.

Mr. Searle said he did not admit on the pleadings that the onus was on the defendant. It was denied specifically that there was an amount due on the guarantee. He thought the plaintiffs should proceed with their case.

Mr. Schreiner admitted that plaintiffs were liable to prove the amount of the guarantee, but beyond that he submitted the onus rested upon the defendant.

Maasdorp, J., said the plaintiffs would have to proceed with their case as far as possible with the information before them. If anything new was introduced the plaintiffs might call rebutting evidence.

Jacobus J. P. de Kok, formerly manager of the Standard Bank at Oudtshoorn, denied that he made threats to the defendant that Meyer Israelsohn would be prosecuted if he (defendant) did not sign the promissory note and the guarantees. About the end of July various people denied the amounts they were liable for on account of Israelsohn, although they admitted their signatures. On a certain day Meyer Israelsohn came to him and asked him to pay a bill of £2,000. Israelsohn said his brother-in-law, the defendant, had promised to sign the guarantee for him for £1,000 to cover the overdraft, and that the balance would be found in cash, and other securities. At first witness declined, but ultimately he was persuaded, when Israelsohn said that the defendant would come to the bank and sign next day. The defendant did not come in as promised, and witness went to see him. The defendant admitted the promise, but said that he would not sign the guarantee until he made further inquiries about the firm's standing. Witness then said there would be only one course open to him, and that was to sue the firm of Israelsohn. Israelsohn asked witness to wait a little, and then he went to Cape Town via Port Elizabeth. A wire from Cape Town informed witness that Israelsohn was offering 7s. 6d. in the £ to his creditors. Upon instructions from headquarters to reduce liabilities, witness sent notices to the makers of the bills. At that time he had not the slightest suspicion that the bills were not in order. The makers

denied that they were liable for the amounts, and then witness had Israelsohn shadowed in Cape Town, and also in Oudtshoorn. None of the signatures were forged. All the time witness thought, and thought so still, that the bank, under the circumstances, was on "velvet." When Israelsohn returned to Oudtshoorn he strenuously denied that the bills had been altered. A portion of the amount was owing by the farmers and the remainder Israelsohn said was an accommodation. Witness said to Israelsohn: "You told me these were trade bills; now you say they are accommodation bills." Israelsohn said: "Because I thought if I told you they were accommodation bills you would not have discounted them." Witness said: "I certainly would not. If you do not retire these bills at once I will sequester your estate, and if you abscond I will have you arrested by that man there" (pointing to a policeman in private clothes). Israelsohn said: "Don't be in a hurry; Hotz is going to take over the business. He is going to help us." Subsequently Hotz came into the bank with Isidoro Israelsohn, and the defendant asked witness to be more lenient, and use some consideration for the sake of his wife and family. The defendant cried. Witness refused to have anything to do with the defendant, but suggested that both the defendant and Israelsohn should see their attorney, Mr. Foster. Witness was sent for and went to Foster's office, where the prospect of the firm pulling through was discussed. There was a suggestion of paying 10s. in the £ to avoid insolvency. It was said that the defendant would help Israelsohn, and Foster suggested that witness should draw up a bill for the amount, which the defendant should sign for. At that meeting no threats were made by witness. Witness then had the guarantee drawn up, which the defendant signed. Leniency was asked for, that witness should not press Israelsohn into sequestration. There was no question of condoning a crime. In September the estate was voluntarily sequestered, and in December the creditors resolved to prosecute the Israelsohns. Subsequently easy terms were sought for on behalf of the defendant, and witness submitted an offer that the defendant should pass a mortgage bond for the full amount of the debt, guarantee and pledge a preferent claim in the estate of Israelsohn, and to pay £100 a month, with interest. At that time the defendant never said that he had signed the note through threats by witness. Upon the conviction of Meyer Israelsohn for forgery, proceedings for fraudulent insolvency were withdrawn against the other partners of the firm. Meyer Israelsohn was sentenced to five years' imprisonment.

Cross-examined by Mr. Searle: He had to report from the end of March,



1904, the amount of Israelsohns' overdraft, as he had to do with other firms. In the months of March, April, and May, Israelsohns' account was largely overdrawn. He denied that he promised to allow a Mr. Gasner to put in cheques and withdraw them immediately afterwards, in order to make it appear that Israelsohns' overdraft was much smaller. Such a thing was done at the end of the month, but he was not a party to the arrangement. In the first instance, he was afraid Israelsohn would decamp, because of his defalcations in the balance-sheet. He wired to the general manager to have Israelsohn shadowed, and from the head office they wired back that they could not do so before they knew more about the matter. Subsequently he wired that serious defalcations were alleged by the makers of the bills. Witness was afraid that Israelsohn might disappear at any time. As soon as the bill was signed by the defendant, he told the police that they need not watch Israelsohn any more. Up to that time there was no question of any fraudulent balance-sheet. He never said to the defendant that he would have all the Israelsohns arrested if he (the defendant) did not sign the bills. If he had not been covered, he would not have stopped proceedings against the Israelsohns. He was covered by the defendant's security. He had no recollection of the defendant coming to the bank to see the bills that were irregular. As far as he could remember, the hundreds in the figures were in different ink. One of the bills, which he thought was most glaring when he was acquainted with the forgeries, much to his surprise was settled by the maker. He did not say to anyone that once the bills were taken up nothing further would be heard of the matter, as the bank only could move. On one occasion the firm of Israelsohn got assistance from Jacobson at the end of the month. Meyer Israelsohn would never have got an overdraft from witness if he had not misrepresented his position. He did not tell one Lavigne, who was opposed to Israelsohn in business, if the bank did not get the money he would make an affidavit, and have the three partners lodged in gaol.

James Alexander Foster, attorney, of Oudtshoorn, stated he remembered the defendant signing the promissory note in witness's office. At that time he was the attorney for the defendant, and Israelsohn Bros. Witness had absolutely nothing to do with the bank. Mr. De Kock did not threaten he would prosecute if the promissory note was not signed, nor did he promise if the note was signed nothing more would be heard of the matter. Witness did not threaten upon the instructions of Mr. De Kock. Witness was trustee in the estate, and in December a resolution was passed to prosecute the insolvent. Wit-

ness did not suggest that Isidore Israelsohn, or the defendant, should get possession of the notes and destroy them.

Cross-examined by Mr. Searle: Witness saw Mr. De Kock about the matter before Meyer Israelsohn returned from Cape Town to Oudtshoorn. The bank vote was so large at the meeting of creditors that they could have controlled the election of trustee. Mr. Strydom pointed out to witness that the bill had been fraudulently altered, and witness thought it was certainly very suspicious. Mr. De Kock had inquired of witness on several occasions as to how things were proceeding. It was quite possible that witness was the first to acquaint defendant with the forgeries. Witness did not tell the defendant to go to the bank to see the forgeries. He did not say to the defendant that it would be a disgrace to the family if he did not take up the notes. When Meyer returned from Cape Town, and failed to effect a compromise, witness did say it was a pity if Isidore, who was a married man, and Barnard, who had little to do with the business, should get into trouble.

Re-examined by Mr. Schreiner: He worked in the interests of his clients, and had nothing to do with the bank beyond seeing Mr. De Kock on several occasions. Meyer Israelsohn assured witness that the bills were accommodation notes.

Richard Seymour, acting manager of the Oudtshoorn branch of the Standard Bank, who relieved Mr. De Kock in January, 1905, stated that when the defendant called at the bank, there was no insinuation of his having signed the documents under threats from Mr. De Kock. The defendant asked for an extension of time, and it was agreed to accept from him £100 a month, with the interest. The defendant paid for two months.

Mr. Schreiner closed his case.

Marcus Hotz (defendant) stated he had lived at Oudtshoorn for about 21 years. His main business was dealing in ostriches. On August 2, when Meyer Israelsohn went away, Mr. De Kock asked witness if he was coming in to sign a guarantee for £1,000, and witness said it was a good thing that he could meet his own liabilities. It was on the 11th August that he found out that there was anything wrong in the bills. He got the knowledge through Mr. Foster, who said witness must come urgently to the office. Mr. Foster said that some of the farmers had made an affidavit that bills in the Standard Bank were forged, that he had seen some of them, and that witness should try and take these bills up. Mr. De Kock told Mr. Foster that if the bills were not immediately retired, he would make an affidavit, and have the Israelsohn Bros. arrested. Mr. De Kock showed him some of the bills

where the hundreds were "cramped" in the body of them, and that the figures had been added in different ink. Mr. De Kock said he had asked Meyer Israelsohn to explain, and Meyer Israelsohn said he had used two inkpots. Mr. De Kock threatened if witness did not take the bills up, he would make an affidavit and have them arrested. Witness said he could not take up the bills. When he returned, Mr. Foster said: "You have been a long time in Oudtshoorn; you have a respectable family, and you should take up the bills." Several times later on Foster advised witness to take up the bills. At a meeting between Mr. Foster, Meyer Israelsohn, Isidore Israelsohn, and witness, Meyer said that the bills were for accommodation. Witness denied that they were forgeries, and Mr. Foster said: "What is the good of talking like that?" Mr. Foster said if witness did not take up the bills, all the three would go to gaol. Mr. De Kock sent for witness and Isidore, and said he had not slept for nights, and said he had a telegram from the general manager to the effect that if the bills were not taken up, an affidavit must be lodged at once to have the Israelsohns arrested. Mr. De Kock added that witness would not be a heavy loser over the transaction, and then he produced a slip of paper with the amount of the bills, and said to witness that he would get £648 from the farmers and 10s. in the £ from the estate. Mr. De Kock, in conclusion, said: "You will only be a loser of £1,100 or £1,200," and then witness signed the document. Mr. De Kock said he would not give up the bills unless witness gave a guarantee for £890, and witness agreed to give this. When they met at Mr. Foster's office Mr. Foster said he would require time to consider the transaction. Witness signed the documents in Mr. Foster's office. Witness never had the bills in his possession. Nothing but the forgery was in his mind when he agreed to sign the documents. When the bills came into court witness had an interview with the manager of the Bank of Africa, took legal advice, and then ceased payment. Witness knew that a special policeman was watching Meyer, and when witness signed the bills the watch was withdrawn. Mr. De Kock told witness of the vigilance of the police. If Mr. De Kock had not said he would have these people arrested he would not have signed the bills. He never instructed Mr. Foster to do any work for him in connection with these bills; he had never had any account from Mr. Foster.

Cross-examined by Mr. Schreiner: When he was asking the bank for leniency he had a fine balance to his credit. Witness was a keen business man, and had made his money in keen competition at Oudtshoorn.

Did you ever buy a pig in a poke?—Yes, sometimes.

Mr. Searle: I'm sure he doesn't know the meaning of that.

Mr. Schreiner: Do you know the meaning of "pig in a poke"?—No.

Then why do you say "Yes" to my question?—I thought you were joking.

Would you say yes to every joke?—Yes.

You and the Israelsohns are very clannish?—Yes.

Mr. Searle: He doesn't know the meaning of "clannish."

Mr. Schreiner: Do you know the meaning of clannish?—No.

You are fond of your family?—Yes.

Continuing, witness said that Meyer never asked him for a guarantee for £1,000. Mr. Foster did not say that witness was signing the guarantee, because he had promised to do so. He knew that his brother-in-law Meyer was being shadowed in Oudtshoorn, but he did not know that the other two partners of the firm were being watched.

When witness saw Strydom's bill he remarked to Mr. De Kock: "How can you discount such a bill?" Mr. De Kock replied that Meyer satisfied him when he saw that he had used two inkpots. Witness had no doubt that Mr. De Kock would carry out his threat to have the three partners arrested. Witness did not care so much what happened to Meyer, but he was anxious about Isidore. Mr. Foster's statement that all three would be arrested weighed very much on his mind.

Re-examined by Mr. Searle: At that time he had no idea of taking over the business. There was pressure brought to bear upon him by his family in the matter. His family were distressed over the question of the bills, not over the prospect of insolvency.

Isidore Israelsohn, brother-in-law of the defendant, and one of the partners in the late firm of Israelsohn Brothers, stated that in July the firm was pressed for money. About the 8th or 9th August, he first knew that there was anything wrong with the bill. Mr. De Kock sent for him, and pointed out the different ink used in the figures. Mr. De Kock then said if the bills were not taken up he would have the three partners arrested and sent to the "King's Breakwater," and they would get five or seven years. Mr. De Kock said the only one who could help them was the defendant. Mr. Foster said that if the bills were not taken up Mr. De Kock would make an affidavit and have all three arrested. Mr. Foster added that as they were partners, they were all liable. Mr. Hotz said he would consider the matter. Witness gave corroborative evidence as to what took place in Mr. De Kock's office. After the prosecution in September last he remained at Oudtshoorn. When the pro-

ceedings were taken in October last against Hotz in the Supreme Court, witness did not make an affidavit, because he was not asked to do so. Witness was summoned by Messrs. Jagger in July, and informed Mr. De Kock. On all the bills Mr. De Kock showed witness different inks were used. Witness did not bring a single one of these bills to the bank. Witness was positive that Mr. De Kock said: "I'll have you all three arrested." He denied that Mr. Foster was ever his attorney in the course of the proceedings. He did not go to his own attorney and inform him of the threat of prosecution on account of the bills. Every time he met Mr. De Kock the latter would say: "All three of you will be arrested." Mr. Foster said to Mr. Meyer: "Even a blind man can see the forgery." Mr. Foster also threatened that all three would be arrested. Witness was not aware that Mr. Foster was then acting as attorney for the defendant or Israelsohn Bros. The defendant was a man of "weak nature," and when the position was put to him, he broke down and cried. He did not fear the sequestration of the estate; he dreaded being arrested and charged with forgery, as being one of the principals of the firm. He did not protest to Mr. De Kock against his name being put in an affidavit, nor did he point out that he had nothing to do with the bills. He was not aware of the law, and did not know that he could not be charged. Prince, Vincent and Co. did not sign a deed of compromise and then withdraw.

Re-examined by Mr. Searle: Mr. Foster acted for Messrs. Jagger in the case against Israelsohn Bros. During that time Mr. Jacobsohn was doing witness's legal work.

Stephen Albert Horne, formerly Chief Constable at Oudtshoorn, stated that Mr. De Kock came to his office and requested him to watch Meyer Israelsohn, as he might be arrested for some crime. Witness detailed two men to watch Meyer Israelsohn. On the evening of the 18th Mr. De Kock said that the watch could be withdrawn. There was common talk about the place of forgeries.

Cross-examined by Mr. Schreiner: It was only Meyer Israelsohn who was to be watched.

Wolfe Saunders stated that Isidore Israelsohn was his brother-in-law. In August Mr. Foster sent for him, acquainted him of the forgeries, told him that all three brothers would be arrested, and asked him to use his influence with Mr. Hotz so that the matter did not go any further. Eventually witness agreed to assist the defendant in the matter.

Cross-examined by Mr. Schreiner: He regarded Mr. Foster as having an interest in the bank's affairs. Witness

always consulted Mr. Foster on matters of business.

Re-examined by Mr. Searle: He came out to South Africa from London for the purposes of the case.

Joseph Wiseman Sydney, who acted as manager for Kenner and Co. in August, stated that at the beginning of that month, as far as he knew, Israelsohn Bros. were in a perfectly sound position. Witness tried to arrange a composition when he was acquainted with the state of affairs. Mr. De Kock was emphatic that the composition should go through, and told witness it was a case of forgery.

Jack Gassner, local manager of Kenner and Co., Oudtshoorn, stated that in 1904 his firm were creditors of Messrs. Israelsohn to a considerable sum. Mr. De Kock was a party to the arrangement of witness's firm, paying in the cheques on behalf of Israelsohn Bros. He did not think he was doing anything wrong. The effect was to reduce the overdraft of Israelsohn Bros for a few days.

Matthias Smit stated that in July 1904, he signed a note to Meyer Israelsohn for £29 7s. 8d. Subsequently he received a note from the bank that he was indebted in the sum of £229 7s. 8d., and he pointed to the bank manager that a figure had been added. Witness produced his account, and receipts to Mr. Foster. Some time afterwards Meyer Israelsohn brought the bill and destroyed it in front of witness. Portions of it were picked up by witness, and put in at the trial.

Cross-examined by Mr. Schreiner: Witness had never given Meyer Israelsohn any accommodation. There were other people in the district who did business with Israelsohn.

J. G. Strydom, farmer, of Oudtshoorn, stated in July, 1904, he gave a bill for £28. Meyer Israelsohn wrote out the bill. It was written out before he signed. Witness got a notice from the bank on a bill for £228, and he then produced to the bank manager the receipt for £28. The bill was subsequently destroyed by a man who was very often in Israelsohn's shop.

Cross-examined by Mr. Schreiner: He had never accommodated the firm of Israelsohn Bros. He might have given a bill for more than he actually owed.

This concluded the evidence.

Maasdorp, J., said the defendant, having admitted the execution of these notes, the burden of establishing the illegality of the consideration rested upon him.

Mr. Searle said that the letters written by Mr. De Kock to his head office went very nearly as far as admitting that the documents were signed under threats to prosecute. Hotz signed because he wanted to prevent a prosecution for forgery. By afterwards pass-

ing a bond he could not make the illegal transaction legal. It was only after it came out that the Israelsohns were after all going to be prosecuted for forgery that the defendant decided not to pay. De Kock certainly intended Hotz to believe that he would prosecute the Israelsohns if the forged bills were not retired. If he did not intend to prosecute why did he get the police to shadow Meyer Israelsohn? It was idle to say that De Kock had no intention to prosecute. He submitted on the authority of *Harris v. Krige* (2 J., 399) that if the note was signed with a view to avoiding the disclosure of the forgeries, with the knowledge of De Kock, then the bank could not recover on the note.

Mr. Schreiner was not called upon.

Maasdorp, J.: In the view I take of the evidence in this case, I do not think it is necessary to hear Mr. Schreiner in reply. The plaintiff seeks to recover from the defendant the sum of £3,378, as the balance due upon a promissory note made by the defendant in favour of Messrs. Israelsohn Bros., and he claims upon a guarantee given by the defendant for the balance that might be due between Israelsohn Bros. and the bank, which balance ultimately was discovered to amount to the sum of £890. The defendant admits the execution of these documents. He alleges that they were the result of an illegal and immoral agreement between the plaintiff and himself, which agreement was stated to amount to this: "It was known at the time that certain notes were in possession of the bank, which were forged by a person called Meyer Israelsohn, and at an interview between the defendant and the plaintiff it is stated it was agreed that upon the defendant taking up these forged notes that the plaintiff, who had threatened a prosecution against Meyer Israelsohn, would, in consideration of the receipt of these notes, withdraw the prosecution, or rather promise not to prosecute. I do not think it will be necessary in a case of this kind to establish by evidence that any express promise in so many words was made on the part of the person who undertakes not to prosecute, because it is an undertaking which is tacitly understood by the parties. A tacit undertaking in the matter would equally express terms as if it were made in so many words. The Court has to decide now whether in consideration for that note there was an express or a tacit undertaking on the part of Mr. De Kock and Mr. Foster not to prosecute Meyer Israelsohn. In the plea it is alleged that such undertaking was given by Mr. De Kock, the manager of the bank, and by Mr. Faber, acting as attorney for such manager. In the greater part of the argument it was advanced by Mr. Searle that Mr. De Kock found himself in

difficulties in reference to the management of the bank. I would prefer to approach the case from the point of view of the difficulties in which the defendant, who is related to Meyer Israelsohn and the family, found himself in respect to this alleged forgery. The promissory note was made and the guarantee given on the 18th of August, and the question now arises as to the position of affairs immediately before the 18th of August. It is quite clear that it had come to the knowledge of Hotz and the other members of the family of Israelsohn that there were certain notes in existence of a very suspicious character, and which pointed to a fraudulent transaction on the part of Meyer Israelsohn. I am not prepared, in view of the evidence, to accept Mr. Hotz's statement on that point, but Mr. Foster admits that the defendant did receive the first information of the trouble from him. He says that it was quite possible before going into any transaction between Mr. Foster and the parties, he would regard the case simply from what was likely to have occurred. Undoubtedly the family was very much distressed when the information was conveyed, and by the prospect of the trouble.

His Lordship, after reviewing the evidence, said he was inclined to believe the versions put forward by Messrs. De Kock and Foster, and gave judgment for the plaintiff for the amounts claimed with interest and costs.

[Plaintiffs' Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Syfret, Godlonton and Low.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. DU PLESSIS. { 1906.  
Aug. 7th.

Magistrate's find on facts overruled — Spoor evidence —  
Caning of juvenile offenders  
— Act 21 of 1869, Sec. 2.

This was an appeal from a judgment of the Resident Magistrate of Sutherland, who had convicted the appellant (Hendrik du Plessis) of the crime of theft.

From the record, it appeared that one Stephanus Hermanus was a shepherd, in the district of Sutherland, and that on the 22nd May last he missed a kettle, mug, and other belongings from a cave that he occupied. The allegation was that appellant (aged 16 years) and Gert du Plessis (aged 11 years) took away the shepherd's belongings, while he was looking after the sheep of his master,



The Magistrate found Hendrik du Plessis guilty, and sentenced him to receive sixteen cuts with the cane. Gert du Plessis was found not guilty, and discharged.

Mr. Louwrens was for appellant; Mr. Howel Jones was for the Crown.

Hopley, J., pointed out that Hendrik was too old to be caned.

Mr. Louwrens said that the ground of appeal was not only that the sentence was irregular, but that the conviction was against the weight of the evidence.

Later on, a letter addressed by the Magistrate to the Registrar of the Supreme Court was read, in the course of which he said: "I erred as regards the age for caning a juvenile, for the moment being under the impression that the age limit in terms of section 1 of Act 21, 1869, was 16, whereas it is 14 years. The accused was too old to be sent to a reformatory; to imprison him with other criminals would have been cruel; and to indenture him for a year or two for the paltry theft with which he was charged was too severe. Under the circumstances, the best punishment would have been a whipping, which I subsequently discovered was illegal."

[Hopley, J.: There was always the alternative of a fine.]

Counsel having been heard in argument on the evidence.

Hopley, J.: In this case, two white lads, called Du Plessis, the elder brother aged 16 and the younger aged 11, were charged with having stolen a kettle, a mug, a bradawl, a tin of fat, a quantity of meat, and a quantity of meal, the property of one Stephanus Hermanus, a shepherd. It appears that Hermanus lives in a cave at his outpost, and that he had there his ordinary provisions and small household belongings. He lives in this cave with his brother, and about two miles or two and a half miles off, on the next farm, also at an outpost, were these two boys herding. The accused were in charge of a flock of sheep, and lived in a krantz in the mountain side. On Tuesday, the 22nd May, Stephanus went away, leaving his belongings in the cave. It was an open cave, without a door, and he went and herded his sheep towards the boundary, which runs between there and the farm where these two lads worked. On that day he says that these lads were herding their flock, also in the direction of the boundary, and they must have been only a few hundred yards from him. He says that on that day they and their flock were under his observation practically. Shepherds, one knows, keep their eyes open in the wide veld. He says that if these lads had gone to his cave they would have to sneak along the river bed to elude his vision. When he went home he missed the articles charged in the indictment, and next day, I think it was, he looked at the spoor,

and he found, he says, a small spoor, bare foot, a child's spoor, coming from the direction of the river towards his cave, and going back again. Now, that is only one spoor, and it went in that direction, and it might very well be that, because it was a child's spoor, and he knew there was a child herding on the other side, his suspicions were at once directed against these two boys. But he does not follow the spoor up to find out whether it led all the way to where the lads lived; we do not know whether it branched off, or anything of that sort, but he reports to his master, who reports to the policeman on Thursday, a few days afterwards. On that day the policeman, having been informed about the bare foot spoor leading in the direction of these children, and amongst other things that there was a kettle which Stephanus's master said he had seen there, and that he identified it as his shepherd's, set about his quest with the idea in his head that these boys were the thieves. One must not lose sight, in weighing the evidence in this case, of the fact that beyond the boundary there is a space of veld of nearly two miles before you come to the place where these two boys lived, and the spoor is not traced beyond the boundary at all, nor does one know how it branched off. Suppose a little coloured boy or woman, with a small foot, had stolen these goods, the indications, so far as the spoors were concerned, would have been exactly the same. No trouble was taken about measuring these spoors, and no trouble was taken about comparing the feet of the accused with the spoors. Consequently, it seems to me that the evidence as to the spoors is very unsatisfactory, and not at all conclusive. The only other thing that is alleged to connect the accused with the crime is the kettle. That kettle does not seem to me to have been anything but an ordinary kettle. There is nothing to show why the shepherd's master should have identified this kettle, or know it from any other. One cannot help coming to the conclusion that, because he saw two kettles at the place where these boys lived, he jumped to the conclusion that one of the kettles was his herd's, which had been stolen. The policeman evidently was under the same impression, because he had been told by Muller that it was his herd's. The policeman laid a trap by removing one of the kettles, and then, because of the answer given by the accused, he is supposed to have shown disingenuous conduct, pointing to his guilt. It does not seem to me that the Magistrate has taken sufficient notice of the evidence for the defence in this matter. There were other things stolen at this time besides the kettle, and these must have been hunted for, but not a single trace of them has been



found. On the whole, it seems to me that the circumstances are altogether such as might not be incompatible with the innocence of both these prisoners. I think, therefore, that the appeal should be allowed and the conviction quashed.

[Appellant's Attorneys: Syfret, God-lonton and Low.]

#### REX V. WESLEY.

This was an appeal from a judgment of the Resident Magistrate of Matatiele, who had convicted appellant of contravening section 243 of the Native Territories Penal Code (Act 24 of 1886), and had sentenced him to a fine of £2 or one week's imprisonment with hard labour.

Appellant, it appeared, was a private in the C.M.R., and he was charged that on the 4th June last he did wilfully damage and injure the door of a room occupied by one Elizabeth by breaking it open. His story was that the place was used as a brothel. He admitted that he had no right in the room except as a visitor.

The Magistrate, in his reasons for judgment, said that the accused went to a private residence in the night while the occupants were asleep, and knocked at the door, and, receiving no response, deliberately broke the door. He held that the breaking of the door was committed with malicious intent.

Mr. Benjamin was for appellant; Mr. Howel Jones was for the Crown.

Mr. Benjamin said it was admitted that this was a very old door, and that the door split into two portions. This was a serious charge for the accused, who was a private in the C.M.R. There was, counsel submitted, no evidence whatever that Wesley acted maliciously. The real reason of the prosecution was that appellant went to the room to see another woman, Emma, and there seemed to have been some feeling between Elizabeth and Emma. Apparently there was some jealousy on the part of Elizabeth.

[Hopley, J.: You may spin your theory, of course, but there is nothing in the evidence.]

Mr. Benjamin (proceeding) contended that it was not shown that appellant acted recklessly and deliberately.

Hopley, J.: It is not necessary to hear Mr. Jones for the Crown in this case. The accused was charged with wilfully damaging and injuring the door of a certain room or rooms occupied by one Elizabeth by breaking the said door. He is charged under a section which reads: "Whoever wilfully commits upon any property whatever any wilful damage or injury shall be punished," etc. Section 250 defines what the word wilfully means as being "every one

who causes any event by an act which he knew would probably cause that event, being reckless, whether such event happened or not, shall be deemed to cause it wilfully for this part of the code." In the present instance the accused went at night to the house of Elizabeth, a place where he had been before, and where apparently he had visited one Emma. On this occasion Emma was not there, and the evidence of Elizabeth is that the accused had no right whatever on her premises, nor had Emma either. He knocked, the door was not opened to him, and he proceeded to push it in such a way that it broke. Now, the Magistrate has held that he deliberately did this. Well, I suppose the Magistrate is right in that. Accused did not do it by accident. He did an act which he knew would probably open the door, and he behaved in such a way that the Magistrate was justified in thinking that appellant acted recklessly. The Magistrate was right in holding that he committed an act which would break open the door. I should not have been at all disinclined to agree with the Magistrate if, under the circumstances, he had held that there was no deliberate intent, and had discharged the accused after he had lectured him in regard to going about at night in that way. But the Magistrate has held that it was a wilful act, and, therefore, I must hold that it was deliberately done, and I must find that accused had contravened the section. I do not see how I can find that the Magistrate's verdict was a wrong one. The appeal must be dismissed.

#### CHIPPS V. VAN CALKER.

This was an appeal from a judgment of the Assistant Resident Magistrate of Matatiele in an action brought against appellant by respondent to recover £44 13s. 9d. for goods sold and delivered.

The Magistrate gave judgment for plaintiff for £44 9s. 3d., with costs, and rejected the evidence given by defendant and his witnesses as unreliable.

The action was brought by the Rev. Theo. E. van Calker, superintendent of the Moravian Missionary Society, and the business had been carried on in the name of Martin and Co., but it was said to belong to the society. The defendant had admitted liability for £3 17s. 3d., and no more, pleading that he had paid £10, for which no credit had been given, that he had delivered six bags of mealies, for which he had not been credited, and that certain goods had been debited to him, of which he had not had delivery. There appeared to have been a change of managers at the store during the transactions, Mr. Martin, who had had

charge of the business, having died in August, 1902.

Mr. W. Porter Buchanan was for appellant; Mr. Sutton was for respondent.

Mr. Buchanan having been heard in argument,

Hopley, J.: Throughout and up to the day of coming into court and half-way through the case the *locus standi* of the plaintiff was not objected to. His right to sue was never questioned, and the case went on as if he were actually the principal to whom these moneys were owing. Now, as far as I can gather from the evidence—and I think it is a correct inference—the facts are that Mr. Van Calker, and before him Mr. Bouer, were simply the managers for the Moravian Missionary Society, and that all along the Moravian Society has been carrying on this trading station under the name of H. Martin or H. Martin and Co. At the date when this account was opened, Mr. Martin himself was there as manager, and apparently as their book-keeper. The defendant had carried on a system of purchasing on credit, and now and then sent produce or paid something in cash from the account. Entries were made in his pass-book by the manager. He never during the lifetime of Mr. Martin disputed a single item of this account, but at the end of Mr. Martin's entries he himself has put in an entry in his own handwriting, and it is the only entry in his handwriting in the whole book, of "by cash £10, 18th April." Either Mr. Martin himself or a subsequent book-keeper scratched it out as being an unwarranted entry. The Magistrate has gone into the whole of this matter, he has had the evidence of the book-keeper, who was there when the rest of the items were entered, and he is satisfied that these amounts are due. The Magistrate disallowed certain items amounting to 4s. 7d., which could not be specified, and gave judgment for the plaintiff for £44 9s. 3d. I see no reason whatever to disturb such judgment, and the appeal must be dismissed with costs.

*In re* INSOLVENT ESTATE GOLDSMITH AND CO.

Mr. Benjamin moved, on the petition of the Federal Supply and Cold Storage Co., of South Africa, Ltd., W. R. Jocks and Co., and McArthur, Atkins and Co., for an order for the removal of Ralph Fernandez from office as provisional trustee in the insolvent estate of Goldsmith and Co., Marble Arch Butchery, and the appointment of J. E. P. Close, as provisional trustee. Counsel said that they did not apply at this stage for the actual removal of Fernandez,

but they thought it was necessary that Mr. Close should also be appointed provisional trustee to exercise some control over Fernandez. There were such serious allegations made against this gentleman that it was desirable to appoint someone to co-operate with him.

Hopley, J.: On the 2nd August, when application was made to have the insolvent estate of Goldsmith and Co. finally adjudicated, the respondent Fernandez was appointed provisional trustee. The present applicants say, in regard to the respondent, that, besides what they describe as his high-handed procedure in not handing over the business to the *curator bonis* for some little time, there is something which requires inquiry in this case, in view of the fact that certain pages of the books of the firm, which dealt with his account, are mutilated, and I suppose it is implied that this was done by him. These, of course, are serious allegations, and one does not decide or say anything about them one way or another, behind the back of respondent; he is not here, and I am not quite sure that he has personally received notice of this application. At the same time, the allegations are of such a nature that it would be desirable to go out of the usual course of practice and appoint somebody to act with him, and I think that the application might be acceded to, so as to appoint Mr. Close co-provisional trustee with Mr. Fernandez in this matter. The order of the Court, therefore, is that Mr. J. E. P. Close be joined with the said Ralph Fernandez as provisional trustee. The question of costs may stand over. There will be no order as to costs made at present as to costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

FILLIS V. CAPE TOWN CORPORATION. { 1906.  
Aug. 8th.  
" 24th.

Mr. Uppington mentioned the matter of Fillis and the Cape Town Corporation, which recently came before his lordship

in Chambers. An application had been made to restrain the Council from demolishing the building on the Parade, known as the Circus.

Maasdorp, J., said there was no allegation that the Council meant to take immediate action, and the applicant could move the Court after notice to the respondent, but they had not done so. There was an affidavit now that the respondents had begun to demolish the building. Already a large portion of the roof had been removed, and the action of the respondents would cause serious damage to the applicant. If the respondents were restrained from proceeding, their position could not in any way be injured.

Maasdorp, J., granted a rule nisi calling on the Town Council to show cause why they should not be restrained from pulling down the Circus, the rule to act as an interim interdict, and to be returnable to-morrow (Thursday) week.

*Postea* (August 24).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Mr. Upington was for applicant; Mr. Douglas Buchanan (in the absence of his leader, Mr. Schreiner, K.C.) was for respondents.

Mr. Upington read the petition upon which the rule was granted.

Mr. Buchanan read lengthy replying affidavits.

De Villiers, C.J., remarked that the only question seemed to be who should remove the building.

Mr. Buchanan: The applicant is now removing the building.

[De Villiers, C.J.: Well then, what is the dispute about?]

Mr. Buchanan: It is merely a matter of costs.

De Villiers, C.J., asked why the Council did not stay their hands and allow the applicant to remove his own Building.

Mr. Buchanan said he supposed that the Council had some doubts as to whether the order to demolish would be complied with. Mr. Buchanan having been heard in argument on the facts.

De Villiers, C.J.: The applicant fills for a long time occupied this space on the Parade ground, and had this building put upon it. It was not a mere precarious tenure in the sense that nothing was paid, because considerable rent was paid all the time when the applicant was in possession. But there was a very stringent clause in the agreement between the parties that the applicant was bound to remove the building upon 24 hours' notice. That does not mean that only 24 hours would be allowed to remove the

building. That would be practically impossible in the case of a large building like that; he must start the removal within 24 hours after he had got notice. That clause in the agreement the applicant was bound by, and up to a certain point the applicant was entirely in the wrong. That is quite clear. But the reason why the applicant really was in the wrong was because there was a misunderstanding apparently. The applicant believed that he had received permission from the military authorities as well as from the Colonial Government. The Town Council had told the applicant that if there were no objection on the part of the military authorities and the Colonial Government, the applicant could remain in possession until the 30th September, 1906, and, the letter added, "Failing which I am to intimate that it will be necessary for you to remove the building and vacate the site on the Parade in accordance with the notification already given to you by the Council." That letter was dated the 29th June, 1906. After that considerable correspondence took place between the parties, and there is no doubt that the applicant, believing that he had got the consent of the military authorities, thought he was entitled to remain in possession. The mistake the applicant made was in not obtaining written consent from Colonel MacKenzie. In point of fact, it appears that Colonel MacKenzie wrote to the Town Council that he refused his consent. It is now said, however, that that letter was written before the verbal consent was given to the applicant, but, even so, I think that the applicant ought then to have got a written consent from the colonel, and sent that written consent to the Town Council. Instead of that, he continued the discussion. I think it is to be regretted that Colonel MacKenzie has not made an affidavit. I understand he is in Cape Town, and there is no affidavit from him denying the statement of the two witnesses to the effect that he had given his verbal consent. But the real reason why these people were continually insisting upon having a continuation of the lease until the 30th September was because they believed that they had got the consent of Colonel MacKenzie. They were wrong, however, in not sending in a written consent, and up to a certain point the Town Council were quite within their rights in telling the applicant that he must remove the building, and that if he did not remove the building the Town Council would remove it. But then the applicant, seeing that it was hopeless to continue this discussion, suggested to the Town Council that they should forego all legal rights, advertise the place for sale immediately and sell the building by public auction on the Saturday morning, the 11th

August, with the condition that the purchaser removes the building within one week, and the further condition that the building be not touched by the respondents in the meantime. Now, in my opinion, that was a most reasonable suggestion. A building like that could not be removed within 24 hours, and the applicant, who had set up the building, and who had intended to sell it, would be able to take it down with greater care. It may be quite true that the Town Council are the owners, we will treat the Town Council as the owners of the property, but where a lessee has made certain improvements upon that property, and he is entitled to remove those improvements, he ought to have a reasonable time for removing those improvements, and the owner of the property has no right forcibly to remove those improvements if the lessee himself expresses his willingness to do so. Now, the Town Council did not think the applicants would carry out their offer, but there is no ground for supposing that they would not. All that they did was up to a certain point they insisted upon their rights, and when they found they could not succeed in obtaining their rights, they made what appears to me this very reasonable offer. It is simply absurd to say, as the respondents do in their affidavits, that to allow the applicant to remove the building would have been an admission that the Town Council's action was in any way unjust or illegal, or would cause the applicant any injury. Their action had up to that time not been unjust, but they certainly became unreasonable when this lessee offered to remove the materials himself, and asked only for a week's time to do it, and they refused that permission. The sale was to take place on the Saturday, the applicant wished to sell it on that day, and within a week's time he offered to remove it. Under these circumstances, I think the applicant was quite justified in applying to the Court for an interdict. He wished to remove the building himself. The Town Council unreasonably took upon themselves the right to remove the building, and the applicant was entitled to come into court and apply for an interdict. The application must, therefore, be granted, with costs, on condition that the applicant remove the building and reinstate the Parade ground in the condition in which it was before the building was erected within one week from Monday next.

[Applicant's Attorneys: Van Zyl and Buissinné. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

COOKE V. COOKE. { 1906.  
Aug. 8th.

Restitution of conjugal rights—  
Domicile.

*A wife who does not reside within the jurisdiction is entitled to a decree of restitution of conjugal rights against a husband domiciled here, who has maliciously deserted her.*

*Jacks v. Jacks followed. (Cur. dubitant, whether a divorce consequent on such order would be recognized in England).*

This was an action brought by Geraldine Cooke, of London, England, against her husband, Henry Bell Cooke, of Cape Town, for restitution of conjugal rights, failing which a decree of divorce, with forfeiture of any benefits of the marriage and costs.

Plaintiff, in her declaration, said that defendant was domiciled in this colony. She was married to defendant at Folkestone in February, 1894, and they thereafter lived together at Folkestone and other places. There was issue of the marriage—one child, aged eleven years. In 1899 defendant wrongfully and unlawfully deserted plaintiff, and had not since returned to her, or in any way restored to her conjugal rights.

Mr. Swift was for plaintiff; defendant had been barred.

[Hopley, J. (to counsel): She has never been in this country.]

Mr. Swift: No, my lord, but her husband is domiciled in this colony, and so the action has to be brought here.

[Hopley, J.: Have you any authority for this application?]

Mr. Swift cited *Jacks v. Jacks* (13 C.T.R., 101).

[Hopley, J.: I think we might have a good many of these cases if once we grant divorces in this way. People cannot get divorces in England, unless there are some more substantial misdeeds than this.]

Mr. Swift: Yes, but the husband being domiciled here, the action must be brought here.

[Hopley, J.: Yes, but what is to prevent husband or wife from taking up a temporary residence here for the purpose of getting a divorce which could not be obtained in England except for some grave misdemeanour? I see that in this case of *Jacks v. Jacks* I seem

Hopley, J.: But he had got his divorce.

Mr. Pohl moved for provisional sentence on a mortgage bond for £8,500, with interest, and for £5 17s. 6d. premiums of insurance, bond due by reason of non-payment of interest; counsel also



applied for the property specially hypothecated to be declared executable.  
Order granted.

**STEYTLER V. MOSTERT.**

Mr. Toms moved for provisional sentence on a mortgage bond for £2,500, with interest, and for £9 premiums of insurance, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

**MYBURGH AND OTHERS V. HEROLD.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £500, with interest, less £62 15s. 9d., paid on account, and for £1 premium of insurance, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

**DEMPERS AND VAN RYNEVELD V. FREEMAN.**

Mr. Pohl moved for provisional sentence on a mortgage bond for £83 14s. with interest, and for the property specially hypothecated to be declared executable.  
Order granted.

**CAPE OF GOOD HOPE SAVINGS BANK V. WAHL.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £300, with interest, and £1 15s., insurance premium; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

**GRAAFF-REINET BOARD OF EXECUTORS V. PRIEST.**

Mr. Pohl moved for provisional sentence on a mortgage bond for £69, with interest, and for the property specially hypothecated to be declared executable.  
Order granted.

**BLEIBERG, GREENBERG AND CO. V. DAVID.**

Mr. Benjamin moved for provisional sentence on a promissory note for £42 2s. 4d.  
Order granted.

**LEWIS V. GROVE.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £51, less £9 paid on account, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

**WALLACE V. JEFFTEA.**

Mr. Roux moved for provisional sentence on a mortgage bond for £300, with interest, bond due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable; counsel also applied for judgment, under Rule 329d, for £1 6s. premium of insurance.  
Order granted.

**NATIONAL BANK V. HAWKINS.**

Mr. Watermeyer moved for provisional sentence on a promissory note for £133 15s. 9d., with interest and costs.  
Order granted.

**MASTER V. EXECUTORS ESTATE FIGLAN.**

Mr. Nightingale moved for an order against the defendants compelling them to file account in the estate.  
Usual order granted.

**TENNANT V. BOTHA.**

Mr. Lewis moved for provisional sentence on a promissory note for £17 13s., with interest and costs.  
Order granted.

**MCBIRKMYRE V. WALSH.**

Dr. Greer moved for a decree of civil imprisonment on an unsatisfied judgment of this Court, operation to be suspended upon payment of £2 a month.

Decree of civil imprisonment granted, execution to be stayed in terms of consent paper filed.

**ILLIQUID ROLL.**

WIENER AND CO., LTD. V. } 1906.  
EAST LONDON DAILY NEWS } Aug. 9th.  
CO., LTD.

Dr. Greer moved for judgment, under Rule 319, in default of plea for £1,050, balance of account due in respect of certain goods sold and delivered, with interest and costs.  
Order granted.

**REID AND NEPHEW V. LLOYD.**

Mr. Gutsche moved for judgment, under Rule 329d, for £9 3s. 2d., fees and disbursements for professional services rendered.

Order granted.

**ROUSSEAU V. BAUERMEISTER.**

Mr. De Waal moved for judgment, under Rule 329d, for £68 10s. 6d., balance of account for live-stock sold and delivered, with interest *a tempore morae* and costs.

Order granted.

**CROYDON ESTATES, LTD. V. COOK.**

Mr. Watermeyer moved for judgment, under Rule 329d, for £46 0s. 10d., balance of purchase price of certain land, with interest and costs.

Order granted.

**PURCELL, YALLOP AND EVERETT V. SHERIFF.**

Dr. Greer moved for judgment, under Rule 329d, for £44 13s. 3d., less £5 paid, balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

**CROWTHER AND ANOTHER V. KERK.**

Mr. Lewis moved for judgment, under Rule 329d, for costs only, capital having been paid.

Judgment for costs.

**KALM V. SIMON.**

Mr. P. S. T. Jones moved for judgment, under Rule 319, on a declaration claiming £100 rent, and an order of ejectment from a certain portion of farm.

Order granted.

**REHABILITATIONS.**

Dr. Greer applied for the discharge of Harris Wainer.

Discharge granted.

Mr. Benjamin applied for the discharge of Charles John Pritchard.

Discharge granted.

**GENERAL MOTIONS.**

*In re* INSOLVENT ESTATE { 1906.  
GOLDING. { Aug. 9th.

Mr. Roux moved, as a matter of urgency, for the appointment of Johannes S. de Villiers, assistant secretary of the Paarl Board of Executors, as provisional trustee of the insolvent estate of Lazarus Golding.

Order granted, appointing Mr. De Villiers provisional trustee, with power to sell perishables and collect debts.

***Ex parte* FORREST.**

Mr. Toms moved for a rule *nisi* under the Derelict Land Act to be made absolute.

Rule made absolute.

**CHIAPPINI V. SHANBAN.**

Dr. Greer moved for a temporary interdict restraining respondent from collecting, receiving, and appropriating the rents of certain property at Woodstock, during the existence of two mortgage bonds for £1,600 and £800, with the interest thereon. The ground of the petition was that respondent, being in arrear with the interest on the bonds, granted an irrevocable power of attorney to applicants to collect the rents of the property, and that they granted the respondent a sub-power to collect the rents and hand them over to the applicants.

Respondent produced certain written statements.

Buchanan, J., told respondent that he must have the statements on affidavit, and he ordered the matter to stand over till to-morrow.

*Postea* (August 10).

Respondent produced an affidavit in which he entered into the whole of the transactions at some length. *Inter alia*, he said that the applicant had not rendered him a statement of his indebtedness.

Buchanan, J. (to respondent): The applicant is to furnish you with an account between you within three days, and then you will be allowed until the end of the month to pay any arrear interest which may be due, and if such arrear interest is not settled by the 31st August you will be interdicted from interfering with the right of the applicant to collect the rents of the property, with costs.

**NANNUCCI V. NANNUCCI.**

Interdict—Restraint of trade.

This was an application for an interdict restraining respondent from trad-

ing in Cape Town, Claremont, or elsewhere in the Western Province in competition with the business of Nannucci, Ltd., at present trading at Woodstock as cleaners and dyers.

From the affidavits, it appeared that the restraint which was relied upon was contained in an agreement, which purported to transfer 20,000 shares in Nannucci, Ltd., to the respondent at 6s. per share. In consideration of the advantageous terms offered to him, it was said that he agreed to the restraint. The applicant said that he was chairman of Nannucci, Ltd., and the respondent was managing director, and that the latter was, in breach of the agreement, carrying on business under the style of the Parisian Dye Works, in Plein-street, Cape Town, and at a branch at Claremont, in opposition to the business of Nannucci, Ltd.

Respondent denied that he was the managing director of Nannucci, Ltd. He said that after the agreement was signed he pressed for transfer of the shares, but did not receive them, and in May the agreement was cancelled by consent. Respondent also said that a further agreement was entered into whereby he should be placed in control of Nannucci, Ltd., but it was not stipulated that he should give up the Parisian Dye Works business. He denied that the applicant had either amalgamated the Parisian Dye Works with Nannucci, Ltd., or had acquired the said business.

Applicant, in replying affidavits, said that since January last the expenses of the Parisian Dye Works had been paid by Nannucci, Ltd., and the work had been done by Nannucci, Ltd., at Woodstock. He denied that respondent had ever made any suggestion that the agreement should not affect the Parisian Dye Works. The sole difficulty about giving respondent transfer of the shares had been the latter's failure to find funds for the amounts payable.

Mr. Close was for applicant (Oreste Zaccaria Nannucci); Mr. P. S. T. Jones was for the respondent (Emilio Ambrogio Nannucci, son of the applicant).

Counsel having been heard in argument on the facts,

Buchanan, J., said that, *prima facie*, the applicant was entitled to an interdict, and an interdict would be granted restraining respondent from engaging in any business in the Western Province in competition with the business of Nannucci, Ltd., leave reserved to respondent to bring an action to set aside the interdict, costs to abide the result of action; if no action be brought, costs to be paid by the respondent.

#### LINSCOTT V. LINSCOTT.

This was an application upon notice to the petitioner's husband (Arthur B.

Linscott) calling upon him to show cause why he should not be ordered to pay to the petitioner £30, to enable her to defend certain divorce proceedings, and 10 per month as alimony, pending the action.

From the affidavits, it appeared that the parties were married at the British Embassy in Paris, in 1898, and that the respondent, who had recently resigned his position as an assistant at the South African College, had commenced proceedings against applicant for divorce, by reason of her alleged adultery with one Charles Marsh. Applicant said that she had no means available. Respondent said that she had means, and that he was not earning anything at present.

Buchanan, J., commenting on an affidavit made by the respondent, said: In affidavits put into court, it is as well to use good English. "I am not in a billet at present"; that is not a happy expression. It is a bit of slang that ought to be avoided.

Dr. Greer was for applicant; Mr. Pohl was for respondent.

Dr. Greer having been heard in argument on the facts,

Buchanan, J.: This is not a case in which the Court should make the order asked for. The parties are married out of community. The husband is without employment, and he has only about £30 to his credit now. The wife is in possession of very considerable property, and there is no need for her to come and ask for an order. No order will be made.

Mr. Pohl asked whether costs would be costs in the cause?

Buchanan, J.: It is not usual to give costs against the wife in these cases. No order will be made.

#### *Ex parte* NEL.

Mr. Pohl moved for leave to petitioner to sell certain property in which a minor was interested.

Order granted as prayed.

#### *Ex parte* KING.

Mr. Payne moved on the petition of the mother and natural guardian of a minor for confirmation of certain sale.

Order granted as prayed.

#### KLEYNHAUS V. KLEYNHAUS AND ANOTHER.

Dr. Greer moved for leave to take the evidence of certain witnesses on commission.

Mr. Burton (for respondents) said he did not oppose, but he wished to have the commission extended to a witness to be called by respondents.

Joint commission granted, appointing the R.M. of Barkly East or officer acting as such to examine such witnesses as may be tendered by plaintiff or defendants, costs to be costs in the cause.

*In re* THE KRAAIFONTEIN HOTEL CO. LTD. (IN LIQUIDATION).

Mr. Roux moved for confirmation of the third and final report of the liquidators, and for an order dissolving the company and authorising destruction of all the books and papers.

Report confirmed and order granted as prayed.

*Ex parte* ESTERHUIZEN.

Mr. Toms moved for leave to petitioner to sue her husband (Samuel Jacobus Esterhuizen) *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce. Counsel said that he was prepared to certify now. Respondent was stated to be a cab-owner in Johannesburg.

Rule *nisi* granted, returnable on the 12th September, rule to be served personally, if possible, failing which one publication in the "Star" (Johannesburg).

*Ex parte* THE EQUITABLE FIRE ASSURANCE CO.

Mr. Burton moved, on the petition of the chairman of the company (Mr. Henry Board) for a winding-up order, for the appointment of Mr. Beard and Mr. G. M. Findlay as official liquidators, and Messrs. J. and H. Reid and Nephew as attorneys, and for time to be fixed within which claims must be filed. It was stated that, after paying £41 10s. on each £25 share, and a bonus of £2,000 to the company's officers, a sum of £1,255 remained in hand.

Order granted as prayed, claims to be filed before the 30th November.

BENEKE V. DE WET.

This was an application upon notice to Daniel Jacobus de Wet to show cause why he should not be interdicted from carrying on business at Laingsburg as a law agent and auctioneer, or in either capacity. Mr. De Waal was for applicant; respondent appeared in person.

The applicant claimed that he was entitled to the interdict by reason of an agreement entered into between respondent and one Gordon, who had bought De Wet's business.

Respondent said that he did not enter into any contract with applicant.

No order was made, there being no privity of contract shown between applicant and respondent.

*Ex parte* INSOLVENT ESTATE KOEVORT

Mr. Douglas Buchanan moved for an order directing the R.M. of Umtata to call a special meeting of the creditors of this estate to elect a fresh trustee, in the room of Mr. J. C. Blakeway, deceased.

Order granted authorising the Master to call a special meeting as prayed.

*Ex parte* ESTATE SWANEPOEL.

Mr. Douglas Buchanan moved for an order authorising transfer of certain property in the Prince Albert district.

Order granted as prayed.

*Ex parte* FLETCHER.

Mr. Watermeyer certified in favour of the petition for leave to sue *in forma pauperis*.

Rule *nisi* granted, returnable on Thursday next.

*Ex parte* VENTER.

Mr. Douglas Buchanan moved for an order declaring Willem Ignatius J. Venter, of Burghersdorp, to be of unsound mind, and appointing Andries Kotze (son-in-law of Mr. Venter) *curator bonis*.

Order granted appointing Mr. J. B. van Renon, R.M. and C.C., of Burghersdorp, *curator ad litem*, who was requested to report to the Court after a personal interview with the respondent, summons returnable on the 23rd November, with leave to give evidence on affidavit as to the respondent's state of mind, Mr. Kotze to be provisionally appointed *curator bonis* pending action to declare respondent of unsound mind, costs out of the estate.

*Ex parte* VERCUIL.

Mr. Douglas Buchanan moved on the petition of the secretary of the Malmesbury Board of Executors for an order authorising the issue of a certified copy of a bond granted by Matthys Michael Basson, now insolvent.

Rule *nisi* granted, calling upon all persons concerned to show cause why the prayer of the petition shall not be granted, rule returnable on the 23rd August, publication once in "Ons Land," and once in the "Cape Times."

*Ex parte* ESTATE VILLA.

Mr. Toms moved on the petition of the executrix testamentary for leave to pass a mortgage bond for £850, upon certain property in the estate of the late

**Jesse Villa.** The petition was brought forward in the interest of one Delponte, to whom deceased was said to be indebted in the sum of £850.

Order granted as prayed.

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*Ex parte* BOKELMAN.

Mr. Palmer moved for an order authorising the amendment of a certain deed of transfer by the insertion of petitioner's correct name.

Order granted as prayed.

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*Ex parte* GINSBERG.

Mr. Toms moved for authority to petitioner to take over certain immovable property at Rhodes in the district of Barkly East.

Order granted as prayed.

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*Ex parte* BAYER AND CO.

Mr. W. Porter Buchanan moved, on the petition of Charles Bayer and Co., of London Wall, London, E.C. (proprietors of the "C.B." corsets), for the attachment of the interest of Strausser, Adler and Co., of New York, in a certain trade mark, to found jurisdiction for an action arising out of an alleged infringement of petitioners' trade mark. Counsel said that he believed it was not necessary in a matter of this kind to proceed by attachment.

Rule granted in similar terms to the order in the case of *Wright, Crossley and Co. v. Royal Baking Powder Co., of New York* (14 Supreme Court Reports, 366), rule returnable on the 14th November next.

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CLIFFORD V. CLIFFORD.

Dr. Greer moved on the petition of John Whiteside Clifford, for an order upon respondent (Mrs. Clifford) directing her to deliver up a certain child named Dorothy Clifford, and declaring petitioner entitled to custody of the said child. The matter was a sequel to a divorce case heard in March, 1903 (13 C.T.R., 180).

Respondent appeared in person, and said that applicant was not a fit and proper person to have custody of the child. The little girl was attending a convent school in England. Applicant was not able to look after and support the child, and he was living in Hanover-street.

Buchanan, J., advised the respondent to have her statements embodied in an affidavit, and ordered the matter to stand over until August 16.

*Postea* (September 3rd).

Dr. Greer read an affidavit from petitioner praying that he be given the custody of his daughter Dorothy, who had been given into the care of his wife as the result of divorce proceedings, petitioner retaining the custody of the two sons of the marriage. He alleged that respondent was living with the co-respondent in the divorce proceedings.

Respondent, in a replying affidavit, stated that her daughter Dorothy was in England, where she was being educated. Respondent denied that she was living with the co-respondent in the divorce proceedings. Applicant was not a fit and proper person to have custody of the child. The little girl was attending a convent school in England. Applicant was not able to look after and support the child, and he was living in Hanover-street.

Mr. Palmer (for respondent) submitted that it would not be in the best interests of the child that she should be handed over to the custody of the father.

Buchanan, J., said respondent had disobeyed the order of the Court by not giving applicant access to his daughter; further, she had removed the child from the jurisdiction of the Court. Hence, she had deliberately disobeyed the order of the Court, and the Court would order her to give applicant access to the child. If the child had been sent out of the country she must restore it within two months to the jurisdiction of the Court. Respondent would pay the costs of the application, and leave would be given to the applicant to apply for the custody of the child, when she was within the jurisdiction of the Court.

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*Ex parte* GRIEVES.

Mr. Benjamin moved for an order authorising the Master to accept certain documents as proof of death of petitioner's mother, Adelaide Sophia Grievos, who had died at the General Hospital, Calcutta.

Order granted as prayed.

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## SUPREME COURT

## FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DE SMIDT V. DE SMIDT. { 1906.  
Aug. 10th.

This was an action brought by Lily de Smidt, of Kimberley, against her husband, Geoffrey W. R. de Smidt, of the South African Constabulary, stationed in the Rustenberg district, Transvaal, for restitution of conjugal rights, failing which a decree of divorce. Mr. Gutsche was for plaintiff; defendant did not appear.

Evidence of the marriage and desertion having been given,

A decree of restitution was granted, defendant to return to or receive the plaintiff on or before the 1st October next, failing which to show cause on the 18th October, why a decree of divorce should not be granted, and why plaintiff should not be entitled to custody of the child of the marriage, with costs.

## PROVISIONAL CASES.

MARSH V. JACOBS.

Mr. Russell stated that service had been effected on the defendant in this matter. He accordingly moved for provisional sentence on a mortgage bond for £3,450, with interest, less £22 2s. 6d. paid, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated, and the rents to be declared executable with costs.

Order granted as prayed.

NOCHAMSON V. VAN DER WESTHUIZEN.

Mr. Alexander moved for provisional sentence on a promissory note for £187 10s.

Mr. W. Porter Buchanan opposed the application.

Affidavits having been read, and counsel heard in argument,

Buchanan, J., refused provisionalsentence, and directed the parties to go into the principal case, costs to abide result.

CAPE OF GOOD HOPE SAVINGS BANK V. BOYD.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,000, with interest, and for £1 ls. insurance, bond due by reason of non-

payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

## GENERAL MOTIONS.

WILKE V. WILKE. { 1906.  
Aug. 10th.

This was an application upon notice calling upon Fritz Wilke, butcher, Wynberg, to show cause why he should not be ordered to pay to applicant's attorneys £30, to enable her to defend proceedings for divorce instituted by respondent against her.

From the affidavits it appeared that respondent had instituted divorce proceedings against his wife by reason of her alleged adultery with one Herman Vienup, against whom £250 damages are claimed.

Applicant, in her affidavit, said that the proceedings were being brought by her husband to enable him to get married to one Hannah Brink, to whom he had promised marriage. The husband denied this, and said that the defendants were carrying on a butcher's business in opposition to his own in Wynberg. The applicant further alleged that her husband treated her cruelly, and that he was addicted to drink. It was stated by applicant that the correspondent was employed by her as a Colonial sausage maker. Respondent said that he employed the woman Brink to assist in his business, but he denied that he was on intimate terms with her. The applicant and Vienup declared that their relationships were purely Platonic.

As to the questions at present before the Court, applicant said that her husband had property, and that he was in a position to provide her with funds for the purpose of defending the action. Respondent said that he could not furnish funds.

The parties were married in London in 1896.

Mr. Lewis was for applicant; Mr. Long was for respondent.

Counsel having been heard in argument on the facts,

Buchanan, J.: The rule is that when the wife is unable to defend an action brought against her by her husband, and the husband is able to do so, he may be compelled to supply her with means to defend the action. But this rule must be affected by the circumstances of each particular case. In this case the parties are married out of community of property, and the defendant (the wife) carries on business on her own behalf in her own name, apart from her husband. *Prima facie*, therefore, she would have no need of his assistance to defend the action. It is stated, and

it is not denied that the husband has means, and is in a comfortable position. I think that he ought to assist his wife in some degree, but not to the extent applied for. The respondent will be ordered to pay applicant's attorneys £5 on filing plea, and a further £5 when the case is set down for trial, costs to be costs in the cause.

BECKER AND OTHERS V. WOLFAARDT.

This was an application brought by plaintiffs in the suit for a commission *de bene esse*, to issue to take the evidence of Jacobus Albertus Wolfaardt (one of the plaintiffs).

The ground of the application was that the witness in question, who lives in the Ladismith district, was physically unfit to make the journey to Cape Town, and give his evidence in court. He was stated to be 83 years of age. The position of the respondents was that it was of the utmost importance that the witness should, if possible, give his evidence before the Court, and that, despite his great age, he was not unfit to make the journey.

Mr. Burton was for the applicants; Mr. Close (with him Mr. Roux) was for respondents.

Buchanan, J.: I think if the witness can be brought here it will be very much better. If Wolfaardt can possibly come, then let him do so. The Resident Magistrate of Ladismith, or the officer acting as such, will be appointed Commissioner to examine the witness, but subject to this condition, that at the trial applicants must show that he is unfit to appear here before his evidence taken on Commission is read. Costs will be costs in the cause.

SILBERMAN V. SILBERMAN.

Mr. Lewis again mentioned this matter, which was an application for leave to petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights. The application had been standing over for further information as to domicile. Counsel said that he was now prepared to certify in favour of the application.

Rule *nisi* granted calling upon respondent to show cause on the last day of term why leave should not be granted to petitioner to sue *in forma pauperis*, personal service, failing which one publication in the "Cape Times."

REX V. LEVINSON.

REX V. NEEDHAM.

Mr. Alexander moved, as a matter of urgency, for an order for the release of

the accused Barnet Levinson and Abraham Needham on bail.

Mr. Nightingale (for the Crown) opposed the application.

The affidavit of H. Hirschberg, attorney, acting on behalf of the petitioner Levinson, stated that on the morning of the 10th August petitioner was charged in the Resident Magistrate's Court, Cape Town, with the crime of inciting to violence. No evidence was led, and accused was remanded until the 17th August, and was refused bail by the Assistant Resident Magistrate.

Buchanan, J.: This is a matter which is in the discretion of the Magistrate.

Mr. Nightingale said that he had a replying affidavit, but

Buchanan, J., interposed, and said that there was no need to put in the affidavit. He remarked that there was nothing stated in the affidavit of the attorney to show why the Court should interfere with the decision of the Magistrate.

Mr. Alexander: I submit that the crime is not a capital crime, and there is no reason stated why these men should not be released on bail. There is power in all cases to come to the Supreme Court and apply for bail. The accused are willing to give bail in any amount fixed by the Attorney-General, and to his satisfaction. I submit it is very inequitable to refuse bail altogether, as though this were a capital charge.

Mr. Nightingale: I put in the Proclamation calling out the Volunteer force to assist the ordinary police force during these troubles. That is one ground.

Buchanan, J.: By the Statute law of this country a prisoner is entitled to apply for bail as soon as he is committed for trial, but before then he is not entitled, as of right to bail. The Magistrate at his discretion may admit to bail before committing, but the accused cannot before then claim bail as of right. As soon as he is committed for trial, the Magistrate is required, except in capital cases, to admit the prisoner to bail, and also required not to ask excessive bail, and power is given to appeal to the Supreme Court in all cases, whether capital or not. *Prima facie*, that means that where a man is entitled to bail, and reasonable bail is refused, or if it is a capital case, he can apply to the Supreme Court. I am not prepared to limit the power of the Supreme Court to granting bail at any time, where good reason is shown. But here the applicants were only arrested yesterday on a serious charge, the preliminary examination has not been taken, they have not been committed for trial, and they have no right whatever to apply for bail. No special grounds are shown why the Court should interfere with the discretion of the Magistrate. The application is refused.

## APPEAL.

ASSETS REALISATION CO., LTD. V. ARGUS  
PRINTING AND PUBLISHING CO.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town in an action brought by appellants against respondents to recover £7 10s., value of certain process block handed to them by one Hildyard Home Drummond, which, it was alleged, had been delivered by the Argus Co. to the wrong person, viz., one Stevens.

Dr. Greer was for appellant; Mr. Upington was for respondent.

The judgment of the Court below was absolution from the instance, with costs.

Counsel having been heard in argument,

Buchanan, J.: The Assets Realisation Association, Limited, of Cape Town, sue the Argus Company for the return to them of a certain process block, or payment of £7 10s., estimated as its value, and £2 damages. The only evidence led for the plaintiff in this case is that of Mr. Hildyard Home Drummond, and the Magistrate, in his reasons to this Court, states that he did not credit Mr. Drummond's evidence. But from the letters and the documents put in, and the statements of the witnesses called for the defendant company, it would appear that Drummond did deliver to the Argus Company a block, and asked them to pull a proof, and send it to Stevens, to whom he was about to sell the block. The block was given afterwards by the Argus Company to Stevens, and they say they gave it to Stevens because Drummond had told them that he intended to sell it to Stevens for £10, and Stevens produced the counterfoil of his cheque-book, stating that he paid to Drummond £10 for this block. I am not clear that this would be sufficient evidence to excuse the Argus Company if an action had been brought by the person who deposited the block with them. This was in 1905. In May, 1906, Drummond, in his evidence before the Magistrate, says that he sold the block to the Assets Realisation Association, Ltd. Who the Assets Realisation Association, Ltd., are it is difficult to ascertain, but it appears that the power of attorney in this case is signed by Drummond as managing director of this company. At the time the alleged contract between Drummond and the association was entered into, both parties knew that the block which Drummond states that he sold to the Association was not in the possession of the Argus Company. It was in the possession of Stevens at the time, and, whatever rights Hildyard Home Drummond may have against the Argus Company for the restoration to him of the block,

and, in the absence of such restoration, for damages, no such claim has been ceded by Drummond to the Assets Realisation Association, Ltd., of Cape Town. Under these circumstances the Magistrate granted absolution from the instance. The reasons which he gave to support his judgment are not, I think, all of them to be sustained, but these main facts, I think, are sufficient to support his decision. He had the witnesses before him, and he did not believe the evidence led for the plaintiff. If that evidence is not believed, there is total absence of any evidence vesting the property in this block in the association. There is also the fact that the block was not in the possession of the defendants, when they were sued, and Drummond knew this. In the absence also of proof that there was any title in this block in the association, I think the Magistrate's decision of absolution from the instance cannot be interfered with. The appeal will be dismissed, with costs.

## SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. KOBOKANA. 1906.  
Aug. 13th.  
" 14th.

Acts 40 of 1879 and 37 of 1884—  
Notice No. 642, 1899—Native  
location.

*Where an inhabitant of a native location, who held land there under quit-rent tenure, was convicted by a Magistrate on a charge of having cultivated certain land without having obtained the permission of his headman, and without the approval of the Inspector of Native Locations, by reason whereof he contravened Sec. 2 of Govt. Notice, 642, 1899, and it was not shown that the accused had cultivated the land continuously since 1884.*

Held on appeal, that the regulations framed under Act 37 of 1884 were applicable (save as to hut tax), notwithstanding the fact that the appellant was a quit-rent tenant, and the appeal was dismissed.

Queen v. Mfenge (10 C.T.R., 19) distinguished.

This was an appeal from the judgment of the A.R.M. of Middledrift, who had convicted appellant of contravening section 2 of regulations published in "Government Gazette" notice, No. 642, 1899, promulgated in accordance with the provisions of section 29, Act 37. of 1884, in that in March last he did wrongfully and unlawfully cultivate certain land not allowed to him, within the limits of the Peuleni commonage, being a portion of the Crown lands native locations, in the division of King William's Town, without permission of the headman of the said location, or the inspector of locations in the district of Middledrift, having first been had and obtained. He pleaded not guilty, but was found guilty, and was sentenced to pay 10s., or in default one week's imprisonment.

The Magistrate, in his reasons for judgment, referred to the fact that, as far back as 1884, complaints were made that the men of Kobolsana's location and others were ploughing on the east bank of Gqatsu stream, and within the boundaries of the Peuleni commonage. No definite action was taken at that time, as larger issues were involved which were subsequently the subject of litigation in the case of *Kama v. Colonial Government* (15 S.C.R., 47) for a declaration of rights. He (the Magistrate) held that the regulations were applicable to the land which the accused was charged with cultivating without proper authority, and that it was abundantly clear from the evidence that any right which accused's father may have acquired to this land did not pass to him. The matter was more in the nature of a test case, and a light fine was inflicted.

Mr. Benjamin was for appellant; Mr. Howell Jones was for the Crown.

Mr. Benjamin said that in the location in question individual title was held and the inhabitants had a right of pasturage with their lots. Under the Act 40 of 1879 no provision was made for the imposition of a penalty. The Act 37 of 1884 clearly did not deal with locations where the people held by title. Any regulations which the Government were empowered to make in connection with the surveyed locations in which commonage lands are set apart must be made under the Act of 1879. Appellant was charged with infringing regulations framed

under the Act 37 of 1885. No regulations had been made and published under the Act of 1879 applicable to this location. Even if the regulations in question had been made under the Act of 1879, they would have been *ultra vires* by reason of the drastic penalties provided. Then section 2 of the regulations referred to "hut-tax register," thus showing that it was not intended to apply to a location such as this, where individual title was held. Counsel went on to submit that the Act of 1884 was never intended to apply to surveyed locations at all, and that it must be taken to be confined to Crown lands which were unsurveyed. The Government themselves had not regarded this location as coming under the Act of 1884.

Mr. Jones, dealing with the second point of the appeal, said that in *Kama v. Colonial Government* (15 Supreme Court Reports, 47) the Court said that it was impossible to hold that these mission stations, of which this location was one, were not native locations situated on Crown lands. If they came under the Act of 1879 they were subject to the regulations which may be framed from time to time.

[Hopley, J.: Under what Act, then, do you say that this location comes?]

Mr. Jones: I say that it is subject to the Act 37 of 1884.

Proceeding, Mr. Jones submitted that the regulations in question would apply to any location. Even though it was said in the notice that the regulations were published under the Act of 1884, that was of little importance. No. 37 of 1884 was quite a general Act. Supposing that the regulations should have been issued under Act 40 of 1879, did the fact that the Governor made the regulations under the Act of 1884 invalidate the regulations? Again, the point was never taken in the Court below that these regulations could not be issued under the Act of 1884.

[Hopley, J.: You rely on the preamble of the Act? That is not part of the Act.]

Mr. Jones: I rely on the title and the preamble.

[Hopley, J.: But those are not part of the Act.]

Mr. Jones: It shows what is intended.

[Hopley, J.: It may show, or it may not.]

Mr. Jones also called the Court's attention to *Queen v. Mfenge* (10 C.T.R., 19).

*Cur. Adv. Vult.*

*Postea* (August 14th).

Hopley, J.: It is, in my opinion, not possible now to raise the point whether or no the Peuleni Location is or is not a native location upon Crown Lands. That point was decided in the case of *Kama v. Colonial Government*

(15 S.C., 47), in which his Lordship the Chief Justice, in giving judgment, said that it would be impossible to hold that such locations were not native locations upon Crown Lands. That being the case, Peuleni Location must be regulated under the various Acts of Parliament affecting native locations on Crown Lands, and among others by Act 37 of 1884. That Act empowers the Governor to make bye-laws, and certain bye-laws have been made to regulate locations generally, one of such bye-laws being the one which the accused has been found guilty of contravening. It is argued, however, that Act 37 of 1884 only applies to locations that pay hut tax, and not to Peuleni, the inhabitants of which pay quitrent. I think, however, that the powers to make bye-laws conferred by that Act are intended for all locations on Crown Lands, and are not affected by the mode in which taxes are collected, though no doubt such portions of the Act as deal with the hut tax would affect only locations where that tax is collected. It is further argued that there is nothing in the Act 37 of 1884 giving power to make bye-laws regulating the use or abuse of the commonage to any locations, and that the bye-laws for that purpose should have been framed under Act 40 of 1879. But I think that the intention of the Legislature was that bye-laws might be framed under Act 37 of 1884 for the regulation of locations generally, and that it was *intra* and not *ultra vires* to frame rules thereunder to protect the commonages of locations from encroachments and to punish such encroachments with fine and imprisonment.

At any rate, in the case of the *Queen v. Mfenge* (10 C.T. Reports, 19) a resident of the Peuleni Location was prosecuted for infringing this very bye-law, and on appeal the finding of the Magistrate convicting and sentencing him was set aside on the ground that under another of these bye-laws dealing with the commonage, viz., bye-law No. 3, the accused was justified in his actions, but the judgment proceeded on the assumption that these byelaws did apply to that location. The point of the validity of the bye-laws was specifically taken in that case, but the Court must be taken to have held that they did apply, and that one of them (No. 3) was efficacious to justify the action of the accused. Such a ruling by a full Court confers upon these bye-laws as applied to this location a judicial sanction which I should be slow to impair or alter. But it was also argued that the accused was only ploughing old ground which had been allotted to him, and that he was in the same position as Mfenge, and could shield himself under the bye-law which provides that land which at the time of their publication should have been brought under cultivation shall be deem-

ed to have been allotted to the person cultivating the same, etc.

There is evidence that the ground in question in this case had once been cultivated, and in that sense it was old ground. But it had not been treated as cultivated ground since 1884 or thereabouts, nor is there any satisfactory evidence that the right of cultivating there had passed to the accused, and I think that the headman and the inspector were right in looking upon it at this date as ground which had reverted to the commonage, and which could not now be broken up anew and cultivated without the leave of the inspector, as provided in the bye-law.

The appeal must be dismissed.

VAN ZYL V. PIENAAR. { 1906.  
(Aug. 13th.

Horse — Contraband of war —  
Trading with "enemy" —  
Booty — *Res nullius*.

*During the late war one K., a member of a hostile commando, exchanged a horse for a stallion and a sum of money with the appellant, a British subject. Appellant was afterwards ordered by the Military to send his horses to a "protection camp," when, seeing that the horse in question bore K.'s mark, they claimed it as booty and eventually sold it to one D. On D.'s death, it was sold as part of his estate to one B., from whom it was purchased by respondent, who offered to restore it to appellant on payment of a certain price. Having obtained possession of the horse, appellant claimed it as his own property, and refused to pay for it. In the Court below the Magistrate gave judgment for £32 in favour of respondent, and against this judgment appellant now appealed.*

Held, that inasmuch as trading with an enemy, especially in contraband of war, is illegal during time of war, appellant had not a good title to the horse; that it was legally a *res nullius*, and that by confiscating it as booty the Military had acquired a good title to it, and that the subsequent sales



were all good in law. That appellant, having been legally divested of his former ownership in the horse, could recover the same only by purchase from the present lawful owner (respondent): and that hence the appeal must be dismissed with costs.

This was an appeal from a judgment of the Resident Magistrate of Colesberg in an action brought against appellant by respondent to recover £32, value of a certain horse.

From the record it appeared that the horse in question was originally brought over the border during the war by one Kolver, a Free State Burgher, who was appointed Landdrost of Colesberg during the occupation by the enemy. Kolver sold it to Van Zyl, the present appellant. After that it came into the hands of the military, being sent in by Van Zyl for protection purposes. The military authorities sold it to one Develin, and from Develin's estate, after his death, it was disposed of to one Badenhorst. Badenhorst sold the animal, according to plaintiff's statement, to him for £32, and Van Zyl bought it from him (Piensaar), and took the animal in January, 1903, but had failed to pay the purchase price.

The Magistrate gave judgment for the plaintiff as prayed, with costs.

Mr. Upington was for appellant; Mr. Burton was for respondent.

Mr. Upington said that it would, he thought, appear to be reasonably clear that he became possessed of the horse partly by sale and partly by exchange from one Kolver in 1900. It was undoubted that the sale or exchange between Kolver (who was at that time Landdrost at Colesberg under the Republican Government then in occupation), and the present appellant referred to the horse now in question. It would be necessary at the outset to consider what was the position of the military authorities with regard to this horse. *Kotz v. Prins* (20, Supreme Court Reports, 156) was very instructive, because the whole question of confiscation or requisition on the part of the military was fully considered by his lordship the Chief Justice. That case dealt with a mule which had been bred on a farm in the district of Van Ryn's Dorp. The mule was sold by public auction by the military authorities after the conclusion of hostilities. That case, counsel submitted, was very much stronger than the present one. The Court allowed the appeal, and ordered judgment of absolution from the instance to be entered in the Court below. If his learned friend succeeded,

he must show that the sale by the military took place before the declaration of peace, and that it was taken over in due form by the military with the intention of depriving the owner of his ownership. Counsel went on to say that his client was in last possession of the horse, and he was in no sense a spoliator. He contended that there was no evidence that the proper steps were taken to confiscate this horse by the military. Major Kelly could not have confiscated the horse at that time. So far as confiscation was concerned, Major Kelly was at that time *functus officio*. It was clear that this was one of four animals which were brought into the town for protection, so that they should not fall into the hands of the enemy. Counsel proceeded to cite the case of *Johnson v. Van der Walt* (20, Supreme Court Reports, 574), also from the district of Colesberg. He relied upon that case as authority for the proposition that the fact that the military, if they had known at the time that the horse was Kolver's property might have confiscated it, did not affect the issue one way or another.

[Hopley, J.: But does that give your client a good title if he had been dealing with the enemy. Taking it that it was a *bona fide* transaction between Kolver and Van Zyl, was it not one which was prohibited by law?]

Mr. Upington submitted that the result of such proposition would be that anybody would be entitled to come and take the animal from Van Zyl. The question then was, whose property was the horse? Surely, the doctrine must be limited, particularly under modern practice, to something in reason. Coming to the authorities quoted by the Magistrate, counsel said that Nathan's "Common Law of South Africa" did not seem to throw any light on the question involved in this case. He also quoted from *Mshwakezele v. Guduza* (11 C.T.R., 259).

[Hopley, J.: That does not seem to touch the present case, as far as I can see.]

Mr. Upington: It is authority, I submit, for this, that goods of the enemy are *res nullius*, the ownership of which can be acquired by the party first taking them.

[Hopley J.: But that means capture. It does not mean dealing with or purchasing from the enemy.]

Mr. Upington: The authority goes to this length, that if my client had not paid for this horse—

[Hopley, J.: Then it would have been a virtuous act. That, of course, is a capture.]

Mr. Upington: If that is the motive of the law, then, surely, to exchange a horse unserviceable for military purposes for one that is serviceable is a virtuous act. Proceeding, counsel said that the main issue in this suit was not, as the Magistrate seemed to have thought,

whether Van Zyl would have been entitled to vindicate the horse as against the third party. Van Zyl was in the position of a defendant who had been sued on an alleged contract of sale of this animal for £32. The important question to decide was whether there actually was or was not a contract of sale, but the Magistrate had not found on that point at all. There was the fact that, while Pienaar said there was a contract of sale in January, 1903, yet in August, 1904, when he made a claim upon the War Losses Compensation Commission, he did not say a word about having sold the horse to Van Zyl. In his affidavit before the Commission, he said that in January, 1903, he bought the horse from one G. H. Badenhorst, and paid £32 for it, and that he had had the horse about a fortnight when Mr. F. J. van Zyl, of Buffel's Vlei, took it from his son, claiming it as his property. Counsel submitted that the contemporaneous documentary evidence was clearly inconsistent with the case now set up by Pienaar.

Mr. Burton said that, dealing with the last point of his learned friend's argument, although, curiously enough, the Magistrate did not say what conclusion he came to on that point, he gave judgment for plaintiff as prayed, with costs, which, of course, must mean that there was such a sale. There was no doubt Pienaar got the horse from Badenhorst for valuable consideration, upon a distinct bargain of purchase and sale, and he gave it up to Van Zyl upon a distinct contract of purchase and sale. Van Zyl could not now be heard to say that he claimed the horse on the ground that it had previously been his property. On the question of the effect of the transaction with Kolver, counsel quoted from sections 309 and 311 of "Wheaton's International Law," and Pollock on International law (vol. 2, p. 124, sections 309 to 311, citing Bynkershoek), and contended that such trading as took place in this case was illegal. Counsel cited *Du Toit v. Kruger* (15 C.T.R. 332), as showing the extent to which confiscation by the military in these matters could go. The distinction between all cases which had been quoted and the present cases was that the person who claimed as the original owner had been the absolute, undoubted, *bona-fide* owner before the war. The whole question was, whether anything had been done in the interval to divest such undoubted owner of his property, and the Court had held in every one of these cases that it would require the very clearest evidence of confiscation by the military before it would take away from a man what was his undoubted property before the war. Counsel also cited *Vorster v. Hodgson* (19 Supreme Court Reports, 493). The present case was quite different from

those which had been referred to. Before the war appellant was not the owner of this horse. During the war, during actual hostilities, he made a commercial arrangement by which he bought this horse from a Republican officer. It was very curious that Hopkirk, who knew all about the history of this horse, was not called during the hearing. If necessary, he suggested that the matter be referred back to the Magistrate to take further evidence. Ever since Van Zyl lost possession of the horse to the military, he had never had the horse until he got it from the plaintiff by virtue of the contract of purchase and sale. The seizure by the military at that time, and the taking of it as booty, was sufficient to divest Van Zyl of his property. The point was, what was the intention? The evidence supported the contention that the horse was taken by the military as booty. Appellant could not now rely upon his previous purchase from Kolver. As to the claim for compensation, plaintiff seemed to have made the claim on the suggestion of the defendant. The whole of that part of the case seemed to be very unsatisfactory so far as both the plaintiff and defendant were concerned. He submitted that Van Zyl clearly had no title in this horse, and that the decision of the Magistrate was correct.

Mr. Upington having been heard in reply.

Hopley, J.: In this case we are concerned with a contract which is alleged to have taken place between plaintiff and defendant in respect of a certain horse, which came into the possession of the defendant in the Court below during the war time. There seems to be no dispute as to the fact that the horse, before the defendant got it, belonged to one Kolver, who was at the time an enemy in the occupation of one of our towns, Colesberg, and in a position of importance there, he having been appointed from the commando who invaded and took Colesberg to be the Landdrost for the time being of the district. He, therefore, was in the full sense of the word, an enemy, and during the time of war. Between him and the defendant there was at that time, as found by the Magistrate, a bargain concluded whereby he (Van Zyl) gave a young stallion for this horse, and something to boot, the exact amount I do not think is stated, from Kolver, and by virtue of that transaction (this horse having been handed over to him by Kolver) he has ever since looked upon it as his legally acquired property. I think, however, that one cannot support a transaction of that sort as having legally invested him with the ownership and the property in that horse. I have not had a long time to look into the matter, but I have always understood that during the time of war traffic with

enemies was forbidden, and especially I should say an exchange of horses in a country where horses are essential for the conduct of war. At all events, I am of opinion that a deal in horses with the enemy during war is a wholly illegal transaction by the law of this country, and that ownership cannot be traced to a source so polluted in its inception. But if that transaction did not give Van Zyl the ownership of that horse, the handing over by Kolver before he retreated did give him possession, and I think that the legal position would be that the horse was a *res nullius*, which the law seems to take to be the position of enemy's property, a thing belonging to nobody of which the first person on the opposite side can take possession. In this particular case Van Zyl did not keep possession of the horse; the military took re-occupation of Colesberg, and he was allowed to keep four horses, but he was told to bring them into Colesberg for the purpose of preventing them from falling into the hands of the enemy, and among the four sent in by him was this particular animal. When the horses came into the possession of the military authorities they, seeing that this horse bore Kolver's mark—they must be taken to have known that it was Kolver's mark, from what happened—confiscated it as being booty of theirs, which they could seize upon. I think they were justified in the circumstances, and that Mr. Van Zyl could not have gone and claimed the horse back from them in the same way as in the cases which have been quoted, in which the owners have claimed their property because they were the true owners *ab initio*. However, nothing was said or done about this possession, the military remained in possession of this horse for a considerable time—about a year—and, after that, it was sold by some of the military who had got possession of it, to Mr. Develin. Mr. Develin subsequently died, and it was sold in his estate, and so acquired by one Badenhorst. At that time it had got the double arrow upon it, which would show the purchaser that it had been acquired by the military as their property, and resold by them to somebody or other. So that purchasers like Badenhorst and probably Develin were most likely *bona fide* owners. I do not say that that decided the question as to the real owner, but, at all events, it would be good enough as against a purchaser like Van Zyl, who could only claim by what I think was in the circumstances a tainted title. Afterwards it came to the knowledge of Van Zyl and Pienaar that Badenhorst had possession of this animal, and, I gather, that they talked about this matter, and that Van Zyl said to Pienaar, "If you get this horse from Badenhorst I shall be glad, and will give you some commission." It is possible that Pienaar,

when he passed that way approached Badenhorst, but Badenhorst had paid good money for the horse, £25. He parted with the horse to Pienaar for £32. I do not know for certain that at that time the horse belonged to Badenhorst, but the probabilities according to the weight of evidence are that then it did belong to Badenhorst. On his return to Colesberg Pienaar told Van Zyl that he had bought the horse from Badenhorst for £32, and that if he wanted the horse his price was £40. Now, it is said that there is no evidence that there was a sale in this matter, but if the evidence which was given before the Magistrate was accepted by him, it is sufficient, and the Magistrate, having given judgment in this case for Pienaar for his claim as set out in the summons, must be taken to have held that there was a sale, because that is all that the summons claimed, and I cannot say that there was not sufficient evidence to support the finding of the Magistrate. There is evidence contradicting this. There is the complexion that Mr. Van Zyl himself tries to put upon it, and there are documents which, to a certain extent, contradict Pienaar. There is the fact that Pienaar got £5 on a certain cheque of which there is no explanation, beyond the statement that it was profit or commission on his transaction. There are also the documents in support of the claim before the War Losses Compensation Commission, but it seems to me that, although the documents are, on the face of them, somewhat contradictory to the idea of a sale from plaintiff to defendant, still they are not inexplicable. The explanation was that there was really a sale between the parties, that Van Zyl, having got hold of the horse, thought he could now stick to his own property, and thereupon repudiated the actual sale, leaving Pienaar to claim compensation, or get out of it the best way he could, and Van Zyl is said to have suggested to Pienaar to claim the compensation. The Magistrate seems to have taken that view. The fact that he gave judgment as prayed seems to make it quite certain that he came to the conclusion that there was a sale. I think, therefore, on these grounds, that the appeal must be dismissed with costs.

[Appellant's Attorneys: Van Zyl and Buissinné. Respondent's Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLKY.]

LAWRENCE V. ROSS.

{	1906.
	Aug. 14th.
	" 15th.
	" 16th.

**Motor car—Faulty construction—  
Negligent driving—Damages  
for personal injury.**

This was an action brought by Richard Priestly Lawrence, of Woodstock, a civil engineer in the employ of the Cape Government Railways, against Edward James Ross, motor garage proprietor, Cape Town, to recover £500 damages for personal injuries sustained by reason of the alleged negligence of defendant or his servant.

Plaintiff, in his declaration, said that on the 19th December, 1905, defendant, in the course of his business, agreed with the plaintiff and one Gemmell, in consideration of certain remuneration, £5 5s. per day, to carry the plaintiff, Gemmell, and another person in a motor-car driven by and under the management and control of a competent and skilful driver, in the employment of the defendant. It was agreed that on the 24th December defendant should well and safely carry the plaintiff, the said Gemmell, and another person from Cape Town to Hermanus on the 25th, through Houw Hoek to Somerset West, and thence to Stellenbosch, and on the 26th from Stellenbosch to French Hoek and thence to Cape Town. On the 25th December, while these persons were being carried by the defendant in pursuance of the contract in a motor-car, driven and managed and controlled by a driver in the employment of the defendant, the motor-car was not sound and in good running order, or fit for the purpose, and more particularly defective as to the steering-gear, and, further, was so negligently and unskilfully driven by the driver, that, whilst passing down a steep incline at or near Houw Hoek, and at an excessive rate of speed, the motor-car overturned, and plaintiff was thrown violently to the ground and severely injured, sustaining a fracture of his right arm and left wrist. By reason of the premises, he had sustained damages in the sum of £500, which sum he claimed with costs.

Defendant, in his plea, said he denied that he entered into any agreement whatever with the plaintiff as regarded the hire of the motor-car, but he admitted that on the said date he hired

a motor-car, to be driven by one of his own servants, with the said Gemmell for the three days inclusive at £5 5s. a day, the car to accommodate three persons, besides the chauffeur. Save as above, he denied the allegations as to the contract. He denied that he contracted to perform the journeys described in paragraph 3 of the declaration. He admitted paragraph 4, save that he denied that the said persons were being so carried in pursuance of any such contract as was alleged in the declaration. As to paragraph 5, he admitted that, whilst the said car was being driven in the locality mentioned, it left the road, and fell on its wheels into a ditch, and that the plaintiff fell to the ground, and was injured, otherwise he denied the allegations in the said paragraph. He said that the car so left the road through an accident to its steering-gear, which could not have been foreseen by him or his driver, or be prevented by any reasonable care on the part of either of them. The said accident was due to the breakage of a certain spring, which caused the driver to lose control of the direction in which the car was travelling, and was in no way attributable to the negligence of the defendant or his said driver. The plaintiff was injured owing to his endeavouring negligently, improperly, and unnecessarily to jump out of the car at the time of the accident, and he would not have been so injured but for his said negligence. Defendant denied that plaintiff had suffered any damages for which he was liable.

The replication was general.

Mr. Upington (with him Mr. M. Bisset) was for plaintiff; Mr. Burton (with him Mr. Douglas Buchanan) was for defendant.

Mr. Upington said that at the time the declaration was drawn plaintiff was in the position of receiving one-third of his salary, while away from his duties, but since then the Government had agreed to give him two-thirds.

[Hopley, J.: The damages would be somewhat reduced in consequence?]

Mr. Upington: Yes.

The plaintiff said that he was employed by the C.G.R. as a civil engineer at a salary of £500 a year. On the 19th December witness went with Mr. Gemmell to see the defendant to arrange about a motor tour in reference to which Mr. Gemmell had already written to defendant. A route was definitely fixed upon at the interview. A driver named Applegate was pointed out to them as the one who should undertake the journey. He was said to be the best driver available. It was not explained in so many words to defendant that witness was to share in the expenses. That, he thought, was the inference which would be understood by defendant. On the journey out to Hermanus they had a safe



trip, and there was no trouble in connection with the steering gear. On Christmas Day they had lunch at Houw Hoek. In the afternoon there was some difficulty in getting up a steep declivity. On reaching the top they started down at an easy pace, but the car acquired a speed of about 15 to 25 miles an hour. The driver was on the left side of the road, and he seemed to be trying to get in the middle of the road. There was a ditch which was not perceptible some distance off. When they saw the ditch, the car was running to the side. The next thing that happened was that the driver got out, and the car ran about 100 feet, and then they dropped into the ditch.

[Hopley, J.: The driver, as soon as he saw the ditch, jumped out of the car?]

Witness: Yes.

Mr. Upington: In order to do that, he had to pass in front of Mrs. Gemmell?

Witness: Yes. Continuing, witness said that the car turned over on its side. Witness was pinned against one of the steep banks of the ditch. Both his arms were broken. Witness was extricated from the position he was placed in by a ganger in the employ of the C.G.R. He afterwards received medical attention at the hotel at Houw Hoek, and afterwards he was brought to Salt River, and removed to the Woodstock Hospital, where he had to remain 93 days. Witness was still unable to use his left wrist properly. His medical adviser thought he would never be able to bend his wrist forward properly. Witness had to pay certain medical and hospital expenses, he had lost one-third of his salary for about three months, he had had to pay for a radiograph operation, and he had had other expenses in consequence of the accident.

Cross-examined: If witness had engaged a railway doctor, he would not have had the medical expenses to bear which he had incurred with Dr. Fuller. Any injury he had sustained had not in any way influenced his position under the Government. He told Ross when he saw him on the 19th December that he was sharing in the tour. The question of expense was not mentioned. They had no complaint to make about the driving before the accident happened. On the occasion in question, they had to get out of the car to push it up the hill. He thought when they were descending the hill the car was in gear all the time; he should say they were travelling from 20 to 30 miles an hour. The speed, he considered, was very fast; he had no time to complain about the speed, in fact, he rather enjoyed it until the accident happened. There was short shrub at the side of the road where the car went over into the ditch. Witness did

not see the driver jump over Mrs. Gemmell just before the accident happened. What he had said about that incident was hearsay. He thought the driver did not put his brakes on when the car swerved to the right side of the road. He might have told Applegate when he called to see him (plaintiff) while he was ill that he did not blame him. He now blamed the chauffeur for causing the accident by not turning the car back into the road. He blamed Applegate for not examining his steering-gear to see that it was right. Witness did not know that Applegate had not examined the steering-gear. He had arranged with Gemmell to pay half the expense of the motor trip.

Re-examined: When he spoke to the driver while he was in bed, he was not aware that the steering-gear had been tied up with picture-cord. He had not heard at that time that the driver had jumped over Mrs. Gemmell and left the car.

Mr. Burton intimated that he did not press the part of the plea relating to plaintiff jumping out of the car.

Hugh Bernard Gemmell, mechanical engineer, employed by the C.G.R., said that when they called at the defendant's garage on the 19th December, he told Mr. Ross that Mr. Lawrence was joining him in the trip. Applegate was pointed out by defendant as a skilful and competent driver. The car was travelling at a rate of over 20 miles an hour just before the accident happened. The car seemed to shoot across the road, and got on the tufty grass just at the side of the watercourse. As they were bumping on the ground, witness saw Applegate step off the car in front of Mrs. Gemmell. A moment afterwards they went down into the watercourse. He did not think Mr. Lawrence made any attempt to jump off the car. Later on that day Applegate came and suggested to witness that he might have seen him tie some part of the steering-gear with a piece of cord before they left Hermanus that morning. Witness had not noticed Applegate do that. Applegate attributed the accident to the cord having got adrift. Witness thought that, even if one of the steel springs in the tube of the steering-gear broke, it would be possible to steer within certain limits if the thing was tied up with sufficiently strong cord. They had to complain about the car being underpowered on the hills. They did not complain about the car's speed, but they had to find fault with having to get out and help the car uphill. Witness was not aware whether the driver had lost control of the car. If the driver had lost control, he should have applied his brakes. Witness would not say that the driver had not applied the brakes, but he did not remember having felt a check.



Evidence was also given by Dr. E. B. Fuller, who attended the plaintiff on his return to the Peninsula, and Thomas Hogbin, a ganger, employed by the C.G.R., who helped to release the plaintiff from the car.

Pency Ashenden, municipal engineer, Rondebosch, who was motoring in the district, and came upon the scene soon after the accident, said that the doll's head could have left the socket of the steering-gear. When he saw it it was possible for the doll's head crank to work out of the casing. He came to the conclusion from what he saw that the connecting rod had been carelessly tied to the crank. He was certain the car was travelling at a speed of over 20 miles an hour, because it leapt 28 ft. from the spot where it left the bank. He considered that the car was going at too great a speed on such a hill. Witness had had experience in motor-cars, having owned four cars.

Cross-examined, witness had had an accident while motoring, but not on this particular piece of road. He had an accident at Sir Lowry's Pass through a fracture of the steel pin. He should think that a careful man would not exceed 15 miles an hour on the hill where this accident happened. He thought it was a reckless and ludicrous thing to tie the rod as had been done in this case.

At the request of the Court, witness gave a number of demonstrations of the working of the crank arm.

Walter Robert McFarlane, proprietor of the Houw Hoek Hotel, said that he looked at the car while the party were at lunch at his house on Christmas Day. Witness owned a motor car. He noticed that the rod of the steering-gear was fastened to the body of the defendant's car with a piece of cord. He also noticed that the hand-brake was not acting; the lever of the hand-brake he saw was lying forward; he made a test, and he called the attention of the driver to it. Applegate said: "It must be like that." Witness had had Applegate in his employ to drive a motor bus. Applegate was a competent driver, but he indulged in drink, and was inclined to be a bit rash.

Cross-examined: On the day in question Applegate was perfectly sober. Witness continued to run the motor bus for a period of six months after he had dismissed Applegate from his employ. One of his complaints against Applegate was that he did not look carefully enough after the machine. All the same, he regarded Applegate as a skilful and competent driver. The cord might have been tied to the crank.

Mr. Upington closed his case.

Andrew Morrison said that he was in the employ of defendant, and part of his duties was to book orders for the hiring of motor cars. He produced a

diary containing entries relating to the hiring in question. There was an entry on the 11th December referring to "Mr. Gemmell's inquiry for car for Christmas Holidays, quotes £21." The entry was made at the time. Witness understood at that time that three passengers were going on the trip, but he did not understand that anybody else was sharing it. Mr. Gemmell did not mention anybody else's name. An appointment was subsequently made between Mr. Gemmell and Mr. Ross. Witness at no time saw Mr. Lawrence during the negotiations.

Cross-examined: Witness did not remember Mr. Gemmell saying at the first interview that he would have to go away and consult his friend. What Mr. Gemmell said was that he would see Mr. Ross, to ascertain if he could not make the charge a little less. There was an entry on the 25th December showing this engagement, and stating that the charge was £21. Witness did not make that entry on the 25th December. He believed he made the entry on the 24th, but he would not swear that he made the entry then. The entry would not be made until an agreement had been entered into. He would not say that an agreement was made for £21.

Edward James B. Ross (the defendant) said that in May last year he had two Brooke cars shipped to him from Home. One was new, and the other was second-hand. The car to which the accident happened was the new car, and cost about £440. It was not a fast car. He did not think it was capable, on a level road, of doing more than 20 miles an hour. In gear, he did not think the car could exceed 20 miles an hour. The car was specially overhauled for this Christmas trip. Witness assisted in taking the whole of the car to pieces. The springs in the steering-gear were all intact. For some considerable time previously they had used cord and canvas to keep dust out of the doll's head joint. This was done because they had not got a leather cover. In the negotiations for the hire of the car, he had only known Mr. Lawrence as the third passenger in the car. No definite route was fixed upon. He had never regarded Mr. Lawrence as one of his debtors for the hire. Two or three days after the accident he went out to Houw Hoek, and saw the car lying in the sluit. It was broken up, and had been set fire to. Somebody had poured petrol over it, and tried to set fire to the tonneau. He did not suggest that Mr. Lawrence had anything to do with the fire. The whole of the tonneau had been pulled to pieces. He picked up the gear. On coming back to town and examining the steering-gear, he found that the steel spiral spring inside the casing had been broken. He thought the breakage might have been caused by the spring losing its tempering. If the spring had not broken, the

crank would have remained in position, and the accident would not have occurred. It was the first time within his experience that such a mishap had occurred to the steering-gear of a car. Since the accident occurred, he had used the same steering gear for the car he was now using.

Cross-examined: Witness, as long as he got his fee of 15 guineas, was prepared to accept Mr. and Mrs. Gemmell and Mr. Lawrence for the tour. He did not know that Mr. Lawrence was sharing the expenses of the tour. He was not led to believe so by either of the parties. He had understood that Mr. Lawrence was Mr. Gemmell's guest. Witness did not know anything about the allegation in the plea that plaintiff negligently or improperly jumped out of the car. That information was given to his attorneys by Applegate. He did not think the car could have come down the hill, even running free, at 35 miles an hour. When the steering-gear went wrong, the proper thing to do was to put all the brakes on and stop the car. He should say that on such a hill as Houw Hoek, if the brakes were applied, they should be able to stop the car within 20 yards, unless they were travelling on sand, and the car skidded.

In reply to another question, witness said that Mr. Lawrence wanted a driver who knew the roads. He immediately afterwards corrected himself, and said he meant Mr. Gemmell.

[Hopley, J.: Why did you say Mr. Lawrence?]

Witness: I think I must have Mr. Lawrence on the brain.

Albert William Applegate said that he was a motor car driver and mechanic. He had had six years' experience of motor cars in this country. He had driven the Brooke car in question on two or three occasions before he took out the party last Christmas. He had not previously had any trouble with the steering-gear of the Brooke car. Witness described what was done in the way of overhauling the car before it was taken out on the journey. The brasses and doll's head were, he said, both in good condition. There used to be a leather cap over the steering joint, which had got lost some time before, and, in place of this, they had tied on a piece of canvas. On Christmas day, he made an inspection of the car before leaving Houwhook. He noticed that the brakes were all right. He did not remember saying a word to Mr. McFarlane. The car could not travel above 20 miles an hour when in gear. The passengers made no complaint about the speed of the car on the level, except that it was slow.

[Hopley, J.: The car was so slow uphill that the passengers had to get out and push on some of the hills. And so, when you got to the top, did

you think you would give them a little exhibition of what speed she should go at?]

Witness: No. Continuing, witness said that the car went down the hill at the rate of 14 to 16 miles an hour. The first thing he noticed was that it seemed to be running towards the bush on the right side. He turned the steering wheel, but the course of the car did not change, and he could feel that the steering gear was out of order. He supposed that the doll's head must at that time have been out of the socket. He at once applied his three brakes. The locking of the back wheels caused a swerving of the car, and it went towards the edge of the sluit. The car went gradually ahead until the front wheel went over the bank. Seeing this, he called to the passengers to look out; he pushed Mrs. Gemmell out of the car, and he jumped out. Witness struck the bank and fell into the sluit. Mrs. Gemmell, he thought, must have alighted in a similar way. She also fell into the sluit. The other passengers were in the tonneau of the car. Mr. Lawrence was lying on the top of the car and the sluit. Witness did not know why the steering gear had gone wrong until they came to examine it, when it had been brought into town. He had known these steel springs break often. There was a good deal of strain at times on the steering gear—for instance, if they struck a stone, a sluit, or sand. He could not account for the smashing of the spring in question.

Cross-examined: Mr. McFarlane did not call his attention to the hand brake at Houwhook, and say that it was loose. Mr. McFarlane must have been mistaken when he said he had done so. Witness oiled the steering gear at Houwhook, but he did not make an examination. Witness saw Mr. Gemmell after the accident, but he did not tell him that he (Mr. Gemmell) might have seen him tying up the steering gear, and that he attributed the accident to the cord having got adrift. Mr. Gemmell must be lying. Hogbin, the ganger, was inaccurate in his evidence as to when he came on the scene. McFarlane did not dismiss witness because of his carelessness. McFarlane's father was his employer in connection with the motor bus. He first noticed that the steering gear was out of order when they were in the middle of the road. Running at 15 miles an hour, they would be able to pull up the car by the brakes in about 20 yards. He thought it quite reasonable that the car should have leapt 26 ft. from the banks while travelling at 15 miles an hour. Witness could not say that Mr. Lawrence attempted to jump out of the car. He told the defendant's attorneys that presumably Mr. Lawrence was thrown forward by the application of the brakes, or he

must have tried to jump out of the car.

Re-examined: Witness had used the brakes after leaving Houwhock, before the car descended the hill where the accident happened.

By the Court: Mr. Ashenden was mistaken when he described how the cord was fastened round the steering rod and the end of the crank.

Joe Stark, a mechanical engineer, employed by defendant, having been called,

Alfred Theo. Hennessy, of the Automobile Club, said that the piece of road in question was one of the safest portions of the Caledon-road for speed work. He thought it was safe to travel on that part at 30 miles an hour; he had travelled down at that speed. It would be a stupid thing to suppose that a steering gear would be fastened up with a piece of string in the way described in the evidence for plaintiff. The reliability of the steering gear in the Brooke car depended entirely upon the steel springs inside the casing. On several makes of cars the steering gear was on a similar principle.

Donald Menzies, motor-car engineer, said that he had examined the steering gear of the car in question. He had examined the doll's head and the brass blocks into which it fitted. The integrity of the gear depended upon the springs. He did not think the brass blocks had been worn to such an extent that they should have been replaced by new ones. The doll's head was worn, but not too much as to be unfit for use. As the design was, he did not think the doll's head and the blocks were good enough. The doll's head and the blocks were not quite so safe as new ones. Looking at what had happened in this case, he did not like the design, seeing that when one spring had broken the crank arm had come away. He was going directly against the make of this steering gear. If the springs had lasted all right he should have regarded himself as safe with that gear, even using the doll's head and brass blocks that were in use when the accident happened. He attributed the failure of the steering gear to the breaking of the spring. Witness had not seen the steering gear until quite recently. A small spiral spring actually broke in the steering gear of the car he used in his last journey. The steering became a little erratic, but there was no danger. Witness had often travelled down the hill near Houw Hock at 25 to 30 miles an hour.

Cross-examined: Travelling on such a hill at 15 miles an hour, and applying the brakes effectually, they should be able to bring a car such as this to a standstill in two or three lengths.

Mr. Upington: Now, you say this is a faulty design?

Witness: I might be had up for libel.

[Hopley, J.: You are quite safe in speaking freely in the witness-box.]

Witness: It is supplied to the War Office. I think this design is faulty.

Mr. Burton closed his case.

Mr. Upington (for plaintiff) said that from the plea it would appear that the defendant wished to place in issue as a question of law, whether, in the absence of a contract between the owner of the car and the plaintiff, the plaintiff was entitled to recover damages for injuries sustained through the negligence of the defendant's agent, acting within the scope of his authority. The English authorities, which had been accepted in our Courts, were absolutely conclusive that he could. Counsel cited *Alex v. Great Eastern Railway Co.* (1895, Q.B.D. II., 387); *Taylor v. M., S. and L. Railway Co.* (1895, Q.B.D. I., 134); *Austin v. G. W. Railway Co.* (L.R., 2 Q.B., 442). It was not essential to the plaintiff's right to recover that there should have been a contract between the plaintiff and the defendant. As long as defendant had contracted to carry passengers, of which the plaintiff was one, and, as long as he was lawfully in the car, he had a right to recover. In the latter case he at least had a right in tort to recover damages sustained through the negligence of the defendant or his servants. On the facts, he submitted that defendant had contracted to carry the plaintiff.

On the question of negligence, it was clear that in the case of an accident of this kind the accident itself was some evidence of negligence. He cited *Gifford v. Table Bay Dock Management Commission* (B. 1874, p. 96); *Puckman v. Gibson* (4 H.C., 410).

In this case as strong proof of negligence as could possibly be produced in a Court of law had been produced.

Mr. Burton (for defendant) said that it was denied in the plea that there was any contract at all, such as set up in the declaration, between the plaintiff and the defendant. The whole declaration was based on contract. The action was not based on tort at all, and it was quite clear that there was no contract between the plaintiff and the defendant at all. If Ross had sued Lawrence for the hire of the car, he could not have succeeded. A person who carried passengers in a vehicle was not an insurer of the passengers. The cases cited by his learned friend related to goods and not to passengers. As to passengers, counsel cited Shirley's leading cases (7th ed., p. 462); *Christie v. Griggs* (2 Camp., 81); *Walker v. Stewart* (2 Kotze, p. 146); *Cowen v. Freedman* (5 H.C., 22); and *Moffatt v. Bateman* (3 L.R. P.C. appeals, 115). The speed at which the car was running when the accident occurred was not excessive. The whole car had been carefully overhauled before the trip. The brakes worked shortly before the accident occurred. In using machinery

of the kind in question, one was always liable to have accidents. The examination of the springs in the steering rod at Houw Hoek would have shown nothing which would have helped to prevent the accident. The driver was under no obligation to take the car to pieces at Houw Hoek.

Hopley, J.: The first question that arises in this case is whether or not the plaintiff has a *locus standi* to sue the defendant in this matter, the case being shaped on a contract, and not on a tort. I do not think that it is necessary to go into the cases which have been quoted on this point, because I am satisfied upon the evidence as it stands that the defendant knew that it was a contract with Lawrence as well as Gemmell with regard to the hiring of this car. The plaintiff has a *locus standi* in this matter to sue upon the contract. That being the case, we have to consider what the undertaking was of the defendant in such a matter as the present. These cars are highly scientific inventions, the machinery is complicated, the pleasure derived from them is great, a considerable charge is made for hiring, and the passengers are generally at the mercy of the goodness of the machinery, and the skill of the driver. In such a case as this, where a machine is travelling at a high rate of speed, it is incumbent to have examined it very carefully, and have made as safe as human foresight could the steering gear of this machine. Now, was that done in this particular case? I cannot say in my opinion that it was. I cannot feel satisfied, looking at the brass blocks, and looking at the doll's head, and, generally in considering the whole of the steering gear, that I should have considered, if it were my own case, that that steering gear was reasonably safe for the purpose of undertaking a trip upon dangerous roads, for all roads in this colony are more or less dangerous in this way, that there is not one that I know of, except short portions, where there are not bumps, and stones and sluits. It is said that this steering gear is used in England, but, then, the roads are much better in England. I think it is going far to say that anybody who lets out machines of this sort in this country can shield himself when an accident occurs by saying that this is the way the machines are turned out by the manufacturer. Therefore, it seems to me at once to follow as a matter of commonsense that you should see, if possible, that the doll's head, which forms part of the steering gear does not come out of the crank. It seems to me, reviewing the evidence, that there were both negligent driving and negligent construction and a negligent state of the machinery of this car for which the defendant is responsible. As to damages, under all the circumstances, I think that the sum

of £200, with costs, would be all the damages I feel inclined to award. Judgment will, therefore, be for the plaintiff for £200, with costs.

Mr. Uppington applied for the plaintiff to be certified as a necessary witness, and for costs of the preparations of the plan. Counsel said that plaintiff had had to come from Kimberley for the case.

His Lordship made an order accordingly.

[Plaintiff's Attorney: G. Trollip. Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

#### CRAFFORD V. LE ROUX.

Dr. Greer moved as a matter of urgency on the petition of Mrs. Crafford, of Claremont, for a temporary interdict restraining the sale by auction of certain movables belonging to respondent on the farm Eland's Vlei, district of Ladismith, owned by the petitioner, pending settlement of her claim for rent.

Mr. J. E. R. de Villiers appeared for respondent in opposition to the application.

It appeared that Mrs. Crafford's property was originally let on lease to one Pieter Johannes Nel for a term of ten years, that the respondent (Gert le Roux) had since become the occupier in place of Nel, and that the rent for the half-year commencing on the 1st July, which was payable in advance, had not been paid.

Mrs. Crafford said that there was owing to her a sum of £120 and she apprehended that if the sale was allowed to proceed she would lose her lien for her rent. The matter had previously been before a Judge in Chambers, and the application had been refused, but Dr. Greer, in renewing the application, said that the Court was now in possession of more information. It appeared that, owing to the hurry in bringing on the application, no opportunity had been had of communicating further with the respondent, and that the sale was advertised to take place on Thursday next. It was further stated in the advertisement that respondent was leaving the district, but, on his behalf, it was explained that he was merely removing to the next district. Furthermore, counsel stated that he had entered an appearance to petitioner's claim for rent, and that the rent had been paid to one Becker, for Nel, to whom respondent was liable.

Affidavits having been read and counsel heard in argument on the facts,

Hopley, J.: It seems to me that the balance of testimony in this case is that Le Roux has stepped into Nel's shoes in the matter of the lease, not by way of assignment, but by way of sub-lease from Nel, with the consent of the



landlady. Of course, the rights as between Mrs. Crafford (the landlady) and Nel and Le Roux and the sureties are all matters which might have been changed very considerably by this transference of tenancy, or by this sub-letting, as the case may be, but it seems to me that, although it is true that he has paid the rent from the 1st January to the 1st July, he is also responsible for the payment of rent in advance under this lease of Nel's for the current half-year. Now, the point arises, is a sub-tenant, who is in a position like that, and has got his movable property on the ground, bound by the tacit hypothec which the landlord has? My own impression is that the sub-tenant's goods are bound in so far, at all events, as he himself owes rent to the person from whom he holds. If he is holding from Mrs. Crafford direct, his goods will be bound for the rent due to her. If he is holding from Nel, his goods, I think, will still be bound to the applicant for such rent as is due, but which he has not paid, if Nel has not paid her the rent due under the contract. At all events, I think his goods are bound one way or another, but they must be the goods upon the place itself, and such a hypothec does not embrace all his movable goods, nor can any interdict against his selling his goods be asked for, save such goods as he is proposing to move off the place belonging to the landlady for the purposes of such sale. While on her place they would be bound for the rent for the current half-year, which, according to the agreement, it is alleged is payable and overdue. I think, therefore, she is entitled to some relief. But it might very likely be that by this time there is nothing left on the ground, it may all have been moved off, and the lien may have been lost. I think that the order that the applicant is entitled to is, not to stop altogether the sale, because that would be rather hard in the circumstances as Mr. Le Roux is holding a general sale of his property for the purpose of realising and going to the next district, but an order that the auctioneer held certain of the proceeds in his hands pending payment of this debt or settlement of the dispute between the parties. Therefore, I think the order I should give, which may be transmitted by telegraph in the circumstances, is that the auctioneer (Becker) be directed to retain in his hands a sum of £120, if there be such an amount realised by the sale of the movables on the property of the applicant. I do not think I should go any further than that. Costs may, for the present, stand over. When I say the movables on the applicant's property, I mean those which were on the property when the present application was

first made. I think that would be the proper time to fix because if, to avoid such an order as this, animals have been moved off, and can be identified, they ought, nevertheless, to be bound.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and a Jury.]

MATARE, BRUNS AND CO. { 1906.  
V. MOSSEL BAY MUNICI- { Aug. 15th  
PALITY. { " 16th  
" 17th

**Municipality — Drains — Negligence—Exercise of statutory powers—Contributory negligence.**

This was an action brought by the plaintiffs to recover damages against the defendants for their alleged negligence in maintaining a certain drain.

The plaintiffs' declaration was as follows:

1. The plaintiffs are merchants and warehousemen carrying on business at Mossel Bay under the style or firm of Matare, Bruns and Co. The defendants are a public body incorporated under the title aforesaid by Act of Parliament, and will be referred to hereinafter as the Council.

2. By the Act or Acts of Parliament constituting the said Council, and by section 1 of Act 20 of 1896 and section 18 of Act 23 of 1897, it is provided that the Council shall have power and authority to make and keep in repair sewers and drains within the limits of the Mossel Bay Municipality and to enter upon private property for the said purpose.

3. The plaintiffs are the owners of certain land and buildings situate between Grave and Bland Streets and Hudson-road within the said municipality. The said land originally belonged to the Council, but was transferred by them on the 30th day of July, 1895, to one G. M. Hudson, subject to the special condition that the Council should have the right to enter on the said land and maintain and repair the drain on the said land not



exceeding a width of five feet. The plaintiff craves leave to refer to the said transfer deed more particularly when produced at the trial. Thereafter on or about the 11th day of January, 1902, the said ground was sold and transferred to the plaintiffs by the said G. M. Hudson.

4. There was no artificial drain in existence on the said ground at the time of the said transfer by the Council to the said G. M. Hudson, but a natural watercourse and drain ran through the said ground and thence entered the sea. Thereafter, in or about the year 1895, the Council built a covered drain through the said ground in the place of the said natural watercourse and drain, the said G. M. Hudson bearing the expense of the cover of the said covered drain. Above the said covered drain, and communicating therewith, the Council had constructed an open barrel drain, which said barrel drain, after traversing the public park of Mossel Bay, entered a culvert running under Bland-street and thence communicated with the said covered drain. The Council further caused an iron grating to be placed where the said barrel drain entered the aforesaid culvert. The said barrel drain when completed was used for the purpose of collecting and carrying down surface and other drainage flowing along and from the western side of the municipality.

5. The Council has from time to time since the making and opening up of the said barrel drain caused more and more water to be diverted into the said drain. More particularly the said Council diverted water which would naturally drain into the eastern side of Church-street from the locality bounded by Rodgers, Klipper, Hill, High, and Montague Streets into a certain drain running along the western side of Church-street. The said water, after finding its way into the drain at the eastern side of Church-street, was carried underneath the said street and joined the drain at the western side of Church-street, and after flowing down the western side of the said street, continued its course along the northern side of Bland-street, entered the barrel drain aforesaid at or near the aforesaid culvert, and was carried thence into the covered drain. The said covered drain was not the natural water course of the said water.

6. In or about the year 1902 the plaintiffs, with the full knowledge and consent of the Council, constructed certain buildings on the said ground under which the aforesaid covered drain was.

7. It was the duty of the Council to construct the drains and works hereinbefore specified or to cause them to be constructed in a proper, workmanlike, and efficient manner, so as to carry off

the water flowing into them without detriment to the adjoining property, and more particularly the plaintiff's property, and further to maintain them or cause them to be maintained in an efficient condition.

8. On or about the 24th day of September, 1905, the said covered drain under the plaintiff's property became blocked and choked and large quantities of water collected as aforesaid, flowing from the barrel drain into the said covered drain, entered from the said covered drain into the buildings belonging to the plaintiffs, as aforesaid, and the said water in the said drain destroyed the floor of the said building and caused it to collapse into the said drain, damaged the goods contained in the said buildings, and the covered drain was in whole or in part destroyed.

9. The said damage was caused by negligent and improper acts or omissions of the Council in or about the maintenance and construction of the drains and works aforesaid. More particularly, the barrel drain aforesaid was improperly and negligently constructed and maintained, and was not kept in a proper state of repair, and the junctions of other drains with the barrel drain were faulty and defective, and so made as to endanger the barrel drain at the points of junction, whereby on the evening of September 24 the water flowing down to the said barrel drain destroyed portion of the said drain and carried down stones and other material composing the said barrel drain or washed from the strata in which it rested to the entrance of the aforesaid culvert; the grating hereinbefore mentioned was not in its proper place at the said culvert, but had been negligently and improperly removed, and in consequence the stones and other material which were washed down as aforesaid in consequence of the destruction of the barrel drain entering the culvert aforesaid found their way into the covered drain and blocked and choked it, whereby the water was dammed back in the said drain. The said drain was in part destroyed and the water dammed up in the said covered drain and still poured down from the barrel drain through the said culvert to the said covered drain, forced its way through the floor, and otherwise into the buildings of the plaintiffs, and caused the damage complained of aforesaid. Further, the said Council negligently failed to make or maintain the said covered drain in an efficient condition or of a sufficient size or to increase the carrying capacity thereof when diverting as aforesaid large additional quantities of water out of their natural flow into the said barrel drain, and thence into the said covered drain.

10. The said damaged drain is a source of danger to the plaintiffs, but the Council, though requested so to do, neg-

lects and refuses, in breach of its legal duty, to place the said drain in an efficient and proper state of repair.

11. The plaintiffs have suffered damage in respect of injury to their premises in the sum of £171 15s., and further, have been in whole or in part deprived since the 25th day of September, 1905, of the use of the said premises, whereby they have suffered and continue to suffer damage in the sum of £12 10s per mensem, but the Council, though requested so to do, neglects and refuse to pay the said sums or any part thereof.

12. The plaintiffs removed or caused to be removed the said goods stored in their buildings damaged as aforesaid and directed and caused steps to be taken for the preservation of the said goods, and thereafter caused some of them to be sold, but notwithstanding the plaintiffs have suffered loss in respect of the said goods in the sum of £278 8s., but the Council, though requested so to do, neglects and refuses to pay the said sum or any part thereof.

Wherefore the plaintiffs claim: (a) An order directing the defendant Council forthwith to construct a suitable and sufficient covered drain in place of the covered drain destroyed as aforesaid, and to make due and proper provision for the disposal of surface or other drainage water flowing through the said drain; (b) judgment for damages in respect of the premises occupied by them in the sums of £171 15s., and £12 10s. per mensem as and from the 25th day of September, 1905, under paragraph 11 hereof; (c) judgment for damages in respect of their goods in the sum of £278 8s., under paragraph 11 hereof; (d) alternative relief; (e) costs of suit.

The defendants' plea was as follows:

For a plea to the declaration the defendants say:

1. They admit paragraphs 1, 2, and 3 thereof.

2. As to paragraph 4 thereof, the open barrel drain referred to, which traverses the public park and communicates with the covered drain, was constructed before the covered drain traversing plaintiffs' property was constructed: save as above they admit the allegations in paragraph 4.

3. They deny the allegations in paragraph 5 thereof and say that there was a natural watercourse existing for many years for carrying off storm-water, on the site of the covered drain, before the said drain was constructed. No more water has been diverted into the drain since its construction than was accustomed to flow in the said watercourse in former years; the drainage water from Montagu-street used to flow into the said drain, but had been diverted prior to September, 1905.

4. As to paragraph 6 thereof, the only plan submitted was a sketch in pencil,

but no ground plan was submitted, and the circumstances under which the plaintiffs' buildings were constructed are referred to in correspondence to which defendants crave leave to refer when produced at the trial. At the time of the construction of plaintiffs' buildings, one Carl Heinrich Bruns, partner of the plaintiffs, was Mayor of the defendant Council, and plaintiffs were at the date of said construction, and are, well aware of the existence and nature of construction of the said covered drain and of the watercourse for which it was substituted. Plaintiffs took the risk upon themselves when building their said premises over the said drain: save as above they admit paragraph 6 thereof.

5. As to paragraph 7 thereof, the covered drain was constructed in a proper workmanlike and efficient manner so as to carry off all the water flowing into it: the defendants admit that drains constructed by them should be properly constructed.

6. As to paragraphs 8, 9, and 10 thereof, on or about September 24, 1905, extraordinary and excessive rains fell in the town and neighbourhood of Mossel Bay, and a storm and flood lasted for some time; several properties were flooded and destroyed, and for any damage done by such rainfall and flooding which may have been sustained by plaintiffs' buildings, defendants are not responsible, the same being due to *vis major*.

7. If plaintiffs had properly constructed their said buildings across and over the said drain, of the construction and existence whereof they (plaintiffs) were well aware, and if they had not placed and built concrete blocks and floors and stored and packed heavy merchandise over or in the neighbourhood of the said covered drain the said drain would not have collapsed and the plaintiffs' building would not have fallen in or been damaged.

8. The plaintiffs contributed either in whole or in part to any damage sustained by them, and owing to the construction of the building aforesaid and its overloading by means of heavy merchandise, caused the said covered drain to collapse at that part over which the said building was erected, and the said cement blocks and floor were placed by plaintiffs; and if any damage was thus sustained by plaintiffs, the defendants are not responsible therefor: no other portion of the said drain save that under plaintiffs' store fell in.

9. They admit that they placed an iron grating at the entrance of the covered drain, but say that they removed the same shortly afterwards, and some time prior to September, 1905, when it was found that the same became frequently blocked, and that the water then overflowed and in consequence caused damage, and that the said grat-

ing was properly removed in order to avert damage to the property of plaintiffs and others.

10. Save as above, they deny the allegations in paragraphs 7, 8, 9, 10, 11, and 12 thereof, and especially that plaintiffs have sustained damages as alleged, or any damage for which defendants are responsible.

Wherefore they pray that plaintiffs' claim may be dismissed; with costs.

For a claim in reconvention, the defendants (now plaintiffs in reconvention) say:

1. They crave leave to refer to the matters above pleaded.

2. Owing to the negligence and wrongful conduct of the plaintiffs (defendants in reconvention) in erecting their said buildings over the said covered drain, with concrete blocks and floors, and in packing heavy merchandise over and near the covered drain on the said floors, the said drain has collapsed, where it passes under their said store, and has been damaged, and it will cost the sum of £100 to repair the same.

Wherefore the plaintiffs in reconvention claim: (a) That the defendants in reconvention be ordered to rebuild and restore in a proper and safe condition the portion of the said drain fallen in as aforesaid, or in the alternative, payment of the sum of £100; (b) alternative relief; (c) costs of suit.

The plaintiffs' replication and plea to claim in reconvention was as follows:

For a replication to the defendants' plea, the plaintiffs say:

1. They admit that the second-named plaintiff was Mayor of the said Council at the time of the construction of the said buildings, and that they were aware of the nature and existence of the said covered drain. They further admit that heavy rains fell in the town of Mossel Bay on September 24, 1905.

2. Save as aforesaid, and save in so far as it consists of admission, they deny each and every allegation in the plea contained, join issue thereon, and again as before pray for judgment, with costs.

And for a plea to the defendants' (now plaintiffs') claim in reconvention, plaintiffs (now defendants) crave leave to refer to the foregoing, specially denying that the defendants have sustained any damage for which they are responsible.

Wherefore they pray that the defendants' (now plaintiffs') claim may be dismissed, with costs.

Mr. Schreiner, K.C. (with him Mr. Sutton), for plaintiffs; Mr. Searle, K.C. (with him Mr. Bisset), for defendants.

Chas. Weidner, architect, of Mossel Bay, said he had been called in by a partner in the plaintiff firm, and made a careful investigation of the damage done. The plan he made was a correct delineation of the surroundings.

Witness gave evidence on the plan he produced.

C. H. Bruns, one of the plaintiffs, said he was a partner in the firm of Matarc, Bruns and Co., which had been carrying on business for the last 29 years. For 25 years he had been a member of the Municipality, and several times had been Mayor. When the property was acquired by Mr. Hudson, he was a member of the Council. His firm bought the property from Hudson's estate in 1902, when the covered drain was already there. When Hudson bought the property there was an old open watercourse. The store was used for ordinary and rough merchandise. Witness was in Europe when the accident occurred, but on his return he went into the question of stock, and found that the floors could have stood the weight of at least half a dozen times as much as they held when they collapsed. In the meantime they had to rent a temporary store. There was nothing to show that the columns of the store stood on the drain. The removal of the iron grating at the point where the open drain joined the covered one could not possibly have avoided causing danger to plaintiff's property.

Cross-examined by Mr. Searle: A plan was submitted without the drain. The whole of the ground was not covered at the outset by buildings.

Frank W. Waldron, associate and member of the Institute of Civil Engineers, stated that previously he had been engineer for the harbour works at Mossel Bay. In January, 1902, he went to Mossel Bay. After the flood he was called by the plaintiff to examine the collapse of the floor in the store, and witness made a plan which he produced. He made a careful investigation of the drain underneath the store. He knew of no column which was exactly over the drain. In his opinion, the pressure of the column on the upper story was not sufficient to break the drain. Mr. Wright was correct when he said the bottom of the drain was broken. The immediate cause of the collapse of the drain, he should say, was that the lower end of the drain was stopped up, which enabled it to fill, and owing to the loose character of the stone composing the bottom of the drain and the top, the water got through and permeated the sand, and put this sand into a solution. When the water began to run, it took this sand away in solution down the drain, and the thing collapsed. It was an improbable theory that the downward pressure of the building smashed the drain. The whole thing was caused through the floor having been robbed of its support.

Cross-examined by Mr. Searle: It was a nice point whether the bottom was torn away by the action of the

debris going down, or whether it fell to pieces through the support of the sand having been taken away. The accident might have happened without the bottom of the drain having been torn away. As an engineer, he would prefer to have the columns placed away from the drain. In such a case the columns should have been put through to the bottom of the drain. If there had been a grating, the result would have been that a considerable amount of water would have come down to the store. He did not think nearly so much damage would have been done in that way as had been done. The water would have been spread, and it would get away somehow at the side of the building.

Re-examined by Mr. Schreiner: If the grating had been in its place, he did not think there would have been any serious damage to the store.

F. W. Matare, partner in the plaintiff firm, stated that he had lived at Mossel Bay since 1878. The rain commenced about 7.30 p.m., with a drizzle, and at 8 o'clock it increased very much, and it rained hard for an hour, but the heaviest rain came down between midnight and one a.m. Next morning at 10 o'clock, Mr. Black's body was found underneath the store. There had been a considerable inwash of water in the lower store. He was frequently in the store, and was in a position to say how the goods were stored. The total weight on the lower store was 96 tons. The stock was just the ordinary one. The store had often had a heavier stock. The goods were distributed over the store in an even way. There never had been any sign of the building giving way on account of over-stocking. He took steps to diminish the damage in his account as much as possible. The wholesale prices were put in for the different articles. He thought they would come to some amicable arrangement with the Municipality, and the statement of the damage was a fair estimate. Witness confirmed what Mr. Bruns had said with regard to the temporary store. On the grounds already stated, he attributed the accident to the negligence of the Municipality.

Cross-examined by Mr. Searle: It was a technical question to ask him how the Municipality were going to increase the drain without taking down his house. The stacking of the timber did not cause the accident. There was a lot of wire resting over the part of the drain which fell in. The rain on the night in question was perhaps the longest for twenty years, although he remembered a heavier fall for an hour.

Mr. Schreiner closed his case.

Charles Wm. Hoggard, architect, of Mossel Bay, stated he was asked to report upon the state of things at this drain by the municipality in May last. He examined the drain at the point

where it had broken. It measured about 45 ft. Slop-water also came down the drain from houses above. The bottom of the drain was mostly intact. There might have been some stones displaced at the sides of the drain. He saw several of the slabs of stone which covered the drain lying around the sides of the drain. Some of the stones were two inches thick, and others six. It was not a proper thing to build this store over the drain. The columns were almost on the side of the drain, which had to carry the whole of the weight.

Wm. John Matthews, formerly a member of the Mossel Bay Town Council, stated that he was a member of the Public Works Committee, and as such went over the streets and examined the drains. He knew the drain in question very well. The drain was in order before the flood. On the night in question, for about an hour, he was detained from getting into his house owing to the extraordinary rush of water. In all his experience he had never encountered such heavy rain, the effect of which was to cover every drain with heaps of stone and debris.

Mr. Bayman, a member of the Municipal Council, gave it as his opinion that the stone must have collapsed before Mr. Black's body came down the drain, otherwise it must have been washed out to sea. He knew of no precaution that could have been taken to have prevented what occurred, considering the heaviness of the rainfall. The rain was so heavy on the night of the accident that in his house his wife could not hear witness speak.

A. I. Vincent, member of the firm of Prince, Vincent and Co., and at present Mayor of Mossel Bay, stated that in 1895 Mr. Hudson applied to the municipality to have the drain covered. Permission was granted on the condition that the work would be done at Mr. Hudson's expense. Witness was in the Council at the time when the plan was submitted by the plaintiffs. The plan did not locate any drain. He did not know that the idea of the plaintiffs was to build over the drain. As a Councillor, he certainly would not have given permission to build over the drain if his attention had been drawn to it. The grating, which witness thought was a source of danger, was removed in 1903. The soil was of a sandy nature, and the previous heavy rains had made it damp.

George Draper, the gaoler at Mossel Bay, gave evidence as to the rain-gauge. The first reading at 9.50 on the night of September 24 was 1.65. In the morning the gauge was overflowing, so he took the reading as 4.50, which was the full capacity of the gauge, thus making a total of 6.15. It was the heaviest rainfall he had ever known.

Mr. Searle closed his case.



Mr. Schreiner, having read certain correspondence, addressed the jury for the plaintiffs. He said that a Municipality was directly responsible for any works which it performed. When the course of nature was interfered with, such interference should not result in damage. The plaintiffs had a right to expect that the grating should be in its place, as it was when their store was put up. He contended that the floor of the barrel drain had been ripped up by the rush of debris. Turning to the defence of *vis major*, he said that this did not hold unless the rain was the direct cause of the damage.

The action of the plaintiffs in building their store over the drain might have been imprudent, but this was immaterial unless it was the weight of the store which broke the drain.

Mr. Searle, for the defence, said that some specific act of negligence should be proved against the municipality in order to fix it with liability. No such act had been proved in this case. If the manner in which the barrel drain was constructed and looked after was negligence, Heaven help municipalities in this country. The removal of the grating was certainly not negligence. It was a highly improper thing to build over the drain. The name of the builder might well be handed down to posterity. All the evidence went to show that the rainfall was exceptional.

Mr. Schreiner having replied,

Buchanan, J., said that the foundation of the action was negligence. It was pleaded in the declaration that the Town Council of Mossel Bay had certain rights and privileges in the making and repairing of sewers. The guiding principle was that where a Town Council or a municipality had powers which it might exercise, if it did not exercise these powers and damage resulted no liability attached to the Council, but if they exercise them they must do so in a way that was proper and reasonable. As he understood the case for the plaintiffs, it was not so much in the way the defendants had constructed the drain at Hudson's property that they complained of, but in not keeping the drain above in such repair as to prevent the stones which formed the base of the drain being carried away. The main conflict in the evidence in the case was between experts, who very often in such cases gave very different views. The drain was covered by the owners of the land. They saw how it was done, and it was for the jury to say whether the Town Council could be held liable for any more than an open drain. In submitting the plans to the Town Council, there was no specific intimation that the building was going to be constructed over this drain. The other alleged act of negligence was the removal of the grating from the

culvert at the side of the road, but if that grating had not been removed still greater injury might have been caused. Could they say that the removal of the grating was a negligent act on the part of the Town Council? It was for the jury to find if there had been any such negligent act or acts proved to them, which ought to make the municipality liable for the breaking of the drain inside the building.

The jury, after an hour's deliberation, found, by six to three that the injury was caused by the negligence of the Council in not constructing the drain down Wasung-street and the barrel drain lower down properly. The jury expressed no opinion about the grating. They awarded damages to the plaintiffs as follows: For repairs to the store, £90, the Council to replace the drain as it was before, and for damages to the merchandise, £278. The jury considered that no compensation should be awarded for rent.

Judgment was accordingly entered for the plaintiffs for £368, with costs, the plaintiffs declared necessary witnesses, and the taxing officer to allow a reasonable amount for plans numbers 1 and 8.

[Plaintiffs' Attorney: G. Trollip. Defendants' Attorneys: Herold and Gie.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MACHAN V. MACHAN. { 1906.  
Aug. 15th.

This was an action brought by the husband for an order against his wife for restitution of conjugal rights, failing which, a decree of divorce. Mr. Payne was for plaintiff; defendant did not appear.

Mr. Payne said that in this case there was a preliminary difficulty in regard to publication. When a rule was granted to sue by edictal citation, an order was made for personal service, failing which, publication in the "North-eastern Daily Gazette" (England) and one publication in the "Government Gazette." Personal service could not be effected, and information was not received here until the 3rd July, and publication could not be made in the "Government Gazette" until the 6th July. The citation was returnable on the 31st July, and thus one calendar month did not elapse after publication as required by Rule 273. Counsel submitted that, although the rule of Court had not been complied with, the matter was one in which the indulgence of the Court should be extended, seeing that defendant would



not be prejudiced. The difficulty was unavoidable.

His Lordship, however, said that he could not sanction the rule of Court being set aside in this way. The return day would be extended until the 15th October, and one publication must be given in the "Government Gazette." He did not regard the difficulty as unavoidable if proper forethought had been exercised.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. { 1906.  
                  { Aug. 16th.

Mr. Burton moved for the admission of Frederick E. W. Groch as an attorney and notary.

Application granted, oath to be taken before the R.M. of Dordrecht.

### PROVISIONAL ROLL.

#### CROYDON ESTATES V. RIOCH.

Mr. De Waal moved for provisional sentence for £44 on certain conditions of sale in respect of land at Stellenbosch.

Order granted.

#### SCHULTZ V. SMITH.

Mr. Gutsche moved for provisional sentence for a balance of about £30 on an unsatisfied judgment of the R.M.'s Court of Colesberg, and for a decree of civil imprisonment.

Mr. Douglas Buchanan opposed the application and read affidavits by defendant and his father-in-law. Defendant said that he was unable to satisfy the judgment, and was without means. He was married by ante-nuptial contract.

Mr. Gutsche read a replying affidavit to the effect that there had been an attempt to defeat the claim of the plaintiff by the ante-nuptial contract.

Mr. Buchanan said that defendant's goods had already been sold up, lock,

stock, and barrel, and he was now dependent on his father-in-law. He submitted that no writ of civil imprisonment would issue from this Court unless there was a return of *nulla bona* to a writ of execution issued out of this court.

Mr. Gutsche submitted that it was the practice of this Court to issue a writ of civil imprisonment upon a Magistrate's Court judgment when accompanied by a return of *nulla bona*.

Provisional sentence granted as prayed, with costs, but no order on the second part of the application, with leave granted to the plaintiff to move the Court if he can bring evidence that defendant has means of paying the debt.

Mr. Buchanan applied for costs of opposing the second part of the application.

Hopley, J., expressed his strong disapprobation of the defendant's conduct and ordered him to pay all costs.

#### DE JAGER V. SMITH.

Mr. Gutsche moved for provisional sentence on an unsatisfied judgment of the R.M.'s Court at Colesberg and for a decree of civil imprisonment.

Judgment granted, with costs as in the previous case.

#### DE BEER V. GROENEWALD.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £200, with interest, bond due by reason of the non-payment of interest. Counsel applied for the property specially hypothecated to be declared executable.

Order granted.

#### COLONIAL GOVERNMENT V. SIROKO AND OTHERS.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £1,216, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ESTATE JONES V. MOHODIK.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £300, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and for rents to be attached.

Order granted as prayed.

**CILLIERS V. SWART.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,400, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Order granted.

**NEWMARK V. COHEN.**

Mr. Payne moved for provisional sentence on a mortgage bond for £700, with interest, less £8 odd, paid on account, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Order granted.

**BOSMAN, POWIS AND CO. V. DAVIS.**

Mr. Roux moved for provisional sentence on two promissory notes for £155 16s. and £155 15s., with interest from May 15, 1906, and costs.

Defendant asked for a month's extension. She was, she said, already in negotiation with a view of disposing of her hotel business.

Hopley, J., granted judgment as prayed, and advised defendant to lay the position before the plaintiff.

**GRAAFF V. WEINTROB AND PENKIN.**

Mr. Van Zyl moved for the final adjudication of the joint estate, and the separate estates of defendants as insolvent.

Order granted.

**HEROLD AND GIE V. WINTERBACH.**

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**SHERWOOD V. HOWARD.**

Mr. McGregor (for plaintiff) moved for the discharge of a provisional order of sequestration of defendant's estate.

Provisional order discharged.

**MICHAU V. GERIOKE.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £350, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Order granted.

**PRITCHARD V. MALAN.**

Mr. De Waal moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court, to be suspended on payment of £1 a month, in terms of defendant's offer.

Decree granted, execution to be suspended on payment of £1 a month, with leave to plaintiff to move the Court for an increased order when so advised.

**ILLIQUID ROLL.**

**KUSSEL V. KUSSEL.** { 1906.  
Aug. 16th.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, in terms of paragraph 4 of the summons, for £1,000, being amount handed to defendant by plaintiff's late father, which sum was the property of plaintiff in terms of certain ante-nuptial contract. The action was brought by the wife against her husband.

Judgment as prayed in paragraph 4 of the summons, with costs.

**WRENSCH V. DREYER.**

Mr. Watermeyer moved for judgment, under Rule 329d, for £36 1s. 1d., with interest and costs.

Order granted.

**SMELLEKAMP V. BROWNE.**

Mr. Watermeyer moved for judgment, under Rule 319, in terms of prayer of plaintiff's declaration, for £51 10s. 8d., arrear rent of a certain hotel at Durbanville, with costs.

Order granted as prayed.

**SMITH AND ROLLINS V. JENKINSON.**

Mr. Struben moved for judgment, under Rule 329d, for £106 0s. 2d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

**GENERAL MOTIONS.**

**FOURIE V. DU PLESSIS.** { 1906.  
Aug. 16th.

This was an application for leave to remove the trial to the ensuing Circuit Court to be held at Oudtshoorn.

Mr. McGregor was for applicant (defendant in the action); Dr. Greer was for respondent (plaintiff in the action).

Affidavits having been read,

The case was removed to the next Circuit Court at Oudtshoorn, costs to be costs in the cause.

*Ex parte DE VILLIERS.***Articled clerk—Breach of continuous service—Football.**

*The Court granted five months' leave of absence to an articled clerk, to enable him to proceed to England with a football team. Applicant to serve an additional period equal to that of his absence. (See also Ex parte Jackson).*

Mr. P. S. T. Jones moved for leave of absence of petitioner from articles of clerkship with Attorney Markotter, of Stellenbosch. Petitioner said that he had been selected as one of the members of the Rugby football team, who were about to proceed to England, and he desired leave to break his articles for a period of five months, which period he was willing to serve at the expiration of his articles.

His Lordship granted an order as prayed, petitioner to serve such period as he may be absent at the end of his articles.

*Ex parte JACKSON.*

Mr. P. S. T. Jones moved for a similar order as in the previous matter. Petitioner applied for six months' leave of absence to enable him to proceed to England as a member of the Rugby football team.

Order granted as prayed petitioner to serve an additional six months at the end of his articles.

**SALKINDER V. BAUMGARTEN.**

Mr. P. S. T. Jones moved for the removal of trial to the ensuing Circuit Court to be held at Victoria West.

The case was ordered to be removed accordingly, costs to be costs in the cause.

*Ex parte THE "EAST LONDON DAILY NEWS" PRINTING AND PUBLISHING COMPANY, LTD.*

Mr. Burton moved, as a matter of urgency, for an order for the appointment of liquidators of the "East London Daily News" Printing and Publishing Company.

Dr. Greer appeared on behalf of Wiener and Co. (judgment creditors).

Mr. Burton read the petition of John Bisseker, who said that he was the chairman, and was a shareholder in the East London Daily News Printing and Publishing Company, Limited. At the last statement of the company, which

was made up to 30th June, 1906, the company's assets showed £14,012 0s. 9d., and the liabilities £4,894 9s. 10d. leaving a difference of assets over liabilities of £9,117 10s. 11d. At a meeting held on the 11th July, 1906, it was resolved to approve of the raising of £5,000 on debentures, to be secured by a general debenture bond, the debentures to be £5. That resolution was confirmed at a further shareholders' meeting on the 30th July. As a result of canvassing amongst the shareholders, support had been given for 339 debentures, which would yield £1,695. Petitioner had reasonable hope that the debentures would be fully subscribed, provided official liquidators were appointed, the reason being that one creditor had sued the company in the Supreme Court and recovered judgment viz., Messrs. Wiener and Co., of Cape Town, for £1,050. That day the Deputy Sheriff of East London had made an attachment of portion of the machinery and plant. He prayed for an order for the appointment of Herbert J. R. Pope (secretary of the Board of Executors), and Charles A. Odlin (secretary of the company), as joint liquidators, or, alternatively, an order of relief in terms of section 139 of the Companies' Act of 1892 by the appointment of provisional liquidators, or restraining proceedings against the company for such period as would permit of the debenture moneys being received by the company.

It was stated that the application had already been made to the Eastern Districts Court, but, under all the circumstances, and more especially seeing that the judgment of Wiener and Co. was obtained in the Supreme Court, the E.D. Court expressed the opinion that the matter was one rather for application to the Supreme Court for relief.

Mr. Burton said that there was no specific application for the winding up of the company. The petitioners asked that certain persons should be appointed liquidators provisionally, or that an order should be given, the effect of which would be that execution in the judgment of Wiener would be stayed on the grounds set forth in the petition.

Dr. Greer said that a copy of the petition had only been served on his clients that morning, and he had to apply for a postponement to enable replying affidavits to be filed.

The application was ordered to stand over until to-morrow, Dr. Greer undertaking, meanwhile, that his clients would not proceed with their execution against the company's assets.

*Postea (August 17th).*

Dr. Greer read an affidavit by Ludwig Wiener, chairman of Wiener and Co. (judgment creditors), who stated that there was no allegation in the petition why an order should be made

under the Companies Act, as prayed. From the statement which was made as to applicant company's position, it appeared that the company was in a perfectly solvent state. His company did not desire to unduly hamper applicant company, and he was willing to give applicant company time to liquidate its liability. He attached to his affidavit certain correspondence, in which applicant company offered £100 a month until the debt of £1,050 was liquidated, to which a reply was sent by deponent's attorneys stating that they would be prepared to accept the offer so long as Mr. Malcomess would be guarantee for due fulfilment of the offer. To this latter letter deponent said no reply had been received. In case the Court granted an order for appointment of liquidators, he urged that the creditors should be consulted as to who the liquidators should be.

Mr. Burton read an answering affidavit by G. Montgomery Walker, of Walker and Jacobsohn, applicants' attorneys, in which he said that after the correspondence he had certain communications over the telephone with Mr. Wiener as to the matter, urging him not to take judgment on the 9th, as applicants were taking steps to raise debentures. To this he would not consent, and he took judgment and had issued a writ thereon. A telegram was also put in from Mr. Drake, of East London, setting out the time that would be required to get the matter of the debentures in order.

Mr. Burton said that the application for appointment of liquidators was somewhat premature, and he was afraid he could not press it. The company, according to the statement of assets and liabilities, was absolutely solvent. His lordship would see that the object of the application was clearly to obtain a stay of execution under the judgment of Wiener and Co. He submitted that the Court should grant some relief to petitioners. It was purely a matter of finding £1,000 in cash.

[Hopley, J. (to Dr. Greer): Are you instructed to press your execution?]

Dr. Greer said that the indebtedness arose from printing machines supplied by his clients to petitioners.

[Hopley, J.: But you do not want to sell them and take the bread out of their mouth?]

Dr. Greer: We have made proposal after proposal of the fairest kind, but they have not even had the courtesy to acknowledge them. Counsel went on to say that the petitioners took no steps to satisfy this claim, and yet they had unpaid calls to the amount of £3,000, which were due, and there was an allegation which was not met that they had made no effort whatever to get in any portion of that money.

[Hopley, J.: You cannot say it has not been met.]

Dr. Greer: They assume a *non possumus* attitude; they refuse to do anything.

Mr. Burton said that it was impossible to communicate with Mr. Malcomess, as he was on the high seas.

Hopley, J., said it would be ordered that further steps in execution of the judgment be stayed for six weeks, and the judgment creditors (Wiener and Co.) would have leave to apply at any time within that period in case their position were in any way prejudiced, petitioners to pay costs of this application.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ANDREWS V. COHEN. } 1906.  
} Aug. 17th.

Mr. Inchbold moved, as a matter of urgency, for discharge of the provisional order of sequestration of defendant's estate. He said that the parties had come to an arrangement, and Cohen was desirous of commencing his business again in Somerset East, but was unable to do so while the provisional order was in existence.

Provisional order set aside.

SEARLE V. WARNER.

Appeal from a Divisional Court—  
Extension of time—Jurisdiction of Divisional Court—  
Copies of record.

*Any judge sitting in the Supreme Court, whether sitting in Chambers or as a Divisional Court, has power to grant an extension of the time prescribed by the Rules of Court for prosecuting an appeal to the Court of Appeal.*

*Where an appellant had not printed copies of the record ready within the time pre-*

*scribed, a Divisional Court granted an extension of time.*

This was an application for an extension of time within which applicant (Warner) may prosecute an appeal from a judgment of the Hon. Sir John Buchanan, sitting as a Divisional Court of the Supreme Court.

The affidavit of Robert Charles Warner stated that he had been sued by Searle Brothers for £75 damages, sustained to a certain wall by reason of the stacking of certain coal. The case was heard on the 17th May last before Sir John Buchanan, who gave judgment for plaintiff for £50, with costs, which had since been paid. On the 23rd May petitioner noted an appeal with the Registrar, and notice was also served on the plaintiff's attorney. Deponent had duly tendered to the Registrar notice to set down, but that was refused owing to the printed record not having been completed.

The answering affidavit of William Searle (one of the respondents), said that the petition disclosed no reason why this Court should grant an extension of time. Petitioner had, in fact, no sufficient ground why the Court should grant him an extension of time.

[Hopley, J.: Well, Mr. Searle has decided the case. He does not submit that it might be so, but he simply says that it is so.]

Mr. Upington was for applicant; Mr. Russell was for respondent.

Mr. Russell took the point that this Court had no jurisdiction in a matter of appeal from another division.

The matter was ordered to stand over.

At a later stage, after argument.

Hopley, J.: In this case it is not now denied that a Judge of the Court sitting in Chambers may make such an order as is at present applied for, and I should say that if he could do so in Chambers he has *a fortiori* a right of doing it when sitting in open Court, where both counsel are heard. The policy of the Court always is, as far as my experience has gone, to give a would-be appellant facilities for prosecuting his appeal. One does not wish, or no Court that I know of wishes, to shut out a litigant from the ultimate resources of the law, which will finally decide whether he is in the right or in the wrong. Of course, he ought, practically speaking, to follow all the steps which the law lays down to enable him to prosecute such appeal as he may be advised to prosecute, and in this case the applicant has been negligent in one particular, and that was in not complying to the full with the terms of the Rule of Court which enjoins that, when prosecuting an appeal or setting it down for hearing within three months, he

should at the same time furnish to the Registrar a certain number of printed copies of the record for the use of the Judges, and of the counsel on the other side. In every other respect, the present applicant did everything that the Rules of Court enjoin, and that the state of the law makes it obligatory upon him to do. But he came within the limit of time, and asked that the case should be set down, and he was unfurnished with printed copies of the record. Under these circumstances, the Registrar refused to take his setting down paper, and it is to cure his default by putting him in the position of going on with his appeal that it is brought now before the Court. Well, I think that he should have, in that state of circumstances, the indulgence of the Court, in fact, that the Court should, to use the words of the Chief Justice, in the case of *Van Nickerk v. Browne*, condone that negligence which he showed in not having copies printed exactly on the right day. Therefore, the applicant will have extension of time within which to prosecute his appeal until the end of this month. As to the question of costs, I feel that there is something in Mr. Russell's point that the applicant has not given any reason why he did not have these copies printed in time. I think that, as the neglect of the applicant has caused the necessity of the present application, and as I do not see that the respondent is to blame in coming here to oppose, costs of the day should be paid by the applicant.

On the application of Mr. Upington, his lordship ordered the appeal to be set down for the 27th August.

#### FOORD V. FOORD.

This was an action brought by Edith Alice Foord, of Cape Town, against Sydney Henry Foord, whose present whereabouts are unknown, for restitution of conjugal rights, failing which, a decree of divorce and custody of the minor child of the marriage. Mr. P. S. T. Jones was for plaintiff; defendant, who was sued by edictal citation, did not appear.

Evidence was led by Mr. Jones.

Wm. Thomas Birch, clerk in charge of the marriage register, Colonial Office, gave proof of the marriage, which took place in Cape Town in March, 1900.

Plaintiff said that on the day of the marriage defendant went to Kimberley for the benefit of his health. At the end of September, 1900, she joined him in Kimberley, and remained with him until the following June. Witness then returned to Cape Town, and resided with her mother. Defendant came down to Cape Town in January, 1902.



After witness returned to Cape Town, he did not give her any support, except the grant she had from the military, defendant having joined the Griqualand West Corps. When he returned to Cape Town, he did not make any attempt to provide her with a home. He was engaged in winding up the affairs of the corps. He would not go and see her at her mother's. Witness in that year went to England with her mother, and he subsequently followed her. She, however, did not see him in England, though she knew he was living with his mother at Horne Hill, Brixton. She afterwards had a communication from defendant's brother, Frank Foord, stating that her husband had gone to Canada. She only communicated with her husband through his brother, who said he had been asked not to disclose his address. The last communication she had from defendant was dated January 1, 1905, from Canada, stating that he would try to find her a home if she went out.

From the correspondence handed in, it appeared that defendant alleged that plaintiff had deserted him.

Plaintiff denied that she was responsible for the desertion.

By the Court: Witness would be prepared to go out to Canada and join defendant, if he provided her with a home. If he came to this country, she would be prepared to live with him.

Decree of restitution granted, defendant to return to or receive plaintiff on or before the 31st December, failing which, to show cause on the 1st February why a decree of divorce should not be granted as prayed, personal service to be effected, failing which, order to be served upon defendant's brother, Frank Foord, of London, S.E., and copy to be sent by registered letter, care of T. R. Bayliss, of Manitoba, Canada.

REHABILITATIONS. { 1906.  
{ Aug. 17th.

Mr. Payne moved for the discharge from insolvency of Oscar Firkser.

Granted.

Dr. Rainsford moved for the discharge from insolvency of Meyer Ellis.

Granted.

Mr. De Waal moved for the discharge from insolvency of Alfred Bawden.

Granted.

## GENERAL MOTIONS.

*Ex parte* ESTATE HOLLIDAY.

Mr. Watermeyer moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* JANSENVILLE MUNICIPALITY.

Mr. Swift moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* THOMAS.

Mr. Roux moved, on the petition of Mr. Thomas, who is trustee in the insolvent estate of David Golding, for an order authorising registration of certain property at Woodstock in name of petitioner. The property was knocked down to petitioner at public auction.

Order granted as prayed.

*Ex parte* FLETCHER.

Mr. Watermeyer moved for a rule *nisi* to be made absolute authorising petitioner to sue *in forma pauperis*. Counsel said that he had certified.

Rule absolute, Mr. Watermeyer appointed counsel, and Messrs. Van Zyl and Buissinne attorneys of the petitioner.

*Ex parte* FAIRBAIRN.

Articled clerk—Breach of service  
—Matriculation examination.

Mr. McGregor moved for leave of absence of petitioner from his articles of clerkship for a period of three months to enable him to proceed to St. Andrew's College, Graham's Town, to prepare for the matriculation examination to be held there in December next. Petitioner said that, should the vacation be granted, he was prepared to serve an additional period of three months at the expiration of his articles.

Order granted as prayed, i.e., applicant to have leave of absence from the 20th September to the 20th December, subject to serving an additional period of three months after the 11th March, 1907.

CRAFFORD V. MULLER.

This was an application brought by Mrs. Crafford, of Claremont, upon notice to respondent, who was a furniture dealer, also of Claremont, to show cause why a certain provisional judgment on two promissory notes for £50 each obtained by respondent against applicant on the 1st August should not be set aside.

The grounds of the application were that one judgment was wrongfully obtained, and in breach of agreement entered into between the attorneys of plaintiff and defendant.

The case, it had been arranged, should not be heard before the 22nd August in any event, and it was the intention of applicant to either pay the amount of the respondent's claim or appear in Court and lay the facts before his lordship. Furthermore, it was said that respondent had obtained judgment for an incorrect amount, having failed to give applicant credit for £12 19s. 6d., value of a suite of furniture sold by respondent on behalf of applicant. It was also urged that the parties both resided within the district of the Resident Magistrate's Court at Wynberg, and that it was a Magistrate's Court matter. Applicant was of independent means. Mr. Brady (her attorney) had offered to settle the capital and costs by ten o'clock on the 22nd August.

The respondent's position was that the judgment was obtained under a misapprehension, and that it had been intended to apply for judgment on the 2nd August. Although Mr. Brady had made the guarantee, no part of the said capital and costs had yet been paid. As to the question of suing in the Resident Magistrate's Court, the amount of the notes was over £40, and defendant only had the usufruct in some farm in the Ladismith district. Respondent's attorney said that there had been a *bona fide* mistake as to the date of set down, and he denied that there had been any breach of faith. It was stated that instructions to counsel were also given for the 2nd August.

An answering affidavit by Mr. Brady stated that he had always been ready and willing to tender what was justly due to respondent, according to his guarantee.

Mr. J. E. R. de Villiers was for applicant; Dr. Greer was for respondents.

After hearing counsel in argument on the facts,

Hopley, J., ordered that the judgment be set aside, with costs.

At a later stage, His Lordship said that the Registrar was in all probability quite correct in setting the matter down for the 1st August, because that was the proper return day, and that was the day on which it ought to be on the cause list. Where Mr. Buirski's clerk made a mistake was in not giving counsel specific instructions to move for an adjournment on the 1st August until the next day.

#### CROUSE AND ANOTHER V. FOURIE.

Mr. Douglas Buchanan moved for an order to admit applicants as co-defendants in certain action. Plaintiff, it was stated, now consented, subject to costs being made costs in the cause.

Ordered that the applicants be placed on the record as co-defendants, costs to be costs in the cause.

#### TAILLARD (FORMERLY TALYARD) V. ASSIGNEES MYBURGH AND CO.

Dr. Greer moved for an order authorising cancellation of certain cession of life policy in the books of the Mutual Company.

Order granted as prayed.

#### *Ex parte* GLYNN.

Dr. Greer moved, as a matter of urgency, for a temporary interdict restraining W. B. Shaw from paying over to one P. N. Theron £34 5s., portion of an inheritance, pending an action to be brought by applicant against respondent for rent of certain premises in Cape Town. Counsel cited several recent cases in support of the application, and more particularly relied on *Lawley v. Herrer* (16 C.T.R., 542).

Hopley, J., said that he was not aware of any precedent for such an application as this. No judgment had been obtained, and there was nothing to show why this attachment should be allowed. He should not grant an order at present. He did not recognise any such practice as counsel sought to set up.

No order.

#### *Ex parte* VAN STRAATEN.

Mr. J. E. R. de Villiers moved for an order authorising sale of certain property bequeathed to petitioner's minor children, in the estate of Nel, and appointment of Mr. Dowd, attorney, Bedford, as curator of the minors, to pass transfer. The Master's report was favourable.

Order granted, in terms of the Master's report.

#### *Ex parte* LE GRANGE.

Mr. J. E. R. de Villiers moved, on the petition of P. J. le Grange, of Prince Albert, for his appointment as guardian of his minor grandchild. Counsel read the petition, and also a deed of renunciation by the boy's father.

Order granted appointing petitioner sole guardian of the said minor, and curator of his property.

# SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

KALK BAY MUNICIPALITY { 1906.  
V. COLLIE. } Aug. 18th.

This was an application upon notice to the respondent (James Collie) to show cause why a jury trial set down for Monday next, the 20th inst., should not be postponed, and why applicant should not be given leave to amend his pleadings to enable him to lead evidence on the improper and unworkmanlike manner in which the drainage scheme at Kalk Bay had been carried out by respondent.

The application arose out of an action instituted by respondent against the Kalk Bay-Muizenberg Municipality, in respect of a certain contract for the construction of drainage works, into which he entered in October, 1904. The contract between the parties was broken in January last, when the works were taken out of the plaintiff's hands by the Municipality.

The principal ground of the present application was that, in consequence of investigations which were being carried on by Dr. Mitchell, Assistant Medical Officer for the Colony, and Mr. Stainthorpe, Assistant Engineer of the Public Works Department, as a commission appointed by the Government, certain new facts had come to light which were very material to the defendant's case. Dr. Mitchell and Mr. Stainthorpe had not yet completed their labours, but they had sworn affidavits to the effect that the construction of certain sections of the sewers was defective, and that the levels and gradients of certain sections of the sewers were not in accordance with the contract. The sewers were not watertight. The Commission expected to conclude their investigations by the end of the present year.

Respondent, in an answering affidavit, strongly opposed a postponement, on the ground that applicants had had ample time in which to prepare their defence. The works, he said, were carried on under the supervision of Mr. Bennett, the Municipal Engineer, or Mr. Olive, the Acting Engineer, so that the Council's official had been in constant touch with the work. His (deponent's) attorneys had already granted the defendants an extension of time in which to file their plea. Defendants had had possession of his plant, implements, and machinery since the 19th January last, and he was without funds with which to purchase further plant. He submitted that any postponement of the action as now set down would constitute a most unfair and serious hardship upon him. His principal and most essential witness, Thomas Pitt, who acted as his foreman during almost

the whole period, informed him that he was remaining in Cape Town solely for the purpose of giving evidence in the case, at considerable inconvenience, and that he intended to leave Cape Town at an early date. He submitted that the grounds upon which postponement was asked for were wholly insufficient. He was quite prepared to admit that the sewer was full of water, or had a large quantity of water in it, but it was capable of simple explanation, as the water could enter from three different sources, which deponent proceeded to describe. Any change in the gradient of the sewer from the original plans had been made in accordance with instructions from the Municipal Engineer.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C., and Mr. Douglas Buchanan), was for applicant (defendant in the action); Mr. Upington (with him Mr. Watermeyer) was for respondent (plaintiff in the action).

Mr. Schreiner said that they were quite sensible of the exceptional position in which they placed plaintiff in this case, and they were quite aware it would be fair that his learned friend should say that costs which had been wasted in connection with the postponement must be paid by the municipality. Beyond that they maintained that it was impossible for him to press on any ground set out in the affidavit opposition to a postponement. These matters were not known to the municipality before. By good fortune the Government had appointed a Commission, who brought forward these important new features, most important in connection with a pumping system, such as this was supposed to be. His lordship would notice that this was not a gravitation system. It was a system of drainage which was going to be dependent upon pumping. Portion of the defence was that they had actually paid to the plaintiff upon certificates of the engineer no less a sum than £16,000, and they claimed in reconvention £11,236. It was absolutely necessary in the interests of justice between the parties that the trial should be postponed.

Mr. Upington said that this was a most unusual application. The statements contained in the affidavits of the Government officials amounted to no more than this: (1) There was a certain defect in the sewer, due to the leakage of water and the sub-soil into it, and (2) that a portion of the work had not been constructed according to the plans and drawings. This contract was terminated by the municipality, so far back as January last. Up to the present time there had not been a suggestion in the correspondence or in the pleadings that the work had been improperly done. Now the defendants asked for a sort of roving order to amend their plea within very general limits.

They had turned the defendant off the work, they had interdicted his plant, and it was with the greatest difficulty that he could bring his case against the municipality with respect to these matters. He had been reduced to great financial straits in consequence of their action, and now he was asked practically to consent to this matter standing over in order that the municipality may repair what was gross negligence on their part. If they had desired to set up such a plea on record, surely they had had all the means at their disposal. There was scarcely a legal defence that could possibly be taken to the plaintiff's claim which they had not taken, and now they asked for a postponement after this long delay.

Mr. Schreiner, in reply, said that, after his learned friend's very eloquent appeal, he should say on behalf of his clients that the taking over of the works was the result of a very strenuously-contested motion, which was heard by his lordship the Chief Justice. Now it appeared that the plaintiff had been paid for the plant. The engineer, without the Council knowing it or authorising it, had given an advance, which was one of the points in issue, and the plaintiff had actually been paid for the plant out of the municipal money.

Mr. Upington (interposing) said that that was not admitted.

Mr. Schreiner rejoined that he thought it was only fair to point this out after the sentimental objections which his learned friend had taken. Proceeding, he urged that in the interests of justice to both parties, it was only fair that the hearing should be postponed in order that they should have all the facts before the Court.

Buchanan, J.: I cannot now go into the merits of this case; it would be very undesirable to do so. The only question I have to decide is whether the case is ripe for hearing on Monday next. Application is made for postponement of the trial mainly on the ground that additional facts have come to the knowledge of the defendant since the case has been set down for trial, and, consequently, he wishes to have his pleadings amended to meet the actual facts of the case, and also to enable him to get the evidence which, unless a postponement takes place, he will not be able to put before the Court. If this were a small case, or a case purely between individuals, one might hesitate somewhat in postponing it, but this is a matter of public importance, a matter affecting a municipality, and the inhabitants thereof, and a matter concerning which evidently there is something which the Government have thought fit to interfere with and require a report upon, a contract also with a very large amount involved on each side, heavy damages are claimed

from the defendant, and with the full information as yet not at the disposal of the parties. I think on the affidavits I must hold that the case is not ripe for trial by jury on Monday next. The evidence is not available, the pleadings are not in order, and unfortunately a break at the trial will not be possible when the case proceeds, as the case has been set down for to be heard before a jury. Under these circumstances, I think that postponement of trials is by no means unusual when cause is shown to the Court, and absence of witnesses alone or inability to procure evidence in time is often relied upon and founded as a ground upon which the trial should be postponed. We have had recent instances of this kind in regard to railway disputes, which have formed the subject of litigation in this Court. In these very considerable latitude was allowed to the defendant to bring all the facts properly before the Court. I must say, however, whatever costs have been incurred in this application, all wasted costs must be paid, and paid promptly, by the applicant in this case. Whatever may be the result of the trial, these costs ought to be paid, and paid at once, by the present applicant. The trial cannot go on on Monday, and must be postponed, and, as far as the amendment of pleadings is concerned, the parties are almost entitled, if they give notice to have any amendment they like before the trial actually comes off. The trial, therefore, set down for Monday next will be postponed, and leave will be given to amend pleadings, but the applicant must pay all wasted costs. The trial will be ordered to be set down for the 8th October.

On the application of Mr. Upington, an order was granted appointing Advocate Giddy as commissioner to take the evidence of Thomas Pitts, who had been employed as foreman by plaintiff, should it be found necessary to take his evidence on commission, four days' notice to be given to defendants when the commission sits.

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*Ex parte* THE KUIL'S RIVER TIN MINES, LTD.

Mr. Close moved, as a matter of urgency, for an order authorising the registration of transfer of certain farms in the division of Stellenbosch.

Order granted, as recommended by the Registrar of Deeds.

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## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN, the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

REHABILITATION. ( 1906.  
( Aug. 20th.

Mr. Sutton applied for leave to mention the application of Stephanus Johannes Schoeman for his discharge from insolvency. The matter, he said, was called on Friday last, while he was engaged in another division. He had been asked to specially mention the application as Schoeman desired to be rehabilitated.

[Hopley, J.: What is the urgency?]

Mr. Sutton said that applicant was anxious to be discharged from insolvency as soon as possible.

Application granted.

### REX V. WARNER.

General dealer — Licence —  
Colonial produce—Act 13 of  
1870, Sec. 6.

*W., having taken out a general dealer's licence in Cape Town, which, however, did not specify any place of sale, was convicted of having sold "coal" at Claremont. No attempt was made by the Crown to prove that this was not Colonial coal. Conviction quashed on the ground that there was no evidence that the appellant had committed the offence of selling imported coal without a licence and had thus contravened Sec. 6 of Act 13 of 1870, the offence with which he was charged.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Wynberg, who had convicted the appellant of the crime of contravening section 6, Act 13 of 1870, as amended by Act 38 of 1887, in that on the 19th July and at Claremont he did wrongfully and unlawfully exercise the trade, business or calling of general dealer without having previously taken out the necessary licence as required by schedule II. of Act 38 of 1887. The Magistrate had sentenced appellant to a fine of 10s.

Appellant, it appeared, had taken out a general dealer's licence for Cape Town. He had understood that he was taking out a licence to cover all his stores. He had asked the Treasury to rectify the

licence issued to him and make it applicable to all his stores in the Colony. The offence, in respect of which a conviction was obtained, was selling 15 bags of coal to the caterer for the police mess from his store in Draper-street, Claremont.

Mr. Upington was for appellant, Robert Charles Warner, trading as R. Warner and Co. Mr. Howel Jones was for the Crown.

Mr. Upington referred to section 3 of Act 38 of 1887, where "general dealer" was defined as "any person who carries on the trade or business of selling, or offering, or exposing for sale, barter, or exchange, any goods, wares, or merchandise, not being the growth, produce or manufacture of South Africa." Coal was produced in South Africa, and the onus was on the prosecution to show that the coal supplied was not the produce of South Africa. This it had failed to prove. In the second place only one sale was proved, and one sale was not sufficient to substantiate a charge of carrying on the business of a general dealer. He cited *Rex v. Kukard* (21, S.C., 189) and *Rex v. Amos* (16, E.D.C., 129). In the third place the charge was vague. It was not sufficient for a witness to state that the trade of general dealer was carried on. Specific acts constituting such a carrying on of trade should be proved (*Rex v. Parkins*, 10, E.D.C., 167). Lastly, the appellant had taken out a general dealer's licence and was entitled to sell anywhere in Cape Town under that licence, even if the coal was kept in a store at Claremont. He submitted that the mere evidence of an isolated sale did not constitute substantial ground for convicting the defendant. The evidence was vague and insufficient; it was not enough merely to say that appellant had a general store and that he carried on business there.

Buchanan, J., put it to counsel for the Crown what the granting of a general dealer's licence meant?

Mr. Jones said that, where a licence was granted for Cape Town, it meant that the licensee was only licensed to sell in Cape Town.

[Buchanan, J.: Could he under that licence sell anywhere in Cape Town, say, at half a dozen different places?]

Mr. Jones: He could by this licence, but I am informed that the practice is to give a general dealer's licence only for particular premises.

[Buchanan, J.: But where is the authority for that?]

Mr. Jones said that the authority for that practice was derived from the case of *Queen v. Rittman* (4 E.D. Court Rep., 309).

[Buchanan, J.: Under this licence appellant could have sold anywhere in Cape Town?]

Mr. Jones admitted that that was so. On the question of commercial travellers going out of the district to sell,



Counsel cited *Queen v. Lezard* (4 High Court Rep., 1).

[Hopley, J.: Yes, but in that case Lezard was carrying a cart load of jewellery about with him and hawking it; it was not merely a matter of taking samples.]

Mr. Jones said that the notice of appeal was in very general terms—that the conviction was contrary to law—and the points now taken were not taken in the Court below. Consequently, they were somewhat embarrassed in meeting the points now raised. Had the ground of appeal not been in such general terms, no doubt they would have been furnished by the Magistrate, with his reasons for judgment. As to the question of whether the coal was South African produce, counsel submitted that it was not necessary for the prosecution to produce evidence which was specially within the knowledge of defendant. Defendant did not raise the defence in the Court below that this was South African produce. As to the point that there was only one transaction proved, he submitted that it was clear that a business was being carried on at the defendant's store at Claremont. He submitted that the Court should not quash the conviction upon the purely technical grounds which were now raised for the first time, and which on the evidence were not supported.

Buchanan, J.: The accused in this case was charged with the crime of contravening section 6 of Act 13 of 1870, that is, the Stamps and Licences Act, in that he exercised the trade or business of a general dealer without a licence. The evidence in the case is very meagre. For the Crown only two witnesses were called. The first witness says he went to the defendant's store in Claremont and that he was told he could be supplied with coal. The other witness says he is the caterer to the police mess, and he ordered from the store fifteen bags of coal, which were delivered and paid for. The charge sheet also is very meagrely drawn. It simply charges the accused with the crime of carrying on the trade or business of a general dealer at Claremont without having previously taken out the necessary licence. The accused was convicted and fined 10s. Objection is taken to this conviction on several grounds. The notice to the Attorney-General says that the conviction is not supported by evidence, and is contrary to law. Counsel, in arguing that it is contrary to law, says that all that has been shown is that there was simply one isolated act, and that the Courts had previously held that a single isolated act is not sufficient to prove the carrying on of the business. If that were the only objection, I think it might be inferred in this case that he was carrying on a business. But it is also objected that the indictment does not

charge the accused with any specific act, but simply says that he carries on the business of a general dealer. To ascertain what "general dealer" means we must refer to the Act, which requires a licence for such business, and which says that "general dealer" means any person who carries on the business of selling any wares or merchandise, not being the growth, produce, or manufacture of South Africa. Therefore, unless the thing sold were not the produce of South Africa, there would be no necessity to have a licence. In this case only the generic term "coal" is used, and it is well known that coal is one of the products of South Africa. Whether this coal was the product of South Africa is not attempted to be proved, and it is necessary to prove that it is not the product of South Africa before a conviction can be obtained. In criminal charges it is necessary that the authorities prove and not that the thing should be assumed; if the fact which is assumed is within the knowledge of the accused there may be *prima facie* evidence sufficient to call upon him to rebut the presumption, but here there is no attempt to prove that it is not Colonial coal. In consequence of the meagre charge and of the very meagre evidence and of the absence of any proof that any general dealer's licence was required for selling this coal, the conviction must be quashed. Certain other and important questions have been raised during the course of the argument, but it is not necessary now to discuss these questions. Curiously enough, the accused in this case is licensed as a general dealer in Cape Town, and on that licence he contends that he is free to sell anywhere in the Colony. It is contended on behalf of the Crown that a licence only authorises sale at a particular place. Well, it happens that this licence does not authorise sale at any particular place, and that it is most general in its terms. But there have been cases in which it has been held that under other sections of the Act a licence can only apply to a specific place mentioned in the licence, but in this case no specific place is mentioned in the licence; it simply authorises him to carry on the business of general dealer. The effect of such an authorisation, I think, it is undesirable now to discuss. It is a matter of considerable importance, and could be raised in a future case. This conviction is quashed on the ground that the crime laid in the charge has not been proved.

Hopley, J., concurred.

#### MOHAMMED V. MOHAMMED.

This was an appeal from a decision of the A.R.M. of Somerset West, in a case in which the plaintiff unsuccessfully sued the defendant for £19, being the

balance claimed for the goodwill of a shop.

From the plaintiff's evidence it appeared that the defendant agreed to give him £20 for the goodwill of his shop, which was in close proximity to that of the defendant. The defendant paid £1, but failed to pay the balance of £19. The plaintiff had carried out his part of the agreement, and tendered the shop to the defendant on the 1st June. The defendant denied the debt, and said that he had agreed to purchase the goods in the shop. The Magistrate's judgment was absolution from the instance in convention and in reconvention, and ordered the plaintiff to pay the costs. He gave as his reasons for judgment that the evidence was unreliable.

Mr. J. E. R. de Villiers was for the appellant and Mr. W. P. Buchanan was for the respondent.

Counsel for the appellant having been heard in argument on the facts,

Buchanan, J.: This dispute is between two Indians. One Mohammed sued another Mohammed in the Magistrate's Court for £19, balance of purchase price, as he alleges, for the goodwill of a shop. The defendant Mohammed says the £19 was to be paid for the goods in the shop. Here was a distinct conflict of the evidence between the parties, and the Magistrate in his reasons which he supplies to us says a conflict of testimony runs all through the case, and it may be surmised from his judgment that he did not believe the stories told by either side. The appeal is solely one of fact, and the arguments by Mr. De Villiers, though good, would have been better addressed to the Magistrate. The Magistrate had the witnesses before him. We have only the record. The Magistrate upon hearing the witnesses decided that the plaintiff had not made out his case. If more witnesses were called for the plaintiff, that is only a question of quantity and not quality, and the Magistrate was better able to judge of the quality. The appeal will be dismissed, with costs.

Hopley, J., concurred.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

LOUBSER V. ESTATE BOTHA. { 1906.  
Aug. 21st.  
„ 22nd.

Master and servant — Wages —  
Inchoate contract—*Quantum meruit*—Immoral consideration.

This was an action brought by Susanna J. Loubser, described as a housekeeper, of Darling, against the executors of the estate of the late Antonie Botha, of Worcester, to recover a sum of £500 and transfer of certain property in terms of an alleged verbal agreement.

This matter had previously been before the Court on an application by plaintiff for leave to sue *in forma pauperis* (16 C.T.R., 77). The application was refused, but the plaintiff had since been able to raise funds to bring the action.

Plaintiff, in her declaration, said that she was a housekeeper residing at Darling, and defendants were sued in their capacity as executors of the estate of the late Antonie Botha, of Worcester. On the 16th September, 1905, during the lifetime of the said Botha, the said Botha entered into an agreement with the plaintiff, whereby the said Botha engaged the plaintiff as his housekeeper, and if she looked after his household matters generally and took care of and tended the said Botha during his lifetime, and until his death, the said Botha—in consideration of the services rendered to him by plaintiff—agreed to provide her with food, lodging, and clothing, and promised and undertook that she should further receive as remuneration and reward for fulfilling her part of the agreement £500 and a certain cottage with the land thereto attached, situate at Worcester, and being undivided portion of erf No. 4 Ward, Hex River, and having a frontage to High-street. It was agreed between the parties that the said remuneration and reward should be paid to the plaintiff at the death of the said Botha. Owing to inadvertence, the said agreement was never put into writing, as the parties to the said agreement intended that it should be. It was of full force and effect during the lifetime of the said Botha. Plaintiff said that she entered the service of the said Botha, and duly fulfilled the terms of the agreement until his death on the 20th October, 1905. She claimed an order upon defendants

to pay her the sum of £500, with interest *a tempore morae*, and to give her separate transfer of the said land and cottage, or, alternatively, failing transfer as aforesaid, payment of £450.

Defendants, in their plea, denied that any such agreement as was alleged in paragraph 2 of the declaration was entered into, and, while they said that there was no such agreement, in writing they denied that it was ever intended that it should be put in writing. They further said that if deceased did make such a promise, the same did not constitute a gift, that it was not registered, and that it was not one upon which the plaintiff could sue. If the said promise was given, the only consideration therefor was that the plaintiff should cohabit with the said Botha as his mistress, and that there was no valid or legal consideration for the said promise, if it were given. They denied that he was in a weak state of health. They denied paragraph 3, save that they admitted that the said plaintiff did cohabit with the said Botha. They said that Mr. Botha did maintain plaintiff until his death. Defendants prayed that the claim be dismissed, with costs.

Plaintiff, in her replication, denied that, in her declaration, she made the alleged admission, "save that they admit that the plaintiff did so cohabit with the said Botha." She prayed that the said statement should be struck out of the plea, otherwise the replication was general.

Mr. Sutton was for plaintiff; Mr. Upington (with him Mr. J. E. R. de Villiers) was for defendant.

Mr. Upington said that he consented to an alteration of the plea accordingly.

Frederick Wm. Lindenberg said that he was formerly an auctioneer and general agent of Worcester, and that he now lived at Woodstock. He used to be a municipal councillor at Worcester, field-cornet, and valuator. He had known the late Mr. Antonie Botha since he was a boy. He used to transact a good deal of Mr. Botha's business. Witness saw Mr. Botha in August last. Mr. Botha said that he wanted a housekeeper, and somebody to attend to him. Mr. Botha had just recovered from a severe illness. Mr. Botha was at that time living apart from his first wife, and his children were living with his son-in-law. Witness suggested to Mr. Botha that he should advertise for a housekeeper. Mr. Botha said that he did not want to pay wages, but he would keep the housekeeper, and at his death he would give her £500. Witness always took Mr. Botha to be worth about £12,000. On instructions from Mr. Botha, he inserted an advertisement in the "Cape Times" for a housekeeper on the 15th September. The advertisement ran as follows: "Housekeeper. — Widower (country) requires housekeeper, to live with family; trustworthy lady will be

well remunerated and rewarded.—Apply care of P.O. Box 1,094, Cape Town." Witness was told by Mr. Lindenberg to state "widower." Over 70 applications were received in reply. Mr. Botha came to town on the 24th September. They looked at the replies. Mr. Botha picked out Miss Loubser's application. He was staying with Loubser's in Worcester, and he remarked that she might be a relative. Neither Mr. Botha nor witness had previously known Miss Loubser. They went to the address given in the letter, but they found that Miss Loubser had removed and they went to Mrs. Wentzel's, in Francis-street. Miss Loubser answered the door, and invited them into the sitting-room. Mrs. Wentzel shortly afterwards came into the sitting-room. Miss Loubser asked what wages he would give, and he said that he would not pay her any fixed wages, but if she attended him properly during his lifetime he would give her £500 and one of his cottages at Worcester. Mr. Botha said that he would put the offer in writing; witness understood that he would put the offer into a contract. He said that he would come again to town in a fortnight's time, and witness must draw up the contract. It was arranged that Miss Loubser should go. Miss Loubser came to Cape Town Station by arrangement next morning, and left by train for Worcester. Mr. Botha told Mrs. Wentzel that he would look after her niece. About a fortnight after witness received a letter from Mr. Botha stating that he would come to town, but on the day when witness expected him he received a telegram requesting him to go to Worcester at once, as Botha was dying. Witness at once went to Worcester, and proceeded to Mr. Loubser's house, where Mr. Botha was living. Mr. Botha had reserved two rooms in the house for his own use. Witness saw that Botha was in a dying state. Miss Loubser was nursing him. Mr. Botha died the following morning, on the 20th October. His children came after he had died. Witness told Mr. Botha, Jun., and Mr. Stoffberg (son-in-law of deceased) of the arrangement made between Mr. Botha and Miss Loubser. Witness valued the cottage on erf 4 at £400.

Witness was cross-examined at some length in reference to a deed of sale purporting to sell to deceased's son and his son-in-law his property for £3,000, property that was valued at £10,000. Witness admitted that he drew up the deed of sale, and that he knew there was such a large margin between the purchase price and the value. At that time, Mr. Botha had some trouble in his relations with his wife. In further cross-examination witness said that he went to Worcester in answer to a telegram from Miss Loubser. He understood from the wire that he was required to put the contract between Mr.

Botha and Miss Loubser in writing. When witness got to the house, Mr. Botha was not in a fit state to transact business. He had his meals with the family he lived with. Witness did not know why Botha wanted a housekeeper; he said that he wanted somebody to attend to him, and look after him when he became ill. Mr. Botha asked him to describe him in the advertisement as a "widower," because it would be inconvenient to describe him as a man who was separated from his wife. Mr. Botha and witness also called at an hotel off Plein-street to see another applicant, but they did not care for her. He believed that applicant was a barmaid, they had an interview with her. She was, he believed, offered the same terms; Mr. Botha interviewed her at the door. Then they proceeded to see Miss Loubser. Witness was informed that plaintiff's agent had provided her with funds, with which to proceed with this action. About the time of these proceedings, Mr. Botha was inclined to take too much drink, and his illnesses may have been due to drink. Mr. Botha always told him that the property was to be re-transferred to him when the trouble with his wife was over. The arrangement with Miss Loubser was that the cottage and land should be transferred to her after his death.

Re-examined: Mr. Botha was 54 years of age at his death. He told witness that his wife had deserted him, and that his children were not living with him.

Susanna Jacomina Loubser (the plaintiff) said that she was a spinster, and lived with her mother at Darling. Her occupation was a dressmaker and housekeeper. Witness was without property. She had been in service at Darling and Malmesbury. Early in September she came to Cape Town, and she stayed with her aunt, Mrs. Wentzel, in Francis-street. She had also a friend named Mrs. Wentzel in Jamieson-street. Mr. Botha told her that he had received 73 replies to his advertisement. Mr. Botha said that he had selected her, because she was a Dutch lady. He told her that he was a widower, and that his children were not with him, because he had no housekeeper. He said he wanted her to look after him until his death, and that he intended to remove from Loubser's house to the cottage. As to terms, he said that he would pay her £500, and give her the cottage at his death. On arriving at Worcester next day, they took a cab to Mr. Gert Loubser's. Afterwards they went out, and Mr. Botha said that he was going to show her the cottage he had given to her. He pointed out to her the house shown on the photograph produced. They went to the house, which was occupied by Uys, and passed right through into the yard. He also showed her the beacons of the property at the front.

Cross-examined: Witness had had two illegitimate children. Mr. Botha was not the father of either of the children. Mr. Miller was the father of one child. She admitted having told one Mr. Wrex that Miller was not the father of her child, and said she did that because she was advised to do so by Mr. Winterbach, and because she considered that Wrex had nothing to do with the matter. She denied that she had been unduly familiar with Mr. Botha. Botha had kissed her. She could not swear that he had not kissed her in public. She told Mr. Botha that she was pregnant the day after she arrived at Worcester. She did not remember a conversation between Botha and Mr. Carroll, of the Masonic Hotel, during which the former made the remark: "She makes up my bed and lives with me." Witness occupied a separate room from Mr. Botha. She was 26 years of age. After Mr. Botha's death she saw Mr. Stofberg and young Mr. Botha, and told them that she was to receive no wages, but was to receive £500 and a cottage after Mr. Botha's death. She did not tell them that he had said he would make provision for her in his will. She said that he had agreed to put the arrangement in a contract. She admitted that she passed under the name of Mrs. Louw at Ceres and Riversdale.

Susan Wentzel, of Jamieson-street, Cape Town, and Elizabeth Wentzel, of Francis-street, having also given evidence,

Mr. Sutton closed his case, subject to the right to call Mr. Meiring, surveyor, who was on his way from Worcester.

Johannes P. M. Stofberg (son-in-law of the late Antonie Botha) was called by Mr. Upington. Witness said that he was one of the executors under Mr. Botha's will. Mr. Botha married his second wife in July, 1902, and he had had unhappy relations with her. The family by the first marriage resided at Rawsonville. There was no estrangement between the children and their father. Witness and Mr. Theunis Botha bought the property from Mr. Botha. The first that witness heard of Mr. Botha's illness was on the morning when he had died. Afterwards witness and his co-executor saw Miss Loubser, and she told them that Mr. Botha had paid her nothing, but that he had said he would make provision for her in his will. Witness pointed out to her that there was no provision in the will, and Miss Loubser then said there had been no time to make any provision in the will. It was not until about a fortnight afterwards that witness heard anything about a contract between Mr. Botha and plaintiff. Mr. Botha's farm and town property had been transferred to witness and young Mr. Botha in 1904, and at his death Mr. Botha had no property in Worcester. Mr. Linden-berg told witness that Mr. Botha had



asked him to put in a kind word for Miss Loubser.

Cross-examined: Witness afterwards made arrangements for Miss Loubser to be paid £2 and her fare back to Cape Town. Miss Loubser did not get this money. There was an option of £13,000 on the farm. Mr. Botha offered the farm to witness and Mr. Theunis Botha for £3,000, it being understood that they were to have the minor children educated. He considered that the transaction was quite straight and honest. Witness refused to take transfer of the property at first, as Mr. Botha was in trouble with his wife. Witness did not want the property on those terms, and he waited until he could buy it.

Dr. Geo. W. Ford, of Worcester, in his evidence, said that Botha suffered from alcoholism. His death was due to heart failure.

J. W. Meiring, sworn appraiser (called by Mr. Sutton), said that he valued the land and cottage claimed by plaintiff at £450.

Theunis Botha (one of the executors and son of the testator) gave evidence.

In cross-examination, witness said he knew that his father had had trouble with his second wife. As to the sale from his father of his property to witness and his brother-in-law, witness had not paid anything, but the purchase price had gone off against his inheritance. Witness could not see that they had done extremely well out of the sale, because there were six minors, all of whom they had to educate. They had also had his father's debts to pay.

Andrew James Carroll, proprietor of the Masonic Hotel, Worcester, said that Mr. Botha was a fairly frequent visitor at his hotel. He recollected Mr. Botha opening a butcher's shop. Soon after he had opened the shop Mr. Botha called with Miss Loubser at the hotel, and went to witness's private quarters. He said that he had got Miss Loubser up to be his housekeeper, and that he had promised Miss Loubser £500 and a house. He said that he had money, and he made other remarks, which led witness to believe that he was on intimate terms with Miss Loubser.

Cross-examined: Witness believed that Mr. Botha was addicted to drink. Latterly he appeared to have become rather deranged in his mind.

Johannes Jacobus du Toit, wagon-maker, Worcester, said that he had seen Mr. Botha kiss Miss Loubser in his butcher's shop. Botha used to address her as "Darling" and "Susie." At the time of the incident, Botha was a little under the influence of liquor. He did not think that at that time Mr. Botha was accountable for his actions.

Jacobus Stephanus Hugo, butcher's assistant, Worcester, and John Carr, railway foreman, also gave evidence.

Mr. Sutton having been heard in argument on the facts,

Maasdorp, J.: In this case the plaintiff sues the executors of the estate of the late Antonie Botha for the payment of £500 and transfer of a cottage situate at Worcester, which is alleged to be the consideration due for her services as a housekeeper to the late Antonie Botha, in pursuance of an agreement entered into between Botha and the plaintiff on the 26th September, 1905. The defendants in their plea dispute this contract, and further allege that, even if such a contract had been entered into, it was for the immoral and illegal consideration of cohabitation between Botha and plaintiff, and that, consequently, the contract would be illegal, and plaintiff could not recover upon it. Defendants represent, amongst others, six children of Botha who are still minors, and whose interests they are bound to protect, and to see that no claims are established which would affect these children, except upon the clearest evidence. The very clearest evidence must be given that this contract was entered into between the plaintiff and the deceased man Botha, who now, of course, is unable to speak for himself. It is interesting to inquire what the circumstances are under which this contract was alleged to have been made. Mr. Botha was the father of a large family, consisting of three sons and seven daughters. He was married to a second wife, from whom he was separated, in consequence of serious differences that had arisen between them. Under the circumstances, he had let a large house of his at Worcester to a Mr. Gert Loubser, to occupy with his family, he (Mr. Botha) retaining two rooms in the house for himself, on condition also that he should become a boarder of Mr. Loubser's. The idea seems to have occurred to him that he should look for and obtain the services of a housekeeper. In pursuit of that notion he came to Cape Town, and he ultimately interviewed the plaintiff, who resided with her aunt (Mrs. Wentzel), a midwife. The plaintiff herself had been the mother of an illegitimate child some little while before. At that time she was pregnant, and in the following February she gave birth to another child. Mr. Botha was accompanied by Mr. Lindenbergh. It is alleged that at this interview, at the house of the plaintiff's aunt, this contract was finally concluded between the parties, the terms of which were that the plaintiff should enter the service of Mr. Botha as a housekeeper, and that he should pay her upon his death £500 and transfer this cottage to her. It may be remarked, in passing, that that cottage did not at that time belong to him; he had sold it some time before. I will say at once that, what-



ever Mr. Botha's frailty of health may have been, if this contract had been clearly proved to me, I would consider that it should be enforced. He was not in such a state of mind that he was not able to carry on his own business at the time, and a contract in those circumstances, if those terms were clearly agreed to, was one which could be sustained by the Court. But the question arises, was any such final contract entered into? The Masters and Servants' Act is not directly applicable to this case, because the term of service did not extend to a period of 12 months. I am not prepared, under the circumstances of the conversation that took place, to find that this contract was finally concluded upon the terms stated in the declaration. According to Mr. Lindenberg's evidence, there was something that would still be required to be done, in the way of executing a contract. Mr. Botha was liberal in his terms, and those terms were readily jumped at by Mrs. Wentzell, the aunt of this girl, in a manner which does not do much credit to her judgment. Mr. Lindenberg's evidence was unsatisfactory upon other points, and I merely say this in respect of his memory, and will not put it upon any stronger ground. Consequently, I cannot accept his evidence upon an important contract on a matter that took place some little while ago. The question is, whether, in the subsequent conversation that took place between the executors and the girl and Mr. Lindenberg, there is not some evidence which would satisfy the Court that even in the minds of the parties a contract had not been concluded at that time. That conversation amounted to this, that some liberal promises had been made, but that they had never formed the terms of a concluded agreement, and the girl had never insisted that that was the case. If the plaintiff had gone with Botha to Worcester in the *bona fide* belief that she was entering into his service by a contract he would be bound by it, whatever liberties he may have had afterwards with her. But having found that this contract is not proved upon satisfactory evidence, the Court might still consider whether the plaintiff is not entitled to something for services actually rendered by her, and, in that shape, the question arises upon what relations she was with Botha at his house. I may say at once that there is not the slightest evidence that she rendered him any service, except that on one or two occasions she put on his socks and his boots, and I may also say that there is a good deal of evidence to prove that the relations between them were of a most improper character. He was in a frail state of health from the excessive use of intoxicating liquor. She must have known it, and she lives in what I may call a very improper manner with this old

man. Consequently, I come to the conclusion that there was no service of any kind rendered by her for which the Court can now award her anything. Judgment must be given for the defendants, with costs.

Mr. Sutton asked his lordship to hear him on the question of costs, and proceeded to urge the Court that his client should not be mulcted in costs.

Maasdorp, J.: In my opinion she ought to have left Botha as soon as she discovered what relations she was on with him there. There is no consideration that can be shown to her at all in the matter of costs.

[Plaintiff's Attorneys: G. Trollip.  
Defendant's Attorneys: Walker and Jacobsohn.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* CLOETE AND } 1906.  
DURANT. } Aug. 21st.

Mr. Close moved as a matter of urgency for a temporary interdict, restraining the trustee in the estate of one David Naude, of Lady Grey, from selling certain leasehold erven, the interest in which the insolvent disposed of to the petitioners.

Interim interdict granted, returnable 12th September, with leave to telegraph the interdict.

## SINCLAIR AND PYPERS V. MATZ.

This was an action brought by the plaintiffs to recover the sum of £89 17s., balance of account for work and labour done.

The declaration set out that the plaintiffs were contractors at Simon's Town, and that the defendant, who resides at Plumstead, was indebted to the plaintiff in the sum of £89 17s. The defendant pleaded that a written agreement was entered into between the plaintiffs and the defendant, but the plaintiffs did not carry out the work in accordance with certain plans and specifications of the architect. The defendant paid £20 on account. It was agreed that the plaintiffs should occupy a certain house at Simon's Town, belonging to the defendant, and that their occupation should apply in reduction of the sum. The plaintiffs owed for rent £22, and this sum the defendant was entitled to set-off against the contract price. The plaintiffs wrongfully, and in breach of contract, omitted to carry out a portion of the work in terms of the plans and specifications to the value of £18, which

he was entitled to deduct. The defendant contended that he was entitled to deduct the amounts of £20, £22, and £18 from the contract price of £110. and there was therefore due to the plaintiffs the sum of £50. which was tendered, with costs, and refused.

Hopley, J., remarked that it was a pity to waste the time of the Court with a case of this description, while up-country witnesses were waiting on more important cases. The point was, whether he should not have to refer this matter to an expert, but that, after all, meant more expense to the parties.

Mr. Van Zyl was for the plaintiffs, and Mr. Roux was for the defendants.

Evidence having been called, and counsel heard in argument on the facts,

Hopley, J.: I regret very much this case has come before this Court, for more than one reason. One is because the dispute between the parties, upon a little careful examination between themselves or their legal advisers, would have shown that the dispute narrowed itself down to such a small amount that it really was not worth risking the heavy expenses of a suit in the Supreme Court for the purposes of settling the matter. Another was, that any ordinary practical man could have settled the dispute. His lordship, after reviewing the evidence and the terms of the contract, gave judgment for the plaintiff for £58, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

WOLFAARD V. BROIDO. { 1906.  
Aug. 22nd.

Magistrate's Court—Judgment by default—Claim in reconvention.

*The plaintiff, being sued in a Magistrate's Court for a debt, was not in a fit state to appear, and judgment was given against him by default. The plaintiff had a counterclaim against the present defendant, then plaintiff, but having failed to file a*

*claim in reconvention, he now brought an action for the amount in the Supreme Court. Held, that the plaintiff would be entitled to recover if he clearly established his claim: but in the absence of clear proof thereof, absolution from the instance was granted.*

This was an action brought by Guillaume Jacobus Wolfardt, farmer, Ladismith, against Nathan Broido, general dealer, also of Ladismith, to recover three sums amounting to about £75, goods sold and delivered.

Plaintiff, in his declaration, said that defendant was indebted to him in the following sums for oat-sheaves and barley delivered to him in 1898, 1899, and 1900, viz., £49 1s. 9d., £12 13s. 9d., and £13 10s., for which sums he claimed judgment.

Defendant, in his plea, said that whatever goods he had purchased from plaintiff he had paid for either in cash or goods, and if any goods had not been so paid for they had not been delivered to or received by him. Alternatively, he said that he was entitled to plead *compensatio* and to set off a judgment of £102 18s. 10d. obtained by him against plaintiff in the Resident Magistrate's Court at Ladismith, which amount had not been satisfied in whole or in part, there being a return of *nulla bona*.

Plaintiff, in his replication, said that he admitted the judgment.

Mr. Russell was for plaintiff; Mr. McGregor was for defendant.

Evidence having been led on both sides and counsel heard in argument on the facts,

De Villiers, C.J.: It appears that on the 29th May, 1905, a summons was served upon the present plaintiff at the suit of the present defendant for a sum of £102 18s. 10d. in the Magistrate's Court. This amount is made up of balance of promissory note, goods sold and delivered, and cash lent. The defendant appeared in the Magistrate's Court on the day fixed for the trial, that is on the 2nd June, 1905; he appeared through his agent or attorney, and he pleaded payment and asked for a postponement. The case was postponed until the 9th August to enable specified detailed account being submitted, showing how the payment was effected. Then on the 9th June the record says: "At this stage Mr. Johnson (that is the agent for defendant) expressed a wish that he be allowed to withdraw from the case, and that judgment be granted by default." On the day named the defendant did not appear, there was no evidence forthcoming and the explanation now given is

that he had been drinking of late, and that he was not in a fit state to appear. The plaintiff has chosen to bring his action in this Court, and no fault is to be found with him for choosing this forum; but, of course, it lies upon him to prove that the forage for which he sues the present defendant has been actually delivered, and that the barley has also actually been delivered to the defendant. Unfortunately, the plaintiff kept nothing in the way of books, except a little note-book, which is not of much assistance to the Court in deciding the matter. Then there are discrepancies in the accounts which he has sent to the defendant. Further, there is nothing to contradict the defendant's books. The only point which is against defendant's evidence is the fact that he seems to admit that where he pays cash there is no entry in his books at all. That seems to me a most extraordinary way of bookkeeping. I do not see how his books can be expected to balance at the end of the year if they do not show what the cash payments were in respect of goods bought by him on behalf of the business. It lies upon the plaintiff to satisfy the Court that all the produce in respect of which he claims has been delivered to the defendant. He says there was a man called Reid, who lived at Ladismith, a feather sorter, to whom these loads of produce were delivered. Reid, however, has not been called. In the absence of anything like corroborative evidence of the statement of the plaintiff, I do not see how the Court can give judgment in his favour. The judgment of the Court will be absolute from the instance, with costs.

On the application of Mr. McGregor, defendant was certified by the Court as a necessary witness.

[Plaintiff's Attorneys: Herold and Gie. Defendant's Attorneys: Sauer and Standen.]

DODOWITZ V. LENG. } 1906.  
Aug. 22nd.

Interdict to prevent issue of summons for arrest—Defendant leaving the Colony.

*The applicant, having been informed that the respondent was about to issue summons for his arrest, applied to the Court for an order restraining the issue of such summons on the ground that he had landed property in the Colony and intended to be absent for a short period only. It appeared, however, that the landed property was heavily mortgaged,*

*and that the period for which the applicant would be absent was doubtful.*

*Held, that, even if it were competent to make the order, there were not sufficient grounds for the interference of the Court.*

This was an application brought by Jacob Dodowitz, of Cape Town, upon notice to S. B. Leng, calling upon him to show cause why the Court should not grant an order preventing respondent from arresting applicant under the 8th Rule of Court.

Applicant's affidavit stated that he intended to proceed to England by the mail steamer this afternoon, and he had reason to believe that respondent, unless restrained, would effect his arrest later in the day on account of a debt which he owed to him. Applicant said that he had taken a return ticket, and that he was going to England in order to buy the plant for the South African Co-operative Bootmakers' Union Ltd.

Respondent, in an answering affidavit, said he had told applicant that, if he found a surety for the debt, or if he paid half the amount owing, he would not apply for his (Dodowitz's) arrest. He submitted that the present proceedings were wholly unnecessary.

Mr. Alexander was for applicant; Mr. Benjamin was for respondent.

Mr. Alexander having been heard in argument on the facts,

De Villiers, C.J.: The applicant admits in his affidavit that he owes the respondent £156. He says that he is going to England on a purely business matter, and has taken a return ticket. He adds that "the business I am proceeding on is in connection with a matter relating to the South African Co-operative Bootmakers' Union, Limited, with which I am connected." But, reading these paragraphs together, I should come to the conclusion that he was going to England, to transact his business there, the business relating to the South African Co-operative Bootmakers' Union. I find that in the documents which he has signed under the Aliens' Act, 1905, he says that he is probably going through to Germany. He has not satisfied me that he is going only for a temporary purpose, nor has he satisfied me that he has left any property that could meet the debt. It is true that he has landed property, but the statement is made that the property is heavily mortgaged, and, if it be heavily mortgaged, with the present depression in landed property, it is not likely that that landed property would be much of a security to the respondent. It is an

unusual application, and I am not prepared to say that it could not be made in any circumstances, but, at all events, the applicant has not shown sufficient cause why the Court should make a special order in this case to prevent the issue of a summons for his arrest. The application must be refused, with costs.

[Applicant's Attorney: L. Alexander.  
Respondent's Attorney: F. B. Andrews.]

### THIRD DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

DUMBLETON V. DUMBLETON. { 1906.  
Aug. 22nd.

This was an action for restitution of conjugal rights, failing which a decree of divorce.

Mr. Lewis was for the plaintiff, and the defendant was in default.

Evidence was called for the plaintiff.

Arthur R. Dumbleton said he was married to the defendant in New Zealand in 1885. He lived happily after his marriage until about 1896, and then there was trouble through the defendant's misconduct. He condoned his wife, and in July, 1900, the defendant left him again, and a deed of separation was drawn up. He vested all his property in his wife, for her benefit and that of the children.

Hopley, J., ordered the matter to be postponed *sine die*, awaiting the production of the certificate of marriage and the deed of separation.

### INSOLVENT ESTATE ALLY V. ISMAIL.

This was an action to recover £747, the price of stock sold and delivered.

The plaintiff's declaration was as follows:

1. The plaintiff is the trustee in the insolvent estate of Carriem Ally, a general dealer, in Cape Town.

2. The estate of the said Ally was duly placed under sequestration as insolvent on the 17th April, 1906, and the plaintiff was thereafter duly elected as trustee thereof, which election was confirmed on the 11th May, 1906.

3. In or about December, 1905, an arrangement was entered into between the said Ally and the defendant, whereby it was arranged that the former should proceed to various country towns in this colony in order to select sheep for purchase on behalf of the defendant, the terms of the arrangement being that the said Ally should from time to time notify the defendant when he found sheep suitable for such purchase; where-

upon, if the defendant approved of the proposed purchase, the said Ally was to buy the sheep at a price to be fixed by the defendant, and the defendant was then to give the said Ally the money wherewith to settle the said purchase price, and also pay his travelling and other expenses in connection with such purchase as well as a commission (according to the condition of the sheep purchased) for his services in the matter.

4. Thereafter, still in December, 1905, in pursuance of the said agreement, the said Ally proceeded to various towns, and concluded purchases of sheep, and the defendant paid the said Ally the purchase price, and also a commission and his expenses.

5. On or about the 8th day of January, 1906, the said Ally, in pursuance of the said agreement, purchased 200 sheep from one Olivier at Tulbagh, on behalf of the defendant, who took the sheep over from the said Ally at the price arranged with the said Olivier, viz., £195, and agreed to give him £5 as commission on the purchase. The defendant, however, has not yet paid anything in respect of this purchase, and owes the sum of £200 therein.

6. On or about the 23rd January, 1906, the said Ally in pursuance of the said agreement purchased 391 sheep from one Snyman at Ceres for £381 4s. 6d., which sheep the defendant took over for £391 from the said Ally, the extra £9 15s. 6d. representing the commission agreed upon. The defendant paid the said Ally the sum of £330 in all in respect of this transaction, and still owes the said estate the sum of £51 thereon.

7. On the 7th February, 1906, the said Ally, in terms of his said agreement, purchased another 432 sheep from the said Snyman for the sum of £475 4s. The defendant took over the said sheep from the said Ally at the same price, and agreed to pay him a commission on this purchase of £10 16s. The defendant still owes the whole sum of £486 in respect of this transaction.

8. The defendant neglects and refuses to pay the said amounts due by him or any of them or any part of them and the plaintiff as representing the estate of the said Ally, is entitled to recover the said sums from the defendant.

The plaintiff claims: (a) Payment of the aforesaid sums of £200, £61, and £486—in all, £747; (b) interest thereon *a tempore morae*; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

For a plea to plaintiff's declaration defendant says:

1. He admits paragraphs 1 and 2.

2. He denies paragraph 3. He at no time authorised Ally to purchase sheep on his behalf.



3. He denies paragraph 4. He at no time paid Ally moneys for purchase of sheep on his (defendant's) account, or any commission or expenses in connection with any such purchases, but he did from time to time during the months of January and February, 1906, purchase from Ally direct at Maitland a number of sheep to the value of £238 in all, which sum he duly paid to Ally.

4. Defendant says that he has no knowledge of the purchase in paragraphs 5 and 6 set forth. He denies generally the allegations in the said paragraphs, specially denying that he at any time authorised Ally to make the said purchases or any such purchases on his behalf, or that he paid the said Ally £330 in respect of the transaction in paragraph 6 set out, or that he is or was at any time indebted to Ally in any sum in respect of any such transactions.

5. With reference to paragraph 7 of the declaration, defendant says that he and one Abbas, also a butcher, agreed to purchase jointly from Ally direct at £1 per head a number of sheep which Ally had previously pointed out to defendant at Ceres, and represented that he was able to obtain. The said sheep were subsequently consigned to plaintiff and Abbas on an order from them, but they declined to accept the same, in consequence, *inter alia*, of Ally wanting 21s. 6d. per head and the amount of carriage. The sale was thereupon cancelled by mutual agreement, the sheep were taken possession of by Ally (plaintiff and Abbas signing the consignment-note to enable him to take delivery) and thereafter disposed of by him to various purchasers on his own account. Defendant at no time authorised Ally to purchase the said sheep on his behalf, at no time took possession of the said sheep, and at no time received any part of the proceeds thereof. Subject to the foregoing, he denies the allegations in paragraph 7.

6. Defendant admits that he refuses to pay the sums of £200, £61, and £486, but otherwise denies the allegations in paragraph 8.

Wherefore he prays that plaintiff's claim may be dismissed with costs.

Mr. Burton (with him Dr. Greer) for plaintiff. Mr. Bisset (with him Mr. Alexander) for defendant.

C. P. Snyman, farmer, of Ceres, stated he knew both Ally and Ismail. He had known them in connection with the purchase of sheep. The price which was fixed Ismail knew on both occasions.

C. H. Snyman, brother of the last witness, stated that in bargaining for the sheep Ismail took a part. Ally paid the money. The documents were signed in witness's house. Ismail figured out the account. He corroborated the last witness as to the conversation with Ismail.

Cross-examined by Mr. Alexander: Ally was the man who always spoke, but he would do nothing without consulting Ismail. He could not understand the conversation between Ally and Ismail, as they were talking in their own language. He could not say whether or not Ismail was the principal in the transaction. Witness thought that Ismail was a partner, yet he did not take the trouble to have his name on the paper. He had never demanded the money from Ally.

Re-examined by Mr. Burton: The signature, "C. Ally," he took to mean as representing the business.

A. Olivier, a butcher, of Tulbagh, stated he had transactions in sheep with both Ally and Ismail. He met the pair of them on one occasion, when Ally said he could speak Dutch. Witness asked Ismail if he could speak Dutch, and he smiled. The sheep were sold to the pair of them for 19s. 6d., and promissory notes were made out to pay the whole amount for two hundred sheep. Witness had received nothing out of the transaction.

Cross-examined by Mr. Bisset: He believed that when Ally was speaking to Ismail that he was asking him what price he should offer for the sheep. Witness looked upon both of them as buyers.

The defendant, in his evidence, said he did not tell the witness Snyman that he and Ally would take the sheep. Witness did not tell Snyman to see that he (Snyman) got the money for the sheep. The transaction witness had was solely with Ally.

Cross-examined by Mr. Burton: He told Mr. Olivier that he could speak Dutch. Witness did not pay Ally's expenses on every occasion when he went in search of sheep. He had nothing whatever to do with any farmer. Witness only dealt with Ally. Snyman sold the sheep to Ally for £1 2s. each, and Ally sold them to witness for £1 each. Witness would swear positively that he did not know what Ally paid for the sheep. When the sheep arrived at Maitland, Ally demanded from witness £1 1s. 6d. each and the carriage, and the sale fell through. The evidence that he handed over £395 to Ally for the purchase of the sheep was false. Ally never got anything for commission.

Alfred Marchent, railway foreman at Maitland, stated that in his capacity as foreman he delivered from time to time consignments of sheep to the consignees. He remembered a consignment of 341 sheep coming to Maitland which was signed for by Kahn. Ally was not there at the time. On a subsequent occasion witness gave delivery of 436 sheep to Ally.

Mahomed Ebrahim, butcher, of Cape Town, stated that he remembered the consignment of over 400 sheep arriving



at Maitland. Witness bought some of the sheep from Ally at £1 2s. 6d. each.

Cross-examined by Mr. Burton: He paid for the 100 sheep in gold and silver, and got no receipt. Indians, as a rule, did not trouble about receipts. Witness disposed of 200 sheep a month at his shop in Sir Lowry-road. There were a lot of Indians in Cape Town with the same name as witness.

Counsel having been heard in argument on the facts,

Hopley, J.: This case has been very ably argued by Mr. Bisset. I do not think he has missed a single point that could have been made for his client, but his arguments do not convince me that this case is misconceived in its form, or that I should refuse the plaintiff the relief now prayed for. It is a case which has given me a great deal of trouble, because it is a case I have had to listen to very carefully, and because I must admit the case, to a certain extent, rests upon suspicion of such a nature that I cannot get over it in my own mind. As to the form of the action, it is said that the evidence shows that Ally did act as disclosed principal of Ismail. In answer to that, I would say, though Ismail was present, there was nothing in what happened to disclose him as the actual principal. He was there, and he was the principal if he bought. He was the principal, but the undisclosed principal, who allowed the agent to take upon himself the responsibility which the agent did. He had undertaken all the responsibility, making himself the debtor, without mentioning his principals in any documents. That would make the agent the liable man, but it would not estop him or his estate thereafter from claiming against the principal for any contracts which were thus made for him, through his agent, or adopted, as he had seen them made, by his agent. I do not think I need trouble about the method of adopting the contract, because, as a matter of fact, the principal was present only as an undisclosed principal. The contract was made for him by the agent, and eventually now the agent comes and says that the principal has to pay him. It is a question of credibility between these two men as to what took place, and their evidence must be weighed by the other evidence brought into the action. His lordship, after reviewing the evidence, said he believed in the main Ally's statement, and there would be judgment for the plaintiff as prayed for, £747, including commission, with costs.

[Plaintiff's Attorneys: C. and A. Friedlander. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BECKER AND OTHERS V. { 1906.  
WOLFAARD. { Aug. 23rd.

Security—Heirs—Legacy of farm on condition that a sum of money be paid by legatee for the benefit of the heirs.

*By the mutual will of the second plaintiff and his wife, a farm was bequeathed to the defendant on condition that the survivor should enjoy the usufruct and that on his or her death the defendant should pay into the joint estate the sum of £700 for the benefit of the heirs. His wife died first, and the defendant induced his father, the second plaintiff, to sell his usufruct and pass transfer of the land, as executor, to the defendant.*

*Held, that the first and third plaintiffs, who represented the heirs, were entitled to demand that security be given to the second plaintiff, as executor, for the due payment on the death of the second plaintiff of the sum of £700, less such sum as was owing by the joint estate to the defendant at the time of the death of the testatrix.*

This was an action brought by (1) Jan Abraham Becker; (2) Jacobus Albertus Wolfaard, in his capacity as executor testamentary of the estate of his late spouse, Cornelia Christina Wolfaard, born Van Zyl; and (3) Zachary Gertruida Wolfaard, born Nel, widow of the late Petrus Hendrik Wolfaard, in her capacity as the mother and natural guardian of her minor children, Jacobus Albertus Wolfaard, and Johannes Petrus Wolfaard, against Guillaume Jacobus Johannes Wolfaardt.

The declaration was as follows:

1. The first plaintiff is a farmer residing at Elansvley, in the district of Ladismith; the second plaintiff is a farmer residing at Elandevley aforesaid,

who sues in his capacity as executor testamentary of the estate of his late spouse, Cornelius Christina Wolfaard, born Van Zyl; and the third plaintiff is a widow residing at Cape Town, who sues in her capacity as the mother and natural guardian of her minor children, Jacobus Albertus Wolfaard and Johannes Petrus Wolfaard, by her marriage with the late Petrus Hendrik Wolfaard, of Elandevley aforesaid.

2. The defendant is a farmer residing at Elandevley, in the said district of Ladismith.

3. By the last will of the said Jacobus Albertus Wolfaard and his wife, Cornelia Christina Wolfaard (one of whose children was the said late Petrus Hendrik Wolfaard), the testators, who were married in community of property, after appointing the survivor with their children the joint heirs of their estates, bequeathing to their sons Guillaume Johannes Jacobus Wolfaard (the defendant) and Frederick Johannes Wolfaard, certain two pieces of redeemed quit-rent land situate in the division of Ladismith, being the lots No. 4 and 18 of the said divided farm Elandevley, measuring respectively 114 morgen 448 square roods and 39 morgen 43 square roods, for the sum of £1,400, subject to the following conditions, viz., that the survivor of them should retain a life interest in the said properties, and that the same should not devolve upon the said sons until after the death of the survivor, when the said sum of £1,400 should be paid into the joint estate of the testators. The plaintiffs crave leave to refer to the terms of the said will in full when produced at the trial.

4. The said Cornelia Christina Wolfaard died on or about the 22nd January, 1900, leaving her husband and her said two sons, Guillaume Johannes Jacobus and Frederick Johannes, her surviving, and leaving the said mutual will of full force and effect. The said son, Petrus Hendrik Wolfaard, had predeceased the testatrix, and his children were specially appointed in the said will as heirs in his stead.

5. In or about June, 1900, the said Frederick Johannes Wolfaard, surrendered his estate as insolvent, and thereafter the trustees in the said estate sold to the first plaintiff the said Frederick Johannes Wolfaard's right to take over the one-half share in the properties aforesaid, as well as all the insolvent's right and title to any inheritance coming to him as one of the residuary heirs in the joint estate of the testators.

6. Transfer of the said half-share in the said properties has been duly passed to the first plaintiff, and the purchase money due in respect thereof secured to the heirs of the said joint estate by a mortgage bond in favour of the estate payable after the death of the survivor.

7. On or about the 25th November, 1904, transfer of the other half-share of

the said properties was passed by the survivor, the said Jacobus Albertus Wolfaard, senior, who was also executor under the said will, to the defendant, who simultaneously with the passing of the said transfer, and shortly afterwards encumbered the said half-share by mortgages to the extent of £800.

8. The defendant has not either paid into the joint estate in terms of the said will, the purchase money (£700) of the land so transferred to him, nor has he given any valid or sufficient security that the same will be duly paid when it falls due.

Plaintiffs claim: (a) That the defendant may be ordered either to pay the sum of £700 into the hands of the Master of this Honourable Court, to be administered by him during the lifetime of the said survivor, or else to give good and sufficient security for the due payment of the said purchase money to the said estate when the same becomes payable; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows: For a plea to the plaintiffs' summons (standing by order of Court as the declaration in this suit), the defendant says:

1. His correct name is Guillaume Jacobus Johannes Wolfaardt.

2. He admits paragraphs 1, 2, 4, 5, and 6, and says, as to paragraph 6, that the transfer therein referred to was passed to the first plaintiff in or about December, 1905.

3. As to paragraph 3, the defendant admits that Petrus Hendrik Wolfaard was a son of the testators. He admits the execution and validity of the will therein referred to, but, as to the true terms of the said will, defendant craves leave to refer to the will when produced at the trial hereof, and he does not otherwise admit paragraph 3.

4. As to paragraphs 7 and 8, the defendant says that, prior to the passing of transfer to him in November, 1904, by the executor in the estate of the late Cornelia Christina Wolfaard and the second plaintiff, the said estate had become indebted to him in a large sum of money. On the 1st November, 1899, the said estate was indebted to him in the sum of £380 3s. 9d., as shown in the account hereto annexed marked A.

5. The sums of £600 and £30 10s. referred to in annexure A were on the 1st November, 1899, advanced by the defendant, to and for the benefit of the joint estate, of which the second plaintiff is the executor, to pay off a certain bond (with interest), held by one Maskew over the property of the estate. The said moneys were so advanced at the special instance and request of the said second plaintiff, who agreed to pay interest thereon at the rate of 6 per cent. per annum, as from the 1st November, 1899.

The sum of £40 represents moneys paid by defendant for and on behalf of, and at the request of the second plaintiff, in connection with the erection of a millwheel belonging to the said joint estate, in September, 1895, and includes charges for the said millwheel.

6. The defendant was indebted to the second plaintiff on the 1st November, 1899, in the sum of £290 6s. 3d. for amounts previously advanced by the second plaintiff, as shown in detail on the said annexure A, leaving the balance of £380 3s. 9d. aforesaid.

7. Prior to the 21st March, 1904, the second plaintiff agreed to waive his right to the usufruct of the land now in suit, and to pass clean transfer to the defendant. The second plaintiff, on behalf of the estate, acknowledged that the bequest price was (as in fact it had been) settled with him in account, the defendant being willing to forego his claim against the estate to so much of his share in the estate residue as was required to liquidate the balance left after deducting the amount of the estate's indebtedness to defendant from the bequest price of £700.

8. The Registrar of Deeds thereafter at first refused to pass transfer, but the second plaintiff signed the statement, copy of which is hereunto annexed, marked B, as showing the position in account between the defendant and the estate. The Registrar thereupon passed clean transfer as aforesaid.

9. The defendant craves leave to refer to the acknowledgment by the second plaintiff in the said annexure B. that the bequest price had been settled in account; the defendant says that by reason of the premises the second plaintiff is estopped from making the claims set forth in the summons (standing as declaration).

10. There are seven heirs who have vested in them the right to an equal share each in the residue of the joint estate. The defendant contends that in any case his own share in the said £700, to wit £100, must be taken in account, and that he is not at the suit of the plaintiffs, other than the second plaintiff, bound to find security to pay over such share, to wit £100, while as to the second plaintiff, he is estopped, as aforesaid, from making claim in respect of the said £100 or otherwise.

11. The state of accounts as between the estate and defendant on the 25th November, 1904, is correctly shown in the account hereto attached marked C, which shows a balance in defendant's favour, after taking into account the bequest price of £700, and the sum of £240 (as being 1-7 heir's share now vested in defendant). The first sum of £9 2s. 6d. shown in annexure C represents the share in the inheritance awarded on the liquidation and distribution account and paid by defendant at the request of the second plaintiff to the first plaintiff (to whom it was due); the second

sum of £9 2s. 6d. represents an amount paid, at the special instance and request of the second plaintiff, to the minor children of the third plaintiff, the other sum of £9 2s. 6d. represents the similar share due to defendant under the said account, and not otherwise paid or settled save as aforesaid in annexure B set forth.

12. Subject to the above, the defendant admits paragraph 7 and denies paragraph 8, and says that he is not liable to pay the sum of £700 or to find security therefor.

13. Alternatively the defendant says that by set-off against the bequest price (£700) of the amounts due to him by the estate, as aforesaid, including interest to date of summons, there is a balance due to defendant by the estate as aforesaid. Wherefore defendant prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention as against the said plaintiff in convention, in his aforesaid capacity (should this honourable Court decide against the contentions of the defendant as aforesaid, but not otherwise) the defendant (now plaintiff) says:

14. He craves leave to refer to the aforesaid.

15. The estate of which the defendant in reconvention is executor is indebted to the plaintiff (in reconvention) in the sums of (a) £380 3s. 9d., as aforesaid, with interest at 6 per cent. per annum thereon from 1st November, 1899 to date of payment; (b) £9 2s. 6d. paid by plaintiff (in reconvention) on behalf of defendant (in reconvention) to the first plaintiff (in convention) as aforesaid; (c) £9 2s. 6d. paid as aforesaid to the minor children of the third plaintiff (in convention), and, (d) £9 2s. 6d. being the share of the plaintiff (in reconvention) as awarded to the heirs on the liquidation and distribution account, as aforesaid.

16. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff (in reconvention) to claim from the defendant (in reconvention) in his aforesaid capacity, the sum of £380 3s. 9d., with interest as aforesaid, and the three sums of £9 2s. 6d., as aforesaid, but the defendant has failed and neglected to pay the same or any part thereof.

Wherefore plaintiff (in reconvention) claims: (a) Judgment for the sum of £380 3s. 9d., with interest at 6 per cent. per annum from 1st November, 1899, as aforesaid; (b) judgment for the three sums of £9 2s. 6d. as aforesaid; (c) alternative relief, and (d) costs of suit.

Plaintiffs' replication was as follows:

1. As to paragraphs 4, 5, 6, and 11 of the plea, the plaintiffs admit that prior to the death of the said Cornelia Christina Wolfaard the defendant had

made certain advances for the benefit of the said joint estate, but they say that at divers times payments were made to the defendant by or on behalf of the said estate, and they deny the correctness of the accounts annexed to the plea.

2. The plaintiffs crave leave to refer this Honourable Court to the liquidation and distribution account of the movables in the estate of the said late C. C. Wolfaard, dated the 3rd of November, 1903, from which it will appear that there was a settlement of accounts between the defendant and the said estate at the said date. Copy of the said account is hereunto annexed marked "D."

3. They say, moreover, that the defendant, in or about 1903, obtained possession, from the second plaintiff, of certain promissory notes owing by certain of the heirs to the said estate and representing debts to the value of about £545 (which said debts figure on the credit side of the said liquidation and distribution account). The defendant has retained possession of the said promissory notes and refuses to restore the same to the second plaintiff, and the plaintiffs say that, even if there was at the time of the framing of the said account any sum owing to the defendant by the said estate, such sum was more than covered and secured by the said notes.

4. As to paragraphs 7, 8, and 9, of the plea, the plaintiffs admit that the second plaintiff signed the statement therein referred to, but they say that while he so signed it, he was an aged man, being then upwards of eighty years old, infirm in mind, and incapable of transacting business, that he acted therein under the influence and at the instigation of the defendant, who then and for some time previously had assumed control of the said estate; that the second plaintiff when he so signed the said statement, did not understand the import of the same and acted *bona fide* upon representations made to him by or on behalf of the defendant that the said statement was in order whereas the said statement was and is in fact erroneous and misleading, to the prejudice of the said estate and the heirs thereof.

5. The plaintiffs admit that the second plaintiff agreed to waive his right to the usufruct of the said land and to pass transfer thereof to the defendant. They also admit that the Registrar of Deeds passed such transfer as stated in the declaration.

6. As to paragraph 10 they admit that there are seven heirs who have vested in them the right to an equal share each in the residue of the joint estate.

7. Save as aforesaid and save as to admissions contained in the plea, the plaintiffs join issue with the defendant thereon and again pray for judgment in terms of the declaration, with costs.

The plea of the second plaintiff to the claim in reconvention denied the allegations set forth in the claim in reconvention.

Mr. Van Zyl for plaintiffs; Mr. Close (with him Mr. Roux) for defendant.

R. D. Steyn, record clerk in the Master's Office, produced the last will of the Wolfaards, and the liquidation and distribution account and inventory in the estate of Mrs. Wolfaard.

Jan Abraham Becker said he was a law agent, carrying on business at Ladismith. Witness acted for defendant's father after the death of his wife. It was not until after the expiration of a year, and after the usual notice from the Master calling upon him to file an account, that Mr. Wolfaardt filed an inventory. Witness believed defendant drew this up. The bequest price of the landed property (£1,700) was put down in the inventory, and the movable property at £135. Liabilities were brought up. A considerable amount owing to the estate by some of the heirs on promissory notes was not brought up in the inventory. One of the heirs becoming insolvent, his expectancy was sold, and witness's son bought the heir's interest. In 1903 witness ascertained that no account had been filed with the Master, who was not aware that there were these promissory notes, and understood that the liabilities exceeded the assets. Defendant said the promissory notes had nothing to do with the estate, as the heirs could not pay. Witness pointed out that they had expectancies. Witness returned the promissory notes, but kept notarial copies. Witness made a draft account, and sent it to the Master's office, showing the amount of the promissory notes, plus interest. An amount of £32 11s. 3d. was shown as left for distribution amongst the heirs. Witness received the share of his son. The promissory notes were good, and could have been realised. Witness would have been prepared, and was now prepared, to take a cession of the notes. The expectancies of the heirs after the death of the survivor more than covered their respective liabilities. The witness went in detail through the accounts and transactions with defendant. He had paid various amounts on behalf of defendant, totalling £193 9s. 9d. There was a promissory note of £100 and other obligations, which left a balance due to defendant at the time of his mother's death of £302 19s. 3d. Witness signed the vouchers in the estate on the understanding that defendant had taken over the promissory notes in the estate, and that in that manner the defendant's claim on the estate had been satisfied.

Mr. Close said the defendant's position was that the promissory notes were still in the estate. Defendant's contention was that the promissory notes were a wholly independent matter. The



defendant would be prepared to render up the promissory notes if the Court thought they should be handed over.

Witness, in answer to the Court, said he would accept the promissory note as security. The only amount for which security had not been given was the £700 owing by the defendant.

In cross-examination, witness said that he had complained about the way the executor administered the estate. Witness was suspicious that the promissory notes would never be accounted for when they were taken from him in 1903. When the notes were taken away, the defendant's father said defendant would settle the matter himself. Witness produced to the Master the notarial copies of the promissory notes, which, together with the interest, amounted to over £1,000. Witness was not aware that some of the notes were for moneys advanced in 1867, and that it was because of an arrangement that the notes should be brought into collation that the notes were not included in the liquidation account.

Further evidence was given in support of the allegations in the declaration.

Mr. Van Zyl closed his case.

The defendant said that the debt to him was in no way settled by the promissory notes. Witness paid off a bond by Maskew. His father was satisfied with what witness had done to discharge his obligation, and signed a document to that effect, and agreeing to give witness transfer of the property. Witness agreed to let his father have the interest on a bond on the property purchased by a Mr. Botha. Botha paid a year's interest, but subsequently went insolvent, and witness agreed to give his father a third of the profits on the farm. His father was quite satisfied with the arrangement which had been made. The estate still owed him money. Witness, when sued for the £700, took up the position that he was entitled to hold the promissory notes as security, as the estate would have owed him the money which he had treated as having been accounted for in the £700. He thought they were suing him for the £700 again.

Cross-examined: The estate was indebted to him, and he held the notes as security. It was not the case, as stated by him in an affidavit, that he took the notes as security. He did not understand that he was saying that in the affidavit. When he was given the promissory notes, he did not regard that as a squaring off of the indebtedness of the estate to him.

De Villiers, C.J., said that he had read the evidence of the testator given on commission, and that he would like to hear Mr. Close.

Mr. Close said that the plaintiffs had misconceived their action. They should

have taken proceedings to have the statement by the executor, acknowledging the estate's indebtedness to defendant, set aside. They did not now sue for restitution *in integrum*. The executor could not now impugn the transfer, which was a quasi-judicial act, passed *coram lege loci*, nor could the first plaintiff impugn it, as he knew all along what was going on. They did not ask to have the document set aside, because they did not wish to allege fraud.

After further argument and after having heard Mr. Van Zyl on the question of interest and costs,

De Villiers, C.J., said that there was an amount owing to the defendant in connection with the mother's estate of £302, and if the notes were given up as security against the £700 from the father's estate, that £302 would have to be paid to the defendant.

Mr. Van Zyl said that the defendant had himself chosen to retain the notes, and he had prevented them from being realised.

The Court ordered that the defendant pass a bond for the sum of £460 without interest on the land to secure payment of the sum payable by him to the estate of his parents on the death of his father, and interdicted defendant from parting with or mortgaging the said land until such bond shall have been passed, the said sum of £460, to be reduced to £38 if the defendant forthwith hand over to the second plaintiff as executor the promissory notes. Judgment was given for defendant (plaintiff in reconvention) on the claim in reconvention against the second plaintiff for £422, with interest *a tempore morae* on condition that the defendant forthwith deliver the promissory note to the second plaintiff and on the further condition that the £422 and interest shall not be paid to the defendant until the death of his father, but shall be held by the second plaintiff as security for the sum payable by defendant to the estate of his parents on the death of his father.

His Lordship intimated that he would consider the question of costs to-morrow.

*Postea* (August 24th).

De Villiers, C.J., intimated that he had considered the question of costs in this case, and he had come to the conclusion that defendant should pay the costs. As he originally stated, defendant had absolutely refused to give security when asked, and he had never tendered delivery of the promissory notes. It was absolutely necessary therefore, that the plaintiffs should come into court for the purpose of asserting their rights. His lordship also gave directions as to the payment of £38 into the Master's Fund in case



the defendant delivered the promissory notes.

[Plaintiff's Attorneys: Sauer and Standen. Defendant's Attorneys: Herold and Gie.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

### PROVISIONAL ROLL.

COOPER AND CO. V. LEVISON ( 1906.  
AND CO. ( Aug. 23rd.

Mr. Payne moved for a provisional order of sequestration to be superseded. Provisional order superseded.

ROOD, PEMBERTON AND CO. V. PYWELL.

Mr. Inchbold moved for provisional sentence on a promissory note for £35 9s. 7d., with interest and costs. Order granted.

GOURLAY, CAVANAGH AND CO. AND OTHERS V. BROWNE.

Mr. Benjamin (with him Mr. Swift) moved for the provisional order of sequestration of the defendant's estate to be made final. Counsel stated that the petitioning creditors represented claims to the amount of £116 5s. His liabilities exceeded his assets.

Defendant read an affidavit, stating that his liabilities were not, as alleged, in excess of his assets. On the contrary, his assets were in excess of his liabilities. The present proceedings had been brought in breach of an agreement Mr. Cavanagh and others had entered into with him, and were really attributable to the fact that he had withdrawn his work from a certain firm of attorneys in the city. Defendant, it seemed, had been proprietor of the International Hotel, Durbanville.

Mr. Swift read a replying affidavit by W. S. C. Harsant, of Harsant and Harsant, attorneys, Cape Town, who said that, as far as he was aware, there was no agreement between Browne and the petitioners whereby they undertook to wait until such time as he received the money due to him from one George Nettleship. Mr. Harsant entered at some length into the relationships of his firm with the defendant. Mr. Swift also read an affidavit by Mr. Gourlay, of Gourlay, Cavanagh, and Co., and Harry Hands, of Cape Town.

Mr. Benjamin submitted that defendant was clearly insolvent.

Defendant again stated his position at some length, and claimed that his estate should not be finally sequestrated.

Buchanan, J.: In this case Gourlay, Cavanagh and Co. are creditors in respect of a promissory note not yet due for £50. It is admitted that the promissory note is not yet due, but the section of the Act 38 of 1884, under which the proceedings are brought, states that a debt need not be due, it may be a future debt, which would entitle the petitioner to petition the Court. Therefore, the fact that the promissory note is not yet due cannot be relied upon as an objection in this case. The next requirement of the Act is that the petitioner must show that the debtor is insolvent. The grounds set forth in the petition are not correct, but from the statement now made in Court by the respondent it is clear that his assets are not sufficient to pay his liabilities. The deficiency is not very large. I would warn attorneys that when they come before the Court they must strictly comply with the Ordinance. The provisional order will be made final.

DONNELLAN V. FORD.

Mr. Lewis moved for a provisional order of sequestration to be made final. Final order granted.

PRETORIA MAATSCHAPPY V. PRIOR.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,500, due by reason of notice having been given, and for the property specially hypothecated to be declared executable. Order granted.

CAPE OF GOOD HOPE SAVINGS BANK V. SPENCE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £500, with interest, and for the property specially hypothecated to be declared executable. Order granted.

DEMPERS V. SOLOMON.

Mr. Roux moved for provisional sentence on a mortgage bond for £100, due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

THEUNISSEN V. BOULTON, N.O.

Mr. De Waal moved for provisional sentence on two mortgage bonds, due

by reason of non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

GRESHAM LIFE ASSURANCE SOCIETY V. MOSTERT.

Mr. De Waal moved for provisional sentence on a mortgage bond for £22,000, with interest, the bond having become due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable, and for the rents to be attached.

Order granted.

HARE V. HARRIS.

Mr. Toms moved for provisional sentence on a mortgage bond, due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

MGOBOLI V. GAZO. } 1906.  
( Aug. 23rd.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £25 odd, moneys advanced.

Order granted.

NATHAN V. MACINTOSH.

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £54 rent, less £1 paid on account, with interest *a tempore morae* and costs.

Order granted.

PURCELL, YALLOP AND EVERETT V. BYDER.

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £61 11s. 9d., balance of account for goods sold and delivered and work and labour done.

Order granted.

MALLET AND CO. V. EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO., LTD.

Mr. Douglas Buchanan moved for judgment, under Rule 319, in default of plea, for £338 18s. 1d., with interest *a tempore morae* and costs.

Mr. Benjamin (for respondents) said that he consented to judgment, but

wished to apply for a stay of execution.

Judgment granted.

Mr. Benjamin then applied for a stay of execution for a period of six weeks, and read an affidavit by Mr. Walker, of Walker and Jacobsohn, applicants' attorneys, who called the Court's attention to the recent application made by the East London Daily News Co., in consequence of which the Court had granted a stay of execution for six weeks, in regard to the judgment obtained by Messrs. Wiener and Co.

Mr. Buchanan read an affidavit by the present respondents' attorneys, who opposed the application for a stay of execution, stating that they had received instructions from East London to push on the matter, and that no security had been offered by the applicants.

Counsel having been heard in argument on the facts,

Buchanan, J.: There has been a previous judgment against the present defendant, and in that case the Court has already stayed execution of the writ for six weeks. It appears that the defendants carry on a large business, that it is a going concern, and that they have a very substantial surplus of assets over liabilities. Under these circumstances, I think it would be only fair in this case to follow the order in the other case. Execution stayed for six weeks from the 17th inst., provided no other creditors take out a writ against the defendants. Should any such writ be issued, this order to lapse. Leave also reserved to respondents to move to set this order aside should their interests be prejudiced.

REHABILITATIONS.

Mr. Watermeyer moved for the discharge from insolvency of Frederick Wm. McKay.

Granted.

Mr. Pohl moved for the discharge from insolvency of Henri Jaques Woolheim.

Granted.

GENERAL MOTIONS.

BRIGHT V. THOMPSON. } 1906.  
( Aug. 23rd.

Dr. Rainsford moved upon notice to respondent to show cause why an order for personal attachment should not be granted against him for contempt of Court by reason of his non-compliance with an order made on the 2nd August to restore and deliver to applicant scrip of certain 200 fully-paid shares in the Saldhana Bay Harbour and Estates, Ltd.

Writ of attachment granted, returnable on the 30th August, with leave to respondent to apply at any previous time to set aside the judgment.

FINLAYSON V. FINLAYSON.

This was an application for stay of certain action instituted by respondent (the husband) against applicant (Katherine Finlayson) for restitution of conjugal rights, failing which a decree of divorce, custody of the child, and forfeiture of the benefits of community. Applicant also applied for removal of bar and an order upon respondent to pay to her a sum sufficient to enable her to defend the action.

From the affidavits it appeared that there had been proceedings, between the parties so long ago as 1902 (12 C.T.R., 598, 789), when applicant was proposing to sue her husband for judicial separation on the ground of his cruelty and drunkenness. This action, she said, she could not bring, because her husband failed to provide her with funds. She was now willing to consent to a divorce, but she claimed to be entitled to continue to have custody of the child, and said that she intended to ask the Court for custody.

It was stated that applicant was a professional nurse, and that her husband was living in Oudtshoorn. The divorce case had been set down for hearing to-morrow.

Mr. Upington was for applicant; Mr. Benjamin was for respondent.

Mr. Upington said that there had been absolute non-compliance by Finlayson with the previous order of Court, except in so far as the return of the child to Mrs. Finlayson was concerned. He submitted that before Finlayson was allowed to go on with this action he should pay the costs of the previous proceedings.

Mr. Benjamin said that if the facts now laid before the Court had been known to the Court on the previous occasion, no such order would have been made. It was unfortunate that respondent, through ignorance, did not then appear. The applicant was earning twelve guineas a month, and she had been in a position to bring an action. The respondent appeared to be acting perfectly *bona fide* in this matter.

Mr. Upington said that Finlayson actually did appear during the proceedings in 1902, so that his learned friend was not strictly correct.

Mr. Benjamin said he was referring to the first proceedings.

Mr. Upington said that the respondent appeared by counsel when the writ of attachment was applied for.

Buchanan, J.: The wife, who has been barred, will have leave now granted to her to plead, and she must file her

plea forthwith and go to trial on the 3rd September. As plaintiff had previously been ordered to pay £10 to defendants' attorneys to enable the wife to put her case before the Court, that order will now be renewed. This money must be paid before the 1st September. If he fails to make this payment, the hearing of this action will be stayed, question of costs to stand over until the trial.

Mr. Upington said that he was afraid it was impossible to file plea forthwith.

Buchanan, J., said that reasonable time would be allowed to defendant to file her plea.

O'CONNELL V. O'CONNELL.

Mr. Benjamin moved for a decree of divorce, with costs, in default of respondent's compliance with an order of restitution of conjugal rights.

Rule made absolute.

*Ex parte* DAVIDS.

Mr. P. S. T. Jones moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* DIXON.

Mr. P. S. T. Jones moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* MAARTENS.

Mr. W. Porter (Buchanan) moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

*Ex parte* THE MALMESBURY BOARD OF EXECUTORS AND TRUST CO.

Mr. Douglas Buchanan moved for a rule *nisi* to be made absolute authorising the Registrar of Deeds to issue a certified copy of certain notarial bond.

Rule made absolute.

*Ex parte* RICKETTS.

Mr. Bailey moved for leave to petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights.

Referred to Mr. Bailey for certificate as to *probabilis causa*.

*Ex parte* HOWES.

Mr. Pohl moved for leave to petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights.

Mr. Pohl said he was prepared to certify.

Rule granted, subject to counsel's certificate, rule to be returnable on the 12th September.

*Ex parte* SEVENTH DAY ADVENTISTS' MEDICAL MISSIONARY AND BENEVOLENT ASSOCIATION BOARD.

Dr. Greer moved for an amendment of a certain transfer deed by the insertion of a fuller description of transferees.

Order granted in terms of report of Registrar of Deeds.

*Ex parte* MILNERTON ESTATES, LTD.

Mr. Schreiner, K.C. (with him Mr. Douglas Buchanan), moved for the attachment of certain articles at Milnerton belonging to Gwynnes, Limited, hydraulic and mechanical engineers, London, England, pending result of an action to be instituted by petitioners in respect of alleged failure of a suction dredger supplied by respondents at a cost of £1,805. Petitioners also applied for leave to sue by edictal citation.

Leave granted to attach property of respondents *ad fundandam jurisdictionem*, and to sue by edictal citation, citation to be returnable in the 1st November, personal service to be effected.

*In re* ESTATE VENTER.

Mr. Douglas Buchanan said that this was the return day of certain lunacy proceedings. A telegram had, however, been received on Tuesday last to the effect that the lunatic had died. He therefore asked that the costs so far incurred might be costs in the estate. Counsel (at the request of his lordship) read the report which had been furnished to the Court by the Magistrate as to a visit he had paid to the lunatic when the preliminary order was granted.

Buchanan, J., said that the proceedings had apparently been justified by Mr. Venter's condition, and the costs would, therefore, come out of the estate.

## MCCARTY V MCCARTY AND ANOTHER.

Mr. Swift moved for removal of this matter to the ensuing Circuit Court to be held at Kynsna.

Case removed accordingly, costs to be costs in the cause.

*Ex parte* ESTATE RETIEF.

Mr. De Waal moved for leave to pass a mortgage bond for a further sum of £150 on security of certain landed property, petitioner being the wife of an inmate of Valkenberg Asylum.

Order granted in terms of Master's report.

*Ex parte* ESTATE JAKOBS.

Mr. Alexander moved, on the petition of the widow and executrix, for leave to pass a certain mortgage bond.

Order granted in terms of Master's report.

*Ex parte* BURGDOFF AND CO.

Mr. Pohl moved for certain interdict restraining the paying over of a certain inheritance to one C. S. Weichs to be discharged.

Ordered to stand over for proof of notice of application to the original petitioner, one Enslin.

## SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SACCO, LTD. V. GILCHRIST { 1906.  
AND POWELL, LTD. { Aug. 24th.

This was an application upon notice to respondents to show cause why they should not pay, on behalf of applicant, to Harry Gibson, as trustee of the insolvent estate of Charles Henry Stevens: (a) £250 as salary due to the said Stevens by the applicant; (b) £88 2s. 6d., cash lent and advanced by Stevens to applicant; and (c) costs and charges of Alexander John MacCallum, the attorney acting for the trustee, in and about the issue of a summons for payment of these said claims, the said claims being lawfully due by applicant to the said trustee, and payable by respondents in terms of a certain written agreement made and entered into by applicant and respondent on the 19th January last.

Mr. Benjamin was for applicant; Mr. W. Porter Buchanan was for respondents.

Mr. Benjamin said that, after the affidavits that had been filed, he did not think that this was a matter which the Court could decide upon motion. The matter should really be decided by way of action, and he would therefore ask that the notice of motion should stand in lieu of summons, costs to abide the result of the action.

Mr. Buchanan said he agreed that the matter should be decided by action, but he thought that the applicant should pay wasted costs.

[De Villiers, C.J.: I am not inclined to let costs abide the result, but to leave it open to discuss the whole question afterwards.]

Mr. Buchanan said that that would meet his views.

Applicant was ordered to proceed by action, notice of motion to stand in lieu of summons, and question of costs to stand over.

#### *Ex parte* ESTATE STOCKHAM.

This was an application for an order confirming certain action of executors, and authorising them to conclude certain articles of partnership, and sign them on behalf of the estate of the late Horatio Wm. Stockham, or, in the alternative, for the appointment of a *curator ad litem* to represent the minor heirs.

Mr. Russell was for petitioners; Mr. W. Porter Buchanan appeared for Tom Loveridge Stockham, son of the deceased.

From the affidavits it appeared that the applicants were one of the executors and the agent of one of the executors under the will of the late H. W. Stockham, who died in England on the 19th February last. Mr. Stockham had carried on business in partnership with Mr. F. Hurst at the Grand Parade Restaurant, Cape Town, but had resided in England since 1901, paying occasional visits to the Cape. Mr. Stockham had left two minor heirs.

Petitioners said that at the death of Mr. Stockham the said Hurst was to continue the business, but the said Hurst had declined to pay for any goodwill, and the matter was further complicated by the fact that Stockham's partnership did not cover the entire period of the lease. The widow of Mr. Stockham desired to continue the business so as to ensure a steady income for the maintenance and support of herself and the children. It would be in the interests of herself and to the benefit of the heirs that the business carried on by deceased, in partnership with Mr. Hurst, should be continued until the expiry of the

lease. Petitioners had drafted articles of partnership, leaving blank the amount of capital to be contributed by the estate of Stockham.

Mr. Russell said that his application at the present stage was for the alternative prayer—i.e., the appointment of a *curator ad litem*. Their submission was that this matter might be decided on motion entirely, but, even so, they thought his lordship might appoint a *curator ad litem* as the interests of minors were concerned.

[De Villiers, C.J.: It seems to be a pure question of law arising out of the will.]

Mr. Russell: And out of the documents.

Mr. Buchanan said he thought it would be satisfactory to all parties to have the matter determined upon motion, without having further expense.

Mr. Russell said that he should like the Court first to appoint a curator to represent the minors.

[De Villiers, C.J.: The interests of the minors would be the same as Mr. Steytler's, wouldn't they?]

Mr. Russell: Mr. Steytler was not the guardian; he is one of the executors. He represents both the minors and the survivor, and the survivor's interests might possibly be antagonistic to the minors' to a certain extent under the will.

De Villiers, C.J., asked why the matter could not be gone into and disposed of at the present stage.

Mr. Russell said that he was not prepared to argue the matter at present. It would be a question to consider whether the estate capital should be continued in this business or not, and that would largely depend upon whether this was a good business to carry on, and whether it would be to the benefit of the minors that it should be carried on. Therefore, they thought some business man should go into the whole question.

Mr. Buchanan said that their position was that they wanted the draft partnership to go through, but there was a question between the executors and his (counsel's) clients upon the document given by the father to the son, which, they said, was given to the son as portion of his estate. Their contention was that as the partnership came to an end there should be a paper dissolution between Stockham and Hurst, and that of Stockham's portion at the dissolution Tom Loveridge Stockham should get one-half. The executors, on the other hand, contended that he did not get that at all, but it was difficult to tell what it was they said he should get.

[De Villiers, C.J.: Is Hurst willing to continue the partnership?]

Mr. Buchanan: Oh, yes, and he knew of this agreement between Stockham, senior, and Stockham, junior. Counsel added that he did not object to the



matter standing over until a curator representing the minors had looked into the question of whether this was a proper investment.

Mr. Russell suggested that Mr. J. E. P. Close should be appointed *curator ad litem*.

[De Villiers, C.J.: I suppose it is quite possible that the parties may come to some agreement, and that the case may not again come into Court, except to confirm the action of the parties.]

Mr. Russell: Of course, we should like confirmation of the action of the executors in any case in entering into or continuing this partnership on be- confirm the action of the parties.

De Villiers, C.J., said that Mr. Close would be appointed *curator ad litem* of the minors. He did not think it would be necessary to appoint special attorneys. The same attorneys might appear for both the executors and the minors.

JOHNSON V. R.M. OF WOOD-  
STOCK. { 1906.  
Aug. 24th.  
" 25th.  
Sept. 6th.

Law agent—Attorney—"In practice"—Act 43 of 1885, Sec. 8.

*An attorney is "in practice," within the meaning of Sec. 8 of Act 43 of 1885, in any place where he opens an office, even although he does not personally attend at that office, provided that he is always available for consultation when required.*

This was an application for an order upon respondent to admit and enrol applicant as an agent of the R.M.'s Court, at Woodstock.

Mr. Molteno (with him Mr. Rowson) was for applicant.

Mr. P. S. T. Jones appeared for the Law Society, and asked for leave to intervene.

Mr. Molteno objected to the Law Society appearing in this matter on the ground that the society had no *locus standi*. This, he said, was a matter between a person who applied to be enrolled as a law agent and the Magistrate.

[De Villiers, C.J.: Who appears for the Magistrate?]

Mr. Molteno: I believe the Attorney-General does not appear.

Mr. Jones said that the society desired to intervene on the general ground of the interests of the profession. The Magistrate found that there were two attorneys practising at the Woodstock Court.

[De Villiers, C.J.: I do not think the Law Society has sufficient *locus standi* to appear. It is of direct interest possibly to attorneys practising in Woodstock, but it is not a matter in which the attorneys of the country as a body have an interest. Therefore, the application to intervene cannot be entertained.]

Mr. Molteno proceeded to read the affidavits of applicant (James C. A. Johnson), H. O. Badnall (Acting R.M. of Woodstock), and others, from which it appeared that the Magistrate took up the position that since Woodstock was constituted a separate magisterial district on the 1st January, 1906, there had been not less than two attorneys practising in the Woodstock district. Applicant, however, contended that there were not two attorneys actually practising in the said district. It appeared that he had twice applied for admission, but had been refused on each occasion, and that several other agents (Messrs. Shaw, Smith, and others) had also been refused admission. Counsel submitted that between the 30th June and the 5th July there was only one attorney, Mr. Foley, practising at Woodstock, and cited *In re Ash's Estate* (6 N.L.R., 243); *R. v. Jansen* (15 C.T.R., 269); and *Voet* (19—2—34). The applicant had been wrongfully refused admission as an agent. The Act contemplated that an attorney must be *bona fide* "in practice" in the district. It would be manifestly unfair if an attorney were allowed to open an office and put a boy there to refer clients to the head office in Cape Town and then pretend that that attorney was "in practice" in that district. The Court, he submitted, would never sanction such a method as that of keeping out enrolled agents.

De Villiers, C.J., said that before he gave judgment he would like to hear the explanation of Mr. McLeod, attorney, in reference to a certain letter which he had written. The Court would be sitting to-morrow (Saturday) morning, and he hoped Mr. McLeod would be in attendance.

*Postea* (August 25th).

Rufus R. J. McLeod (in answer to his lordship) said that he had been negotiating for some time with a Mr. J. C. Behr to take charge of his office at Woodstock. On the 30th June last Mr. Behr wrote witness a letter accepting his offer (letter put in). Mr. Behr was appointed. He was not an attorney. The office was taken charge of on Monday, the 2nd July. Occupation of the premises was given to witness on the first business day in July. It was a mistake to say that the office was still to let on that day. The man whom witness appointed was to have charge of the office when he (McLeod) was not there. Witness could not explain why a certain

date was left blank in a letter that he had written. Behr was always at the office, and he gave advice to clients except in intricate matters, which were referred to witness. Witness considered that he was practising at Woodstock.

Cross-examined by Mr. Molteno: Witness had his head office in Cape Town, but he considered that Woodstock was one of his offices.

De Villiers, C.J., remarked that, had he known the name of the landlord of the office at Woodstock, he would have directed that he should appear and give evidence.

Mr. Molteno having been heard further in argument,

Mr. McLeod was recalled, and in reply to the Court, said that he had practised in the Woodstock Court before the 2nd July, and had had cases in the court.

Mr. Lewis said that he was instructed to apply on behalf of Mr. Foley for leave to intervene, and put his position before the Court, and also bring further evidence before the Court.

[De Villiers, C.J.: How is Mr. Foley interested in the matter?]

Mr. Lewis: He is practising in Woodstock as an attorney.

Mr. Molteno: We do not impugn Mr. Foley's position at all. We have admitted all along that he is practising there.

[De Villiers, C.J.: Well, Mr. Foley, perhaps does not want an interloper. I am afraid that if Mr. Foley comes forward I must hear him. The Law Society had too indirect an interest to be allowed to intervene.]

Mr. Molteno: We submit Mr. Foley is the one *bona fide* attorney practising there.

De Villiers C.J., said that he was sorry that there should be this delay and increase of expenses, but he did not see how it could be avoided under the circumstances. The matter must stand over until Thursday next, so that Mr. Foley could present affidavits and the landlord and Mr. Behr could make affidavits in regard to the 2nd July and for any other evidence that might be produced.

*Postea* (September 6th).

Mr. Molteno said that at the last hearing the Court asked for an affidavit by the landlord with regard to the letting of the office to Mr. Macleod and for an affidavit by Mr. Behr, Mr. Macleod's clerk in charge of the office.

Mr. Lewis read an affidavit by Joseph Cloete Behr, who stated that in June last he was approached by Mr. R. G. R. Macleod, and that on July 2 an office was hired and that he had occupied the office since that date as managing clerk for Mr. Macleod. The affidavit of Mrs. Stead stated that she let an office at Woodstock to Mr. Macleod on July 2 at £2 per month. She considered Mr. Macleod as her tenant from

July 1. Further affidavits were read by Cape Town attorneys who stated that they often conducted cases in the Magistrate's Court at Woodstock.

Mr. Molteno said that in view of the affidavits now before the Court he could not contend that the office was not taken on July 2, but it did not affect the argument that an attorney who simply took an office and left an unqualified person in attendance, could not be said to be in practice. An attorney's work was personal, and an attorney could not be said to be in practice at Cape Town and at Woodstock at the same time. Behr, the man engaged, was not qualified in any way, and Macleod could not be said to have been in practice at Woodstock. An Act which imposed disabilities on persons had to be strictly construed.

De Villiers, C.J., said that Section 8 of Act 43 of 1885 enacted that "no person in any district where not less than two attorneys are in practice, shall be admitted and enrolled as an agent in the Court of any Resident Magistrate." It was common cause that on July 2 last Mr. Foley was in practice in the district of Woodstock and the only question was whether there was another attorney in practice there. The evidence adduced at the last hearing left it somewhat in doubt as to whether Mr. Macleod was at that time actually in practice, but the Court was now satisfied on the further affidavits that Mr. Macleod might reasonably be taken to have been in practice in Woodstock. He had on several previous occasions conducted cases in the Resident Magistrate's Court at Woodstock, but it was unnecessary to decide if that was sufficient practice. The Court was satisfied that he practised there on July 2. He had hired a room and left Behr in charge. Behr was not an attorney or an articled clerk, but that was not necessary. The test was whether an attorney was at hand to be consulted when necessary. Woodstock was very near to Cape Town, and he (the Chief Justice) presumed that there was a telephone between the two places, and, in any case, if a telegram was sent by the clerk in charge of the office, the attorney could be there in a very short time. All requirements were complied with if the attorney was within hailing distance of Woodstock. It was perfectly clear that two attorneys were in practice on the day on which the Magistrate refused to enroll the applicant, and the application had to be refused, with costs, including the costs of the intervening attorney Foley. An example should, however, be made of attorneys who did not attend in court when their cases were being dealt with. When certain information (about the service of affidavits) was required, Mr. Foley's attorney was not in court, and the costs would therefore not include the attend-

ance charges of the attorney. Attorneys should be in court if they charged for appearance.

[Attorney for Applicant: E. J. Sydney. Attorney for Mr. Foley: A. J. McCallum.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

*Ex parte* BURGDOFF AND CO. { 1906.  
Aug. 24th.

Mr. Pohl moved for a certain interdict restraining the paying over of certain inheritance to one C. S. Weichs to be discharged. Counsel said that a consent paper had now been filed.

The Court ordered the discharge of the interdict.

### NEWMAN V. NEWMAN AND JULIUS.

This was an action for divorce and damages brought by Henry Christian Jacobus Newman, a wagon driver, of Roger-street, Cape Town, against his wife, Rosetta Johanna Newman and Abraham Julius, both of Cape Town, against the latter of whom £50 damages were claimed.

Dr. Greer for plaintiff; defendants in default.

The plaintiff said he was married to the first defendant in September, 1889. There were two children of the marriage, one of whom died. The surviving child—a girl of 10 years—was now with the mother, and witness paid £1 a month for her maintenance, as well as for her schooling and clothing. Witness went away in 1903, but in consequence of certain information he came back, and resumed living with his wife in Cape Town. When he returned the co-defendant, who was defendant's cousin's husband, was living in the house. Afterwards witness had his leg broken, and while lying in the house he saw what was going on. He wanted to send Julius away, but his wife said: "He has done nothing; if you send him away I will go with him." She refused to give witness food, and Julius assaulted him. Julius and defendant had been living together in Stone-street as man and wife, and the latter had had three children, of which witness was not the father. Witness was suing *in forma pauperis*. He did not press for damages, but asked for costs of suit against the co-defendant.

Evidence was given by co-defendant's wife, who said her husband drove her out of the house, and had since lived with defendant.

Decree of divorce granted, plaintiff to have the custody of the child, and judgment against co-defendant for costs.

### MARAI V. MARAI.

This was an action brought by Wilhelmina Sarah Marais, of Carnarvon, against her husband for restitution of conjugal rights, failing which for a decree of divorce.

Mr. De Waal was for the plaintiff; defendant was in default.

Plaintiff said she was married to the defendant in community of property on May 29, 1905. After marriage she lived with defendant on his farm in the Fraserburg district until November. In that month defendant asked her to leave and go to her parents, saying he did not love her. He said if she left he would fetch her some time later on, as he was going away. Witness left, but defendant did not fetch her, and she went back in about three weeks' time, being accompanied by her little brother and sister-in-law. He asked her to leave again on the day she arrived. She went away back to her parents, who brought her back again. She remained on the farm one night with defendant, but on the following morning—about November 19—he again asked her to leave, threatening that if she did not go she would lose her life. Witness was expecting her confinement at the time, and defendant said he would not do anything for her in her illness. Witness's father saw defendant, and afterwards told witness what her husband had said. She thereupon fainted, and her father put her on the cart and took her away. In January, three weeks after the birth of the child, she went back to the farm and spoke to the defendant. Previously, in December, witness received a letter from defendant's attorney suggesting a separation on the basis of a division of the joint estate. Witness asked for a decree of restitution of conjugal rights, failing which for divorce, with equal division of the joint property, and witness to have the custody of the child.

In reply to the Court, the witness said she would be 17 years of age on the 24th of October next. Defendant was 19 years of age at the time of the marriage.

Johannes Josias Nicolas Vos, farmer, in the district of Carnarvon and father of the last witness, gave evidence, as to the visit to the defendant in November. Defendant told him to take his daughter away; otherwise he would drive her out of the house.

[Buchanan, J.: Altogether he seems to have behaved like a blackguard?]

Witness: Yes, my lord.

Order for restitution granted, defendant to return to or receive plaintiff on

or before the 1st October, failing which rule to issue calling upon defendant to show cause why a decree of divorce should not be granted as prayed.

PANNELL V. PANNELL.

This was an action brought by the husband for divorce on the ground of adultery.

Dr. Greer was for the plaintiff; respondent was in default.

John Richard Pannell said he was married to defendant in November last year at Cape Town, and afterwards lived with her in Wale-street. They were very unhappy on account of defendant's intemperate habits. On the 21st April, 1906, he left defendant, and told her he was not coming back. She was so drunk the previous night that he thought he must leave her. He returned, however, the same afternoon, and she told him there was a man in her bedroom. On other occasions he went to the house, and at 8 o'clock on the following Tuesday night he saw a man named Wadsworth there. Wadsworth came from his wife's bedroom; defendant was lying down drunk. There was no property in the estate.

Further evidence having been given as to the adultery, a decree of divorce was granted.

LINSCOTT V. LINSCOTT.

This was an action brought by the husband, Arthur B. Linscott, an engineer, residing at Cape Town, against his wife for divorce on the ground of her alleged adultery with a man named Marsh.

Mr. Pohl was for the plaintiff; Mr. Van Zyl was for the defendant.

The plaintiff said he was married to the defendant before the British Consul in Paris in October, 1898. They came to South Africa in January of last year, leaving their child—a boy—in London. From September of last year his wife had been at Somerset Strand, whither she had been ordered by the doctor. Witness went there every Saturday. Defendant was staying at a boardinghouse at the Strand. Witness had seen co-defendant on two occasions at the Strand. His wife introduced them. Witness received certain information, as a result of which he brought this action.

Cross-examined by Mr. Van Zyl: They lived after the marriage for about a fortnight or three weeks in Paris. They were very happy. Afterwards defendant went to Australia in order to settle matters concerning some property which she had inherited. She came back in June, and returned to witness in 1901, and they

lived in London until 1904. There was some difference between them on account of witness asking his wife to entertain his friends. Witness wanted her to invite people to their home who had invited them, but she complained of the strain. His wife paid her passage to the Cape from her own income of about £75 a year. Witness received an appointment at the South African College at £350 a year. The circumstances under which defendant paid her own passage were that she suddenly made up her mind to accompany witness, and booked her passage on the previous day, whereas it had been arranged that she should, on account of her health, remain in England for some months. His wife's health declined here, and she was obliged to be removed as a lunatic to Valkenberg in March, 1905.

Did you before that throw her down in the road at Rondebosch?—No; I remember her lying down on the road because she refused to go back to the house.

She says you threw her down because she did not walk fast enough?—I absolutely deny it.

In further cross-examination, the witness said his wife left Valkenberg in September, 1905, and she was taken by her sister—Mrs. Barton—to Somerset West Strand.

In November, 1905, you wrote her a long letter?—Yes.

You were then considering the matter of getting rid of her?—Oh, no.

You were anxious to get a divorce?—No.

Continuing under cross-examination, the witness said that in his letter he put it to his wife that it would require a strong effort on her part to keep up a social standing in Cape Town. The only intimacy he noticed at Somerset Strand was that when his wife's veil became detached, she asked Mr. Marsh to fix it, instead of asking her sister or witness. That, however, witness regarded as trifling. He last visited his wife at Somerset Strand at the end of June, and in consequence of what he heard, he employed certain people, including Osberg, a private detective. He did not employ a man named Cooper.

A witness named James Prior, a fisherman, living at the Strand, said that on two or three occasions he had seen Marsh and the defendant together on the beach at twilight, under circumstances which the witness detailed.

In cross-examination, the witness said Detective Osberg had seen him, and asked him about the case. A policeman came to his house one night, and said Osberg wanted to see him at the Police Station.

By the Court: The policeman was on duty at the time.

Mr. Van Zyl: You are living with another man's wife?



Witness: Yes, her husband deserted her, and I took her and keep her children.

A witness named Mrs. Van Niekerk said she had seen the defendant and Marsh walking together.

Dinah Adams said she had seen defendant and Marsh walking together.

Mr. Pohl closed his case.

Mrs. Beatrice Lily Maud Linscott, the defendant, was called. She said that she stayed at Somerset West Strand with her sister at a boarding-house. After her husband wrote the long letter spoken of to her, she expressed her willingness to go back to him, but he demurred as to this and also on other occasions when she spoke to him. She was introduced to Marsh in January. Marsh had taken witness and her sister to dances and to football matches. He used to come to the boarding-house and play cards with a Mr. McGuire, witness, and her sister.

Mr. Van Zyl: It is alleged that there has been improper conduct between yourself and Mr. Marsh?—I emphatically deny that.

You have heard the evidence of Prior?—Yes. I emphatically deny all his allegations.

In cross-examination, the witness said she had never walked arm-in-arm with Marsh. She had never gone alone for a walk with Marsh of an evening.

[Buchanan, J.: After these proceedings have gone so far, would it be pleasant for you to live together? Would you agree to a separation, or would you return to your husband?]

Witness: I am quite willing to return to my husband.

Buchanan, J., said he did not think it necessary to hear any further evidence for the defence.

After hearing Mr. Pohl, and without calling upon Mr. Van Zyl.

Buchanan, J.: This is an action for divorce on the ground of adultery. The evidence discloses the fact that a private detective was engaged in this matter to work up evidence. This private detective must, I presume, have been watching for some time, but he has only been able to produce to the Court the evidence of a witness, who has been described as a highly respectable fisherman, but who lived with another man's wife. This man has stated that in a public place, near a boat, he saw impropriety between the respondent and Marsh. The defendant has been called, and has flatly contradicted this. Now, I am not satisfied with this evidence, considering the way in which this case has been worked up, and the way in which this man has been induced to come forward to give his evidence. The allegations that the defendant is unconventional and that she has walked arm-in-arm with a gentleman might perhaps be things that might lead up to support other evidence, but I must say,

sitting as a juror, that in this case there is an absence of such evidence as would induce any Court to come to the conclusion that the defendant has been guilty of adultery. Absolution from the instance must be given, with costs. His Lordship said there was one other remark he must make. It was applicable to other cases as well as this, but he would take this opportunity of drawing attention to the matter. He wished to say that private detectives were not justified in going to the police for assistance or in describing themselves as police, or in using police constables for the purpose of getting evidence. He was in hopes that the private detective in question would have been called, but he had not been put in the box, and had not had an opportunity of giving any explanation; but he (the Judge) must say that a private detective was not justified, and was acting improperly, in describing himself as a policeman, and in using police constables for the purposes of his case.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

KRAMER V. VAN DER MERWE. { 1906.  
Aug. 25th.

Mr. Lewis moved as a matter of urgency for the discharge of a certain interdict granted by Mr. Justice Hopley on the 24th August, or, in the alternative, for an order requiring respondent to furnish security in the sum of £100 to the satisfaction of the Registrar of this Court.

This matter, it appeared, arose out of a judgment obtained in July by the present applicant against one Morris Brodie, of Sutherland. A writ of execution was issued, whereupon the respondent, Van der Merwe, claimed as his property certain mules, cart, and harness, which he said he had bought from Brodie. Kramer said he did not think the alleged sale had taken place, and he brought the present application, because, counsel explained, he feared that Brodie, the debtor, might become insolvent at any moment.

The interdict granted on an *ex parte* application by Mr. Justice Hopley temporarily restrained the Deputy



Sheriff of Sutherland from selling the goods in question, pending an action to be brought by the then applicant (Van der Merwe) to have the ownership of the goods determined.

Mr. Lewis was for applicant; Mr. J. E. R. de Villiers was for respondent.

Mr. De Villiers said that the mules, etc., were in the hands of the Deputy Sheriff already, and the present applicant, Kramer, was perfectly secured. He submitted that the application should be refused, with costs.

Mr. Lewis argued that the interdict should be discharged, or Van der Merwe should be ordered to furnish security. Kramer's position was such that, whether he won or lost on the interpleader case, he was absolutely unprotected. Van der Merwe would not be prejudiced in any way if ordered to give security.

Mr. De Villiers submitted that, *prima facie*, there was a *bona fide* sale from Brodie to Van der Merwe.

De Villiers, C.J.: An order has been made by a Judge restraining the sale pending an action which is to be brought forthwith by Van der Merwe. I am of the very strong opinion that if notice had been given a different order might have been made. If all the facts had been brought to the notice of the Judge, probably he never would have made an order. This case is an illustration of the necessity of giving notice to people of motions which affect their rights. Here Van der Merwe must have known, when the application was made, that Kramer had a claim in respect of these goods, and, notwithstanding such knowledge, he proceeded to get an *ex parte* order from the Judge, which might never have been granted if notice had been given. From the form of the contract between Van der Merwe and Brodie, it does not appear perfectly clear that there ever was a true contract of sale. This is a form very often adopted, when parties wish to give a kind of security, a kind of pledge, without being an actual contract of sale. Brodie still remains in possession. It seems that Van der Merwe at one time had had possession, but he did not remain in possession long. At the same time, the order stands, and I am not satisfied that the present applicant would suffer at all from the continuance of the order. The only prejudice to him is the possible delay in getting his judgment debt paid. I am not inclined to make an order on this application, but I do think that the question of costs ought to stand over until after the trial. The Court will then be in a better position to judge as to how far the present application was required.

Mr. Lewis again mentioned the matter at a later stage, and said that per-

haps he had not made his position quite clear as to the reason of the application. The application was made in view of the fact that the respondent Van der Merwe might become insolvent any day.

[De Villiers, C.J.: Do you wish me now to review my own previous decision?]

Mr. Lewis said that he had been asked to bring this fact before the Court, as he thought it had not been made clear previously.

[De Villiers, C.J.: What is the use of mentioning it? The order has been made, and there is nothing new before the Court. There is really no danger to your client. The order will stand.]

ALGOA MILLING CO. V. { 1906.  
BELL AND CO. { Aug. 25th.

Foreign plaintiff — Security for costs — Time when security can be demanded.

*The plaintiff, being a foreigner, sued the defendant, who filed his plea, and thereafter objected to the plaintiff filing his replication until he gave security for costs that might subsequently be incurred by the defendant.*

*Held, that the objection was a good one, and although the replication was allowed to be filed, all further proceedings were stayed until such security should be given.*

This was an application upon notice to respondents calling upon them to show cause why a replication filed by them on the 15th August should not be removed from the record until respondents have furnished security for costs in an action instituted by them against applicants, and why respondents shall not be barred from further proceeding with their action until such security has been entered into.

Applicants' position was that respondents had filed their declaration and described themselves as a partnership, trading in Australia and Durban, Natal. On the 31st July, immediately on receipt of instructions from their Port Elizabeth correspondents to the effect that security for costs had not been given, and before pleadings had been closed, applicants' attorneys addressed to respondents' attorneys a letter calling upon Messrs. Bell to provide security for costs before filing replication. Respondents had, however, filed their replication without providing security.

Respondents' attorneys said that, after considerable delay, applicants were

barred from pleading to the action. Application was then made for removal of bar, and this was opposed by respondents on the ground that the defence was not *bona fide*, and that applicants merely wished to gain time. Applicants had now demanded security for costs, which, if granted, would mean further delay in the proceedings. Respondents claimed that they were entitled to proceed with their action in view of the fact that no demand for security was made at the commencement of proceedings.

Mr. Upington was for applicants; Mr. McGregor was for respondents.

Mr. McGregor said that security could not be demanded after the case had been allowed to proceed as far as the pleading stage. He quoted *Van der Linden* (Henry's translation), p. 411. If the application were not made at an early stage it might be used as an engine for delaying proceedings. *Van der Linden* (Judg Prak, pp. 155, 160, 264), *Voet* (2, 13, 4); *Merula Manier van Proc* (4, 38, 1n).

Mr. Upington quoted *Merula* (4, 41, 1), to show that security might be demanded at any stage till *litis contestatio*.

De Villiers, C.J.: I am not prepared to accept the view that a defendant is not entitled to demand security for costs from a foreign plaintiff after plea has been filed, nor is it clear that under our practice—whatever the Dutch practice may have been—security can be demanded only before *litis contestatio*. Cases may possibly arise in which a defendant would be estopped from demanding security for costs during the later stages of an action, but that could be only where the plaintiff has in some way been prejudiced by the defendant's failure to make the demand sooner. But, as a general rule, I am of opinion that a defendant is not debarred from objecting to any step in the action being taken by the plaintiff until security is given for costs which might thereafter be incurred by the defendant. In the present case the defendant objects to the replication being filed until such security is given. There has not yet been *litis contestatio*, and, therefore, even if the authorities cited applied, the objection is not too late. Under all the circumstances the filing of the replication will be allowed; but all further proceedings must be stayed until security for the defendant's further costs is given.

*Ex parte* GREYLING.

Mr. J. E. R. de Villiers moved, on behalf of petitioner, who resides in the Orange River Colony, for an order authorising payment of certain money for the education and maintenance of minor children. Petitioner, it appeared, was married out of community. His wife was an inmate of the Graham's

Town Asylum. Petitioner said that he was without means, and his wife was possessed of considerable funds from a sale of farm property. Her estate was managed by a curator. The proceeds of the sale of her farm had been placed in the Guardians' Fund. Petitioner needed assistance for the maintenance and education of the minor children.

De Villiers, C.J.: I can quite understand that until the first payment of interest has been made to the minors, it may be difficult for the petitioner to tide over the interim. I think for that period he might fairly be paid £100. I am not inclined to make any further order for future payments. I think that once this £100 has been paid to the petitioner, he can work, and by his work and labour he can maintain the children, having in addition to that the sum of £74 from the interest. The Court will therefore make an order in terms of the Master's report, with the direction that out of the capital sum in the Guardians' Fund, there be forthwith paid to the petitioner for the support and maintenance of the lunatic's children the sum of £100, and such further sum as shall be required for payment of the costs of this application, so that out of the capital there will be paid £100, and costs of this application.

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REX V. VAN DER WALT. { 1906.  
Aug. 27th.

Scab—Act 20 of 1894, Sec. 21.

*Whensoever an owner of sheep shall have reasonable grounds to suspect that any of his flock are infected with scab, he must both at once give notice to the local scab inspector and also make proper efforts to cleanse the infected sheep.*

Rex v. Van der Berg (16 C.T.R., 216) distinguished.

This was an appeal from a judgment of the Resident Magistrate of Philip's

Town, who had convicted the appellant, Charl van der Walt, of contravening section 21 of the Scab Act (No. 20 of 1894).

Mr. Watermeyer was for appellant; Mr. Howel Jones was for the Crown.

Mr. Watermeyer said that the whole ground of appeal was the construction of the section. He relied upon the case of *Rex v. Van der Berg* (16 "Cape Times" Reports, 216) for his contention that it was sufficient if the owner did either one or other of the duties set out in the section. It was sufficient if he gave notice of the outbreak of scab or if he made proper and diligent efforts to cleanse. Mr. Justice Hopley, in the case of *Van der Berg*, found that under the second part of the section the owner had an alternative. Counsel pointed out that this was a criminal enactment, and that the words of the section must be construed strictly, and in accordance with their grammatical meaning.

Mr. Jones said that, with very great respect to the learned Judge who decided the case in question—a decision which, being the decision of a single Judge, would not be binding in other cases—came to a wrong conclusion. He did not say that the learned Judge was wrong in upsetting the conviction in that case, because there was some evidence that the accused had hand-dressed the sheep. But he submitted that his lordship was entirely wrong when he went on to discuss the general effect of the Act and the judgment, if he might say so, was inconsistent. Counsel went on to contend that the inspector under the Act must have notice given to him of the occurrence of scab. The Act said that the owner must give notice of any outbreak of scab, and the question was, was there anything which said that he should not give notice? He contended that there was not.

Mr. Watermeyer having been heard in reply,

Buchanan, J.: The accused in this case is charged with having contravened section 21 of the Scab Act (No. 20 of 1894) in that having become aware that his flock of sheep was infected with scab, he failed to give notice within seven days to the inspector. It is perfectly clear from the evidence that the accused did fail to give the notice required. It is also clear on the evidence that he had attempted to cleanse his sheep by hand-dressing. The twenty-first section requires every owner of any flock of sheep both to give seven days' notice to the inspector when he is aware that there is scab amongst his sheep, and he shall forthwith proceed to make proper and diligent efforts to cleanse such sheep. That is clear; there is no mistaking the clear, grammatical meaning of this section so far. Two duties are cast by the section upon the owner—one is to give notice within

seven days, and the other is forthwith to commence cleansing his sheep. Then there is a second paragraph of the section, which says that every owner failing to make such efforts or to give seven days' notice shall be deemed guilty of a contravention of this Act. This clearly means that if an owner fails to perform one or other of the duties which the Act imposes upon him, he shall be guilty of the offence. Learned counsel for the accused wishes to read this paragraph as meaning that the owner cannot be prosecuted unless he fail in both these duties. If that had been the intention of the Legislature they would have used the word "and" instead of "or." It is clear what the Legislature's meaning is. Reliance, therefore, upon the grammatical meaning of the section cannot be sustained. The learned counsel goes on to rely on a decision given by my brother Hopley in the case of *Rex v. Van der Berg* (16 "Cape Times" Reports, 216). This case was quoted before the Magistrate and the Magistrate said that the case did not apply to the one before him. In this respect the Magistrate is perfectly right. In the case of *Rex v. Van der Berg*, the person did give notice, and he was charged with having failed to cleanse his sheep, and my brother Hopley, in commenting upon this section, says these duties no doubt are concurrent, and the Act means that he should not sit still, but he should do his best to try and eradicate the disease, and he must also tell the inspector. It is clear that my brother Hopley took the same reading of the Act as we are taking now. It is quite a different case from this, and there is no conflict between that decision and the present decision. The appeal must be dismissed.

Maasdorp, J., concurred.

#### WARREN V. LEWIN.

This was an appeal from a judgment of the Resident Magistrate of Oudtshoorn in an action brought by appellant against respondent to recover £20 damages for trespass to land and a mare.

From the record, it appeared that the parties are owners and occupiers of adjoining erven situate in High-street, Oudtshoorn. There was a mud wall dividing the erven. The ground of the claim was that the defendant's stallion leaped the partition wall, entered the plaintiff's ground, and trespassed upon it and covered his mare. Defendant denied liability or that plaintiff had sustained any damages. He further said that, without prejudice to his legal rights, he had tendered £5 to the plaintiff in settlement of any damages.

The Magistrate's decision was absolute from the instance, with costs. In

his reasons, he said he was not satisfied that the mare had been put in foal by the defendant's stallion. Plaintiff did not found any part of his claim upon trespass upon his land.

Mr. Benjamin was for appellant; Mr. Alexander was for respondent.

Mr. Benjamin submitted that the balance of testimony was distinctly in favour of the plaintiff. He contended that plaintiff was entitled to claim prospective damages in respect of the covering of the mare. Judgment ought to have been entered for the plaintiff for a substantial amount of damages.

Without calling upon Mr. Alexander, Buchanan, J.: Plaintiff had a mare running in his camp, which adjoined the camp of the defendant, and in which latter camp the defendant had a stallion running. The two questions that arise in this case are: (1) Whether the stallion had covered the plaintiff's mare, and (2) whether the mare, if so covered, has been rendered unfit for work thereby. The plaintiff says that the only damage he claims is, not for any trespass, but simply for the damage done through being deprived of the services of the mare. The witnesses were heard before the Magistrate, and on both the questions at issue the Magistrate has found against the plaintiff, and he has given absolution from the instance, as he is not satisfied that the plaintiff has made out his case. The only witness called for the plaintiff to show that the stallion had covered the mare is the boy Aries, and Aries' statement is such as to give the Magistrate sufficient ground for saying that he does not credit the statement that the mare was covered at all. Then, as to the second question, the Magistrate says there is nothing to show on the evidence whether the mare is in foal or not. Sufficient time has not elapsed. A test was applied to the mare, but the Magistrate did not consider it a satisfactory test. Mr. Benjamin has argued that the balance of testimony is in favour of the plaintiff. The Magistrate had the witnesses before him, and he has not been satisfied that the balance of testimony is in favour of the plaintiff, and he has given absolution from the instance, with costs. The defendant applied for a postponement to enable it to be seen whether the mare was in foal, and to this the plaintiff objected. Under the circumstances, I think the Magistrate's judgment cannot be interfered with. I am inclined to go with Mr. Benjamin so far, that, if it had been clearly established, and if the Magistrate had found that the stallion had covered the mare, prospective damages might have been taken into consideration, and something might have been awarded, but no prospective damages have been established. I think, under the circumstances, we cannot interfere with the finding of the Magistrate upon

the facts, and it is only a question of facts. The appeal will be dismissed, with costs.

Maasdorp, J., concurred.

#### DU TOIT V. DZINQWA AND A.B.M. OF MATATIELE.

#### Magistrate's Court—Costs—Taxation.

*A Magistrate has jurisdiction to review the taxation of costs in his court allowed by his clerk.*

This matter came in review from a decision of the Assistant Resident Magistrate of Matatiele in reference to taxation of certain costs.

The matter, it appeared, arose out of a claim brought by applicant in the Magistrate's Court for £12 18s. 6d. for work and labour done and material supplied in the completion of certain building belonging to defendant at Mount Fletcher. Defendant admitted that he had agreed to pay £11 15s., but he put in a claim in reconvention for £10 5s. The Magistrate found for plaintiff for a certain amount, with costs, in convention, and for defendant for a certain amount, with costs, in reconvention. Plaintiff's costs were taxed by the Magistrate's clerk, and allowed at the sum of £18 11s. 9d. Upon review, the Magistrate struck out the expenses of two witnesses (£11 10s.), thus reducing plaintiff's taxed costs to £7 1s. 9d.

Mr. Benjamin was for appellant; Mr. Upington was for respondent.

Mr. Benjamin said the matter was brought under review by this Court by procedure laid down in *Knysna Municipality v Jackson and others* (6 Juta, 85). Counsel submitted that the Magistrate was wrong in disallowing costs that the clerk had already allowed. It was an unusual thing for a Court to interfere with the discretion of the Taxing Master in determining a question of costs.

[Buchanan, J.: The only question is whether these two witnesses were material.]

Mr. Benjamin said that plaintiff called the two witnesses to prove a certain agreement, and the Magistrate found that the agreement was not proved.

Without calling upon Mr. Upington,

Buchanan, J.: A case was brought by the present applicant against one Piet Dzingwa, in the Magistrate's Court of Matatiele, in which the plaintiff set up an agreement upon which he founded his claim. Witnesses were called to support the fact that such an agreement had been entered into, and the Magistrate found that no such agreement had been entered into, but on



other grounds he gave judgment for the plaintiff for a portion of his claim. The matter went before the Magistrate's clerk for taxation of costs, and under the 36th Rule of Magistrates' Courts, the clerk, in taxing the costs, ought to allow the parties any witnesses whose evidence was necessary to establish the claim brought by the plaintiff. The clerk allowed the expenses of two witnesses who had been called by the plaintiff to prove the agreement. The matter came in review before the Magistrate. The Magistrate, who had heard the case, held that these two witnesses were not necessary, and that the plaintiff was not entitled to include their expenses in his bill of costs, and he therefore amended the clerk's taxation by striking out these witnesses' expenses. It is candidly admitted now that the witnesses were not necessary to establish the case set up by plaintiff. We cannot now interfere with the Magistrate's decision in this case. The proper procedure, although not recognised by the Rules of Court, has been followed in this matter. It is on the ground that the witnesses have been proved not to have been necessary that the application is refused with costs.

Maasdorp, J., concurred.

#### VAN BLOMMESTEIN V. VAN DER VENTER.

This was an appeal from a judgment of the Acting Resident Magistrate of Bredasdorp in an action brought by Van Blommestein against Van der Venter to recover £5 damages for trespass by defendant's goats on plaintiff's land on four occasions. Van Blommestein had also sued for £1 expenses of assessors, but he had withdrawn that part of the claim.

The Magistrate found that damage had only been proved on the last occasion, and he gave judgment for one-fourth of the amount claimed, viz., £1 5s., but made no order as to costs.

The appeal was of a two-fold character. Van Blommestein appealed on the question of costs, and Van der Venter appealed on the merits.

Mr. McGregor was for Van der Venter; Mr. W. Porter Buchanan was for Van Blommestein.

Counsel having been heard in argument on the facts,

Buchanan, J.: An action was brought in the Magistrate's Court for £3 damages for trespass and £1 expenses for assessing the damage caused. The Magistrate heard the case, and he gave judgment for £1 5s. without giving any costs. Against that decision an appeal has been brought on the merits of the case for the defendant, and a cross appeal on the question of costs by the plaintiff. There is no doubt a conflict of evidence between the plaintiff's and defendant's witnesses as to whether any

trespass took place, but the Magistrate, having had the witnesses before him, has found as a fact there was a trespass, and, though the Court is not precluded from setting aside on appeal on a question of fact, still I think the probabilities would support the Magistrate's finding as to trespass having taken place. Judging from the record, I think the Magistrate's decision was perfectly right, that a trespass had taken place. Then, as to the amount awarded, the plaintiff claimed £20 originally, but the assessors reduced his damages to £5. The Magistrate has reduced the damages to £1 5s., because there were no less than four separate trespasses, and he presumes that the damages assessed by the assessors were for the whole four trespasses, and the plaintiff had made no complaint as to the first, second, and third trespasses. I do not follow the Magistrate's reasoning in this respect, but still there has been no cross appeal on the amount awarded. The Magistrate took one-fourth of the amount awarded by the assessors, and that judgment has not been appealed against, and it still stands. The remaining question is whether the Magistrate ought not to have given costs when he found for the plaintiff for £1 5s. Both on matters of fact and questions of costs the Court is very loth to interfere with the discretion of the Magistrate. In this case the Magistrate has refused costs, because he says that the plaintiff's overseer did not act in a straightforward manner when the defendant's goats trespassed on the first, second, and third time, in not giving notice to the defendant. Well, I do not think there has been any want of straightforwardness on the part of plaintiff's overseer in not advising the defendant every time his goats trespassed, but when they trespassed on the fourth occasion, and did considerable damage, then he instituted these proceedings. Then the Magistrate goes on to say that the plaintiff acted in an off-hand manner. But there is no evidence of that. Then he alleges that the plaintiff must have acted in spite. He may have known something of the parties which is not on the record. I have listened to the evidence being read in this case, and I must say I find no grounds whatever for holding on the record before me that there are any grounds for saying that there was spite on the part of the plaintiff. I certainly think the Magistrate ought to have given costs in the case, but I still would have been loth to interfere with his discretion if I could have found any firm ground to justify the Magistrate in exercising his discretion. Judgment ought to be entered in the Court below for the plaintiff for £1 5s., with costs in the Court below. The appeal has failed on the merits in this case, and I think the appellant (defendant in



the Court below) must pay the costs of appeal. The judgment of the Court below will be altered to judgment for the plaintiff for £1 5s., with costs, and the appeal will be dismissed, with costs, defendant in the Court below (appellant on appeal) to pay the costs of appeal.

Maasdorp, J., concurred.

#### AMERIKA V. GROBBELAAR.

This was an action brought by the plaintiff against the defendant for transfer of certain property, failing which a compliance of the contract.

The plaintiff's declaration was as follows:

1. Plaintiff is a coloured farm labourer. Defendant is a retired farmer.

2. Both plaintiff and defendant reside at or near Riebeeck West, in the Malmesbury Division.

3. On or about the 1st February, 1899, the defendant, by verbal agreement, contracted and agreed with the plaintiff to sell, and did sell, to the plaintiff, and the plaintiff agreed to purchase, and did purchase, the portion at that time occupied by and in the use of the plaintiff, extending from the street side to a distance of 101 feet by 53 feet in width of erf, No. 2, also known as Vinknest, in the village adjoining Riebeeck West, for the sum of £30 sterling, upon the terms and conditions following viz., that the plaintiff should pay the purchase price by him and his family rendering certain services to and performing work for defendant and by payments in money as he could find same.

4. The plaintiff by cash payments and wages has paid £12 of the purchase price.

5. All conditions have been fulfilled, all things happened, and all times elapsed to entitle the plaintiff to have the said contract completed and performed, and transfer of the said property given by the defendant to the plaintiff, and though the plaintiff has always been ready and willing to do all things required of him by the said contract of sale and purchase, and before action tendered, and still tenders, the balance of the purchase price, yet the defendant has refused and neglected to complete and perform his said contract entered into as aforesaid.

Wherefore the plaintiff prays: (a) That the defendant be ordered forthwith to give transfer and conveyance to him of the aforementioned property; (b) failing compliance with which, cancellation of the contract, return of the money paid under the contract, and £60 as and for damages for breach of contract; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1 and 2 of the plaintiff's declaration.

2. As to paragraph 3 thereof, he says that on or about the said date he entered into an agreement for the provisional sale of a certain portion of the said erf with one Asia Amerika, not the plaintiff. The portion as provisionally sold was that in the occupation of the purchaser at the time up to ten feet below a certain well thereon.

3. The purchase price of the said portion was, under the said agreement, to be the sum of £30, with 6 per cent. interest thereon, per annum; should the seller demand the same, and it was a term of the said agreement, that the seller, i.e., the defendant, retained full owner's rights on the said erf and house as long as he lived.

4. Another term of the said agreement was that the purchaser bound himself and his family to work for the seller, when the latter required them to do so, for the same wages as could be obtained from others, and that payments on account of the said purchase price were to be made only by way of work done by the purchaser or his family.

5. The seller had the right under the said agreement to cancel the said provisional sale if the purchaser did not fulfil the conditions thereof, e.g., if he hired himself to others, or upon three months' notice, written or verbal, and the purchaser also had the right to cancel the said agreement at any time. The said agreement was embodied in a document signed by the defendant, whereof a copy was handed to the said Asia Amerika and to the terms whereof the defendant craves leave to refer at the trial.

6. Save as aforesaid, the defendant denies paragraph 3 of the declaration.

7. As to paragraph 4 thereof, the defendant admits that the said Asia Amerika and his family did work for him to the value of £12, but otherwise the defendant denies the said paragraph.

8. He denies paragraph 5, save that he admits the tender of £18 in cash, and his refusal to accept the same or to pass transfer of the said property.

9. The said Asia Amerika and his family frequently refused to work for the defendant when called upon to do so, and the defendant, in or about November, 1905, gave the said Asia Amerika notice in terms of the said provisional agreement that he cancelled and did cancel the said agreement by reason of the said breaches thereof, and the defendant at the same time tendered to return the said £12, for which work had already been done, but the said Asia Amerika refused to accept the same. The defendant has always been, and still is, willing to refund the same sum to the said Asia Amerika.

10. Thereafter in or about January, 1906, the defendant sold the said property to his son, C. A. Grobbelaar, jun., to whom transfer thereof was duly passed, on or about the 22nd March, 1906,

and the said Asia Amerika hired the said property from the defendant's said son from the 15th January, 1906, at a rental of 12s. a month.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

Mr. Pohl was for the plaintiff and Mr. Burton was for the defendant.

Hopley, J., after hearing the evidence, and counsel in argument on the facts, gave judgment for the defendant with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

CARELSE V. ESTATE DE VRIES. { 1906.  
Aug. 28th.  
Sept. 3rd.

This was an action brought by Mary Elizabeth Carelse, of Cape Town, against the executors dative of the estate of the late Marthinus Christian Terence de Vries, who died intestate on the 13th September, 1905.

The plaintiff, in her declaration, stated that on or about the month of March, 1884, De Vries, on promise of marriage, seduced her, and thereafter cohabited with her up to the time of his death. Plaintiff had had several children, of whom De Vries was the father, and there were now living as issue of plaintiff and De Vries seven children, of whom the eldest was 20 and the youngest four. De Vries did not fulfil his promise to marry the plaintiff, who did not discover until a year after the seduction that De Vries was a married man. Plaintiff was in impoverished circumstances, and wholly unable to provide for or support herself or her children, save as to the two eldest children, who were earning sufficient to maintain themselves. The assets in the estate were amply sufficient to provide for the support and main-

tenance of the remaining children. Plaintiff claimed in her individual capacity £500 damages for seduction and breach of promise, and in her capacity as mother and natural guardian of the children claimed an order for payment of £28 per month, or, alternatively, that the defendants be ordered to pay into the hands of trustees such sum as will yield interest at the rate of £28 per month for such maintenance, which sum had been regularly paid by De Vries for a considerable period prior to his death. Alternatively, the plaintiff claimed, if not entitled to claim such maintenance, that the defendants be ordered to pay such sum as damages.

In their plea the defendants admitted that the income of the estate was at present sufficient for the support of deceased's legitimate children, but the estate was almost entirely dependent for the present upon certain income which it enjoyed from the estate of the deceased's father and his predeceased spouse during the lifetime of the former, who is now nearly eighty years of age. At the death of the deceased's father, the estate would be substantially diminished, and it was doubtful if it would be sufficient for the support of the eight legitimate children, of whom four are minors. Defendants, without admitting any liability for the sum claimed for seduction and breach of promise, pleaded that, in any event, the claim was barred by prescription. They denied the validity of the claim for maintenance, and said that the amount claimed was unreasonable and excessive, having regard to the value of the estate. Should the Court hold that the plaintiff was entitled to claim maintenance on behalf of the minor children, the defendants contended that the allowance should be limited to the lifetime of the deceased's father, or that defendants should be at liberty at any time to apply for a reduction in the amount fixed.

Mr. Close was for the plaintiff; Mr. McGregor (with him Mr. Swift) for the defendants.

Mary Elizabeth Carelse, the plaintiff, said that she met the late Mr. De Vries in 1884 and became intimate with him. She understood that he was a single man. He promised to marry her, and on that she allowed him to seduce her. When the first child was two weeks old she found that De Vries was a married man. He always made her a regular allowance, and in all eleven children were born, of whom seven were alive.

By the Court: De Vries was a chemist. He continued to live with his wife.

Continuing, witness said that the late Mr. De Vries allowed her £4 10s. a week, and he also paid the rent and for the schooling of the children. Last year she received a telegram from Mrs. De Vries, informing her that Mr. De Vries

had died. She went out to Claremont where he was living, and her children went to the funeral. After the death of the late Mr. De Vries she received small amounts from his father, but the old gentleman had now ceased to support her.

In cross-examination, she said that she was in a tobacco-shop in Plein-street when she met the late Mr. De Vries. Her parents were both dead, and she was at that time living with a brother. De Vries told her he lived over the chemist's shop in Grave-street (now Parliament-street). In November they went to live together. Two weeks after her first child was born she found out that De Vries, who had repeatedly put off marrying her, was married already. He said that his wife had found out all about her and threatened him with a divorce. Her two elder children were earning their own living. The eldest girl was earning £2 10s. a month and the eldest boy £8 10s., out of which he paid the house rent.

By the Court: She was earning no money herself—only looking after the house and the children. She used to take in sewing, but could get none now. She was 21 when she met De Vries.

Gerald E. D'A. Orpen, who represented Mr. Syfret in connection with the defendant estate, said that the present annual value of the estate was £787 net per annum from rents. When the rentals ran out and on the death of Mr. De Vries' father there would be some re-adjustment. Mrs. De Vries had eight children, seven of whom were still living with her. Mrs. De Vries required about £40 per month for house-keeping. Half of the estate belonged to Mrs. De Vries.

In cross-examination, he said that the rent of the one building was £110 per month, out of which old Mr. De Vries received £30 and the rates and taxes had to be paid.

Mr. Close, in argument, cited the case of *Levensvelt* (4 J., p. 64), where the relationship began in 1852 and continued till the death of the man in 1878, and the Court granted relief. In *Kramer v. Findlay's executors* (B. 1878, p. 51), the Court ordered a certain sum to be paid out monthly by way of damages for the seduction. On the question of prescription, he said that Holl Consultatie (Vol. I., No. 148) was against him, but on the other hand Voet (48, 5, 5) laid down that the period of prescription in cases of this kind was 30 years. On the death of the seducer he could not be ordered to marry the plaintiff, but an action lay against his estate for damages. There was no authority that the continued cohabitation would deprive the seduced party of her action. Schorer (Maasdorp's translation, p. 660) also laid down the period of prescription as 30 years. The payment had to be made out of the goods of the father.

Counsel further cited Voet (25, 3, 5; 34, 1, 3; and 38, 17, 8). As long as there were goods of the father, the children were entitled to maintenance out of those goods. (Matthaeus Paroemia 1, 18; also Justinian's Novels 89, 12, 6; Christinan 3, 143, 7, and Van Leeuwen's *Censura Forensis* 1, 3, 13, 7, and 1, 1, 10, 3.)

Mr. McGregor submitted that the period of prescription in those cases was five years (Holl Cons. I. 148; *Nassau la Leek* sub. voc. *defloratie* and *maagd*), De Villiers (*De injuriis*, pp. 228-230) did not accept the period of 30 years either. The 30 years' period mentioned by Schorer referred to the *lex Cornelia Stuprum* was based on the *lex Julia de Adulteris*, and the action under that law would be prescribed in five years. Voet (48, 5, 5) cited no authority (see also Dig. 48, 5, 29, 5 and 6). As to the breach of promise, that would be governed by the same rules as the seduction, especially where the case of a breach of promise of marriage did not come suitably or aptly from one who continued living with the party against whose estate she brought the action. The claim for maintenance could not be sustained in both cases in our Court (*Levensvelt's case* and *Kramer's case*) the executors submitted to the judgment of the Court, because in neither of those cases were there any legitimate children. Here there were legitimate minor children, as well as the illegitimate children. Counsel further referred to *Groenewegen ad Cod* (5, 27, 2).

De Villiers, C.J., said that if there was a conflict of authorities he personally would be inclined to give some maintenance out of the estate of the man who was the author of the children's being.

Continuing, Mr. McGregor said that Matthaeus (referred to by Mr. Close), stated the law of Friesland which was more like the Roman law than the law of Holland.

Mr. Close, in reply, cited *Carpzovius Crim. Quest.* (68, 3), and Van Zyl (p. 420).

*Cur. Adv. Vult.*

*Postea* (September 3rd).

De Villiers, C.J.: In the year 1884 the plaintiff, who was then 21 years of age, was seduced by one De Vries, who was then a married man with several children. She states—and there is no reason to disbelieve her statement—that she was not aware of his being married, and that she yielded to his solicitations on his promise that he would marry her. Two weeks after the birth of her first child she discovered that De Vries was a married man, but she continued to be visited by him, and had six more children, of whom he was the father. During his lifetime he always maintained the plaintiff and

the children, for whose maintenance he made her an allowance of £28 a month. He died intestate in 1905 without having made any provision for the further maintenance and support of the plaintiff and her children, and the object of the present action is to secure such maintenance out of his estate in addition to a sum of £500, which is claimed by way of damages for her seduction, and for the breach of De Vries' alleged promise to marry her. The defendants' plea, while admitting that the present income of the estate would be sufficient for the support of De Vries' children, states that the estate is subject to diminution, which may render it insufficient for the support of the legitimate as well as the illegitimate children of the deceased. The evidence, however, shows that there are more than sufficient assets for the support of all the children who require support. The plea further denies the liability of the estate for any part of the claims, and states, moreover, that the claim for damages is barred by prescription. Upon the question whether the obligation of a father to support his children passes to his heirs, the authorities are by no means agreed. Voet, in several passages of his Commentaries (notably in 33, 2, 82), maintains that the obligation ceases upon the death of the parent, while Groenewegen (ad. dig., 34, 1, 15) maintains the opposite view. The question was discussed in *ex parte Levenveld* (4, Juta, 84), but was not definitely decided as the executors consented to a sum of money being paid to the mother of the children for their past and future maintenance. In the previous case of *Kramer v. Findlay's Executors* (Buch. Rep. for 1878, p. 51), the executors raised no objection to monthly payments being made to the mother of the illegitimate child of the deceased. In the present case the executors object to the payment of any sum whatever for the support of the illegitimate children of the deceased, and the question must be definitely decided whether the objection holds good in our law. The obligation of a father to support his illegitimate children rests upon the ground that, as the author of their being, he is bound to assist their mother in keeping them alive and in health, and bringing them up as useful members of society. If it be held that this obligation ceases with the death of the father, it would follow that the obligation of a father to support his legitimate children ceases with his death. An unnatural father possessed of ample means might bequest all his property to strangers, and leave his own legitimate offspring unprovided for, and a burthen on the rest of the community. Under the Dutch law he was bound, at all events, to leave to his lawful children their legitimate portion, but as this obligation no longer exists in this

colony, the claim of legitimate and illegitimate children stands on the same footing. The difference between the Dutch authorities may, perhaps, be reconciled by confining Voet's statement as to the non-liability of heirs for maintenance due by the deceased to cases in which the inheritance accruing to the heirs is insufficient for the purpose. Under our law, as explained in *Fischer v. Union Bank* (8 Juta, 46), the executor stands on a very different footing from the heir of the Dutch law, and would not in any case be liable to pay more than he has actually received. Where the estate of the deceased is more than sufficient to pay for the support and maintenance, according to their condition in life, of his legitimate children, I am of opinion that under our law, it is competent for the Court to award to the mother of his illegitimate children, as their natural guardian, such sum as shall enable her to supply them with the means of subsistence, until they are old enough to earn it for themselves. To do more would be against the policy of the law, which discourages all illicit relations between the sexes; to do less would be absolute cruelty to the innocent illegitimate offspring, besides being a gross injustice towards the mother in throwing upon her the whole burthen of maintaining the children, for whose existence the deceased was primarily responsible. In the present case the deceased fully recognised his duty during his lifetime by allowing the plaintiff £28 a month for the maintenance of the children, but, for some unexplained reason, he neglected to make any provision for them after his death. The two elder children are old enough to support themselves, but some of the younger ones will for some years still require support. The estate of the deceased is amply sufficient to maintain his legitimate children in comfort, and provide them with a good education. The plaintiff, on the other hand, is in needy circumstances, and having personally to attend to the children, is wholly unable to earn the bare means of subsistence for them. Under all the circumstances, I am of opinion that the estate might justly contribute the sum of £500 towards the future support of the children. In regard to the plaintiff's claim for damages for seduction and breach of promise of marriage, the seduction took place twenty-one years before the death of De Vries, and during the interval he made ample provision for supporting her in comfort. After consenting to be kept by him as his mistress for that long period, she is not, in my opinion, entitled to damages for his alleged breach of promise to marry her, whatever the legal period of prescription for that form of action might be. The same remark applies with even greater force to her claim for damages for seduction. It is impossible to hold that the action was kept alive by his continued inter-



course with her. The cause of action arose when she was deprived of her virginity, and De Vries' subsequent intercourse with her did not add to his liability. On the contrary, by deliberately electing to receive favours from him, instead of breaking the connection and suing for damages for seduction, she reduced and ultimately extinguished her claim for damages. It is true that if she had sued him after the birth of her first child she would have been entitled not only to compensation for her seduction, but also for the lying-in charges and for the maintenance of the child. But she would not have been entitled on the birth of subsequent children to claim any further compensation for herself. Any claim she might have had would be, as mother and natural guardian of the children, to obtain that support for them which she was unable herself to render alone. That claim he fully satisfied during his lifetime. In this view of the case it is unnecessary for the Court to decide the question whether the claim for damages for seduction is barred by prescription. It is a question upon which great diversity of opinion existed among Dutch lawyers. Most of them class the action among the *actiones injuriarum*, but the action is really not founded on *injuria*. The term seduction presupposes consent on the part of the girl, and where there is consent there can be no injury. The action is *sui generis*, and was, according to Grotius (Intro. 3, 36, 8), allowed in the Netherlands, on account of the weakness of women. At first it was an action to compel the seducer to marry the woman, but, it being found that the effect was that many maidservants enticed the sons of honourable citizens into immorality, the seducer was allowed the alternative of making compensation in money. If the action were classed among the actions for injury, the term of prescription would be one year, but, according to the opinion of P. van der Meulen (1 Holl. Cons. 148), the true period is five years. Voet (48, 5, 5), on the other hand, maintains that the action can be brought within the full prescriptive period of thirty years, and he adds that it may be brought against the heirs of the seducer. In the case of *Kramer v. Findlay's Executors* (Buch. for 1878, p. 51), the action was brought after a considerable interval of time, but prescription was not pleaded. It would, moreover, appear from the report that the claim for damages for seduction was not included in the declaration, which was confined to a claim for maintenance for the child. The sum of £1 10s. per month was awarded, but the report must be mistaken in adding that it was by way of damages for seduction. What was probably intended was to give judgment for maintenance in lieu of damages. But, whatever the period of prescription might

be, I am satisfied that no Court of law would ever award damages for seduction under the circumstances disclosed in the present case. As to the claim for maintenance, there must be judgment for the plaintiff, as mother and natural guardian, for the sum of £500 for the support and maintenance of her five younger children, of which £100 must be paid to her forthwith, and the balance of £400 paid into the Guardians' Fund, with direction to the Master to pay to the plaintiff the sum of £80 at the end of the first year, with such interest as may then have accrued; the sum of £50 at the end of the second year; the sum of £50 at the end of the third year; and thereafter at the rate of £40 per annum, until the capital and interest shall have been exhausted. The costs of the action will be paid out of the estate.

His Lordship added that Mr. Justice Maasdorp, before whom also the case was heard, concurred in the foregoing judgment.

[Plaintiff's Attorneys: Fairbridge, Arderne, and Lawton. Defendant's Attorney: G. Trollip.]

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

KLEYNHAUS V. KLEYNHAUS ; 1906.  
AND PARSONS. { Aug. 28th.

This was an action for decree of divorce against the defendant on the ground of misconduct with the co-defendant, and £1,000 damages from him. The defendant counterclaimed for a decree of divorce from the plaintiff on the ground of misconduct.

Dr. Greer (with him Mr. Van Zyl) was for the petitioner; Mr. Burton (with him Mr. Lewis) for the defendants.

The petitioner, Theodorus Barnardus Kleynhans, stated that he was a farmer residing in the Barkly East district. He was married to defendant on November 2, 1891, but the marriage was an unhappy one, in consequence of his wife's jealousy. Shortly before the war the co-defendant, who was then about 20 years of age, came to live on his (plaintiff's) farm, Branksome, residing in the house as one of the family. In March last defendant refused to live with witness as his wife, and in May she suggested that they should part and divide the property. When the division was made she said she wanted a divorce as well. Witness made inquiries and as a result this action was brought.

Cross-examined: His wife often accused him of misconduct with various



women. He denied that he misconducted himself with a certain Mrs. Pretorius or with Tyna Kleynhans. He had never struck or kicked his wife.

Johannes J. Niewenhuis alleged that on December 22, 1905, he surprised the defendant and co-defendant in a compromising position.

Isak J. van Biljoen said he had seen Parsons kissing Mrs. Kleynhans, and had also seen them coming out of the former's bedroom together.

Dr. Greer closed his case.

Mrs. Katrina Wilhelmina Kleynhans, the defendant, stated that their married life had not been happy. Mrs. Martens told her that petitioner had made improper suggestions to her, but he denied it. During the war he admitted misconduct with Mrs. Pretorius.

Cross-examined by Dr. Greer: She denied that she offered a woman named Krokobell money if she would tell her (witness) something in connection with the case. Since she left the farm she had resided at Barkly East with one of her relations. Parsons had visited her at that house, but he had never stayed the night there.

Re-examined by Mr. Burton: Parsons visited her at Barkly East in connection with the present case.

Jacobus Johannes Parsons, the co-defendant, stated that he resided at the farm Kelvingrove, in the Barkly East district. It was about an hour and a half's drive from plaintiff's farm, Branksome. While he resided with Mr. and Mrs. Kleynhans they lived at times very unhappily together. On one occasion when Mrs. Pretorius was leaving the farm Branksome after a visit she kissed both witness and plaintiff, and when witness asked plaintiff why she did that, the latter replied that Mrs. Pretorius was very fond of kissing. Subsequently plaintiff informed witness that he (Kleynhans) had misconducted himself with Mrs. Pretorius. Witness knew of the quarrels between Mr. and Mrs. Kleynhans about Mrs. Pretorius. The first time witness heard that he was to be involved in the present proceedings was on May 29 last.

Cross-examined by Mr. Van Zyl: He was always on the best of terms with Mr. and Mrs. Mrs. Kleynhans. He had remonstrated with the former with regard to his immoral conduct. Witness denied that he had invented his evidence with reference to petitioner's repeated acts of misconduct. Witness denied that he had been discovered by Johannes J. Niewenhuis in a compromising position with Mrs. Kleynhans on the sofa in the dining-room. Witness kissed Mrs. Kleynhans when he left the farm, but he denied doing this frequently. He had never misconducted himself with defendant.

The next witness was a native woman employed by plaintiff during the war.

She alleged that she saw petitioner with a Bastard woman, under suspicious circumstances. Kleynhans had made improper overtures to her on more than one occasion.

A coloured mason, named Thomas Theron, residing in the Barkly East district, and his son Klaas, also gave evidence. The latter said he had been offered £30 to "keep out of the case"

William Pretorius said he had "cruised" through the whole of the Barkly East district. Together with his wife and seven children he went to live in a house on the farm Branksome, staying there from September, 1900, to March, 1901. At that time his wife was in a sickly condition, and was never well throughout that period.

Mr. Burton closed his case.

Buchanan, J., suggested that the parties might arrive at a settlement between themselves. They were both of them young, and at one time were in love with one another. They had had fifteen years of married life, and had three children, and for their sakes and for their own, he suggested that they should both of them forgive and forget. He would adjourn the case until the following day, and in the meanwhile they could talk the matter over, and he hoped that the solicitors on both sides would assist in bringing about an amicable understanding.

*Postea* (August 30th).

Mr. Burton said that he had been informed that the parties had unfortunately not been able to agree. He thought it right to say that he thought Mrs. Kleynhans would agree to a settlement on account of the children, but the plaintiff (the husband) would not hear of it.

The case was then proceeded with, and counsel were heard in argument on the facts.

Buchanan, J., said the plaintiff (the husband) brought an action against his wife for a decree of divorce on the grounds of her adultery, and cited Parsons as co-defendant. In answer to this claim, both the defendants denied adultery, and the wife brought a claim in reconvention for divorce on the grounds of the husband's adultery. Now, when a person went into court and asked for a divorce, it remained a very serious consideration with the Court that the person making such application came into the Court with clean hands. It was therefore desirable to look into the charges brought by the wife against the husband, and see if the evidence substantiated them. The charges were that he had committed adultery with three different people. Sitting as a juror, one would have to ask himself if the charges had been proved. He had very carefully followed up this case, and as a juror, he ar-

rived at the conclusion that the plaintiff was lewd, vicious, and unfaithful to his marriage vow, and he therefore found on the facts before the Court that the plaintiff was not entitled to succeed. He would have been glad to have allowed the case to remain there, but for the claim in convention; and here again he had followed the case very faithfully, and had reluctantly had to find that the defendant had been unfaithful to her husband, and he thought it would have been impossible for anybody who had followed the case to arrive at any other conclusion. On the claim in convention, he gave absolution from the instance, with costs against plaintiff, and on the claim in reconvention, there would also be absolution from the instance, the first-named defendant to pay her costs. Now the Court had next to consider the custody of the children. If either party had been innocent of the charges alleged against them, they would have had the custody of the children, but they were not, and the Court had to look to the interests of the minors, and he decided to give the plaintiff the custody of the two eldest boys, and the defendant the custody of the girl and the youngest boy, and the plaintiff would have to pay to the defendant the sum of £3 per month for each child until they reached sixteen years of age. He thought it right to say that after the evidence disclosed, he strongly urged that the parties might come to some amicable arrangement. He was not surprised at the wife being willing to come to a compromise, knowing that the mother's affection for the children would accentuate that. He really did not think that the resistance would have come from the plaintiff. He apparently thought he was going to get a divorce, and completely overlooked his own misconduct. He thought it would have been far better if the parties had agreed to allow bygones to be bygones, and attempt to live together again, knowing what they did about each other, for the sake of their children. Parsons would also have to bear his own costs.

[Plaintiff's attorneys: Van de Byl and H. de Villiers; defendants: Syfret, Godlonton and Low.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLE.]

	1906.
CALEDONIA SHIPPING AND SALVAGE CO. AND COLONIAL FISHERIES CO. V. EAST LONDON HARBOUR BOARD.	Aug. 29th.
	" 30th.
	" 31st.
	Sept. 3rd.
	" 4th.
	" 5th.
	" 6th.

Harbour Board—Harbour Master  
Act 36 of 1896—Negligence  
*Ultra vires*—Servants' scope  
of employment.

*The 38th section of Act 36 of 1896 enacts that if it shall appear necessary to the Harbour Master of E. L., he may order any vessel to shift or change her berth to any other berth to be pointed out. The plaintiffs' vessels were duly licenced to lie up in the Buffalo River, and they were duly and safely moored in proper berths assigned to them. A regatta being about to be held in the River, the Harbour Master ordered the temporary removal of the vessels, and as he knew that they had no master or crew on board, he employed servants of the Board to attach them to a hulk lying nearer the side of the river. There was negligence in attaching these vessels to the hulk, and the Court, moreover, found that the work was done in a negligent manner. A freshet arose, causing one of the vessels to be stranded and thereby open to drift into the sea.*

Held, that the Board was liable for the damage.

These actions were consolidated for the purposes of the hearing. The Caledonia Company sued the East London Harbour Board for £4,000 damages for

loss of a tug, and the Fisheries Company sued the Board for £345 for damage to a hulk and loss of coal.

The declaration of the Colonial Fisheries Company was in the following terms:

1. Plaintiffs are a limited liability company incorporated under the Companies' Act No. 25 of 1892, and having their registered office at East London.

2. Defendants are the Harbour Board of East London, as constituted under the Provisions of Act No. 36 of 1896.

3. Plaintiffs are, and were, at the dates hereafter referred to, the owners of the wooden ship "Nini," then used as a coal hulk.

4. On or about 6th October, 1905, the said ship was lawfully lying, well, properly, and sufficiently moored in a clear berth in the Buffalo River, East London.

5. On or about the said date, defendants, through themselves, their agents, or servants, wrongfully and unlawfully, and without cause and without the consent of plaintiffs, removed the said ship to a new berth in the said river, and wrongfully, unlawfully, negligently, insufficiently, and without due and proper care, attached and fastened her alongside another vessel, to wit, the Alpha, to which the said defendants also fastened and attached another vessel, to wit, the Caledonia.

6. On or about the 11th of October, and by reason of the the said wrongful and unlawful removal, without cause, and wrongful, unlawful, negligent, and insufficient attachment and fastening without due and proper care, or one or other of them, the said ship broke adrift after a heavy rain and floated down the aforesaid river, and ultimately washed up on the west bank thereof in a seriously damaged condition, and is thereby lost to plaintiffs.

7. At the time of the wrongful and unlawful acts complained of, the said ship contained a considerable quantity of coal, whereof 50 tons, of the value of £100, are submerged, and wholly lost, and of the remainder, to wit, 120 tons, the cost of removal will amount to £30, over and above the ordinary cost of removal when the said ship lay at her anchorage.

8. The value of the said ship and her moorings at and before the time of the said wrongful and unlawful acts was the sum of £215.

9. Plaintiffs are entitled to claim the said sums of £215, £100, and £30 respectively, but defendants wrongfully and unlawfully refuse to pay the same.

Wherefore the plaintiffs pray (a) Judgment for the sums of £215, £100, and £30 respectively; (b) interest *a tempore morae*; (c) alternative relief; (d) costs of suit.

In their declaration the Caledonia Company said they were a joint stock company incorporated in Edinburgh

under the Companies Acts. At the dates stated the plaintiffs were the owners of the iron or steel steam tug Caledonia. The allegations were identical to those in the Fisheries Company's declaration, except as to what happened after the flood. In paragraph 6 it was alleged that, after wrong and unlawful removal by the Board, "the said tug broke adrift after a heavy rain and floated down the river, and was wholly lost." "By reason of the said loss of the said tug," the declaration continued, "plaintiffs have suffered damages in the sum of £4,000, being the value of the said tug and appurtenances, for which sum defendants are liable, but which they wrongfully and unlawfully refuse to pay." Plaintiffs claimed judgment for (a) £4,000; (b) interest *a tempore morae*; and (c) costs of suit.

To the Caledonia Company's claim the defendants pleaded as follows:

1. The defendant Board admits the allegations in paragraphs 1, 2, and 3 of the declaration.

2. With regard to paragraphs 4 and 5 the defendant Board admits that the said tug was lying moored in a certain part of the Buffalo River previous to and on the 4th October, 1905, but does not admit that she was there moored so well, properly, and sufficiently as to be safe there, in the circumstances which subsequently occurred, as hereinafter set forth.

3. On the said 4th October, for the purpose of clearing the course before a regatta which was not under the control or management of the defendant board, the said tug was, not by the act of the defendant Board or of anyone acting within the scope of his authority on its behalf, moved from that berth lower down the river alongside the Alpha, alongside which the Nini was thereafter also moored, and there the said tug was moored at least as strongly and safely as she had been moored before she was moved. Save as aforesaid, the allegations in paragraphs 4 and 5 are denied.

4. The defendant Board says that the tug was so moved at the request, and with the knowledge and consent, of one Womersley, representing the firm of Palmer, Womersley and Co., and acting as the agent of the owners of the said tug.

5. The defendant Board further says that the above-mentioned moving and re-mooring were carried out executed with all due and proper care and skill, according to the custom of the port, by a properly qualified pilot, duly licensed for the port of East London, which is in terms of section 87 of Act No. 36 of 1896, a compulsory pilotage port, and the defendant Board is not responsible for any loss, damage, or accident that may occur through the act, omission, or default of any such pilot.

6. The defendant Board denies paragraph 6, save that it admits that in the early morning of October 11, 1905, by reason of an abnormal, extraordinary, and excessive flood or freshet which, throughout the night of October 10, swept down the river after heavy rains, and which it was not possible to provide against or control, the said tug broke adrift from its moorings, floated down the river, and was, as far as the Board has knowledge, lost.

7. The defendant Board has no knowledge, and does not admit, the alleged value of the said tug and appurtenances, and denies that it is liable to make good the sum of £4,000, or any part thereof, to plaintiffs. The Board admits the alleged refusal to pay, but denies that such refusal is wrongful or unlawful.

8. In the alternative to so much of paragraph 3 hereof, as sets forth that the tug Caledonia was moved and moored, as therein alleged, not by the act of the defendant Board, or of any one acting within the scope of his authority on its behalf, and in case the said moving and mooring be held to be the act of the defendant Board, it says that the said tug was lawfully moved and moored as aforesaid in the exercise of the powers of control and management vested in the Board by the aforesaid Act and the regulations lawfully made thereunder, and that the Board is not liable in the premises for any loss or damage which the plaintiff may have sustained.

Wherefore the defendant Board prays that plaintiff's claim may be dismissed, with costs.

The plea to the Fisheries Company's claim was in similar terms, except that no allegation of knowledge or consent on the part of the plaintiffs was made.

Mr. Searle, K.C. (with him Mr. Benjamin), for plaintiffs; Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan), for defendants.

Captain Scholefield said that he was a master mariner, and was employed by Palmer, Wormesley and Co., of Port Elizabeth, as manager of their stevedoring business. He had charge of the firm's plant. He took the Caledonia to East London on August 30, 1905, for the purpose of laying her up for safety. The tug was of composite construction—steel frames and wooden plankings. Witness described the moorings of the Caledonia in the berth to which he was directed by the Harbour Board's pilot (Barrie) in the Buffalo River. A caretaker was left in charge of the tug. The anchor was exceptionally large, and, in fact, he was ridiculed by Pilot Parrie for bringing such an anchor. The tug was moored with her bow up the river; he knew of no better way of mooring. He did not think it was right to moor a boat with her stern up the river. The Caledonia's tonnage was 47-30, and her

length 69 feet. Witness was shown a model of the way in which the Caledonia, Nini, and Alpha were moored when the flood took place, and he said that he objected to such mooring. He did not think that two large ships should have been moored in such a way to a small ship like the Caledonia. Again, he did not think that the Caledonia should have been moored with her stern up the river.

Archibald Marshall, a mate, also gave evidence as to the removal of the tug from Port Elizabeth to East London.

James Anderson, a shipwright, employed by Mr. Godfrey (engineer in charge of the Buffalo Bridge construction works), said that he had charge of the Government hulk Alpha. Witness spoke to the change of berths. The Caledonia, he said, had slipped her anchor higher up. The tying up of the Caledonia was done by Harbour Board people under the direction of Pilot Barrie. On the same day the Nini was brought down, and was slacked down alongside the Alpha. The ships were put to these fresh moorings on the Friday. The regatta took place on the following Monday. There would have been ample time to take the ships back to their original moorings. On Tuesday night about 9 o'clock he heard the ropes of the Nini parting. The Nini broke away, and came back several times and struck the Alpha three times. Witness went aft, and found that all the chains attached to the buoy had gone. Alpha's, Caledonia's, and Nini's. The Alpha immediately began to drag. The Nini sheered off towards the west bank, and drifted down the river among some piles. The Alpha dragged down the river with the Caledonia, and swung round about three times, with the result that the Caledonia was brought round the bow to the Alpha's port side, and went down the river on the Alpha's port side. About midnight the Alpha got down to the pontoon with the Caledonia, held only by the breast ropes, ranging about heavily. This continued until about half-past three, when the Caledonia broke adrift, went out in mid-stream, and drifted down the river, when he lost sight of her. Witness thought the mischief was caused by the Nini striking the Alpha in her bow, causing the Alpha to drag. Witness believed that a tug could have come to their assistance. The river began to rise about half-past six on Tuesday evening, but the current did not become really strong until about three o'clock next morning.

Joseph James Godfrey, engineer in charge of the Buffalo Bridge works, said that he had been engaged on this work about four and a half years. Some two years ago he objected by letter to the Port Captain to a steam lighter being tied to the Alpha. If permission had been asked to tie the Caledonia or



Nini to the Alpha, he should not have given his consent. About £30 or £40 damage was done to the Alpha. Some damage was also done to the staging by the Nini. The Government had made a claim for this damage upon the Harbour Board, and negotiations were pending.

Cross-examined: Witness considered that he was entitled to safeguard the interests of his department, and he had a right to protest against anybody tying other vessels to the Government's property.

By the Court: Witness was told before the flood occurred that the other ships had been fastened to the Alpha. He did not raise any objection.

Harry Blandford Womersley said he represented Palmer, Womersley and Co. in East London. Before the regatta he heard that the Caledonia was to be moved. He communicated with Captain Munn. Witness informed Captain Munn that he did not mind where the tug was put, as long as she was in a safe berth. Witness, after the disaster, saw Pilot Barrie, who pointed out the hulk Nini as the cause of the mischief.

Cross-examined: Witness did not remember having asked Captain Munn when he was going to take the Caledonia off the regatta course. He asked Captain Munn when he was going to shift the Caledonia. Witness did not remember having suggested to Captain Munn that the Caledonia should be put alongside the hulk Alpha.

Samuel John Womersley, of the firm of Palmer, Womersley and Co., of Port Elizabeth, said that they were agents of the Clan Line. They did not know the Caledonia was not insured until November. The value of the tug was £4,900.

Robert B. Jackson, Ferry Superintendent, East London, said that the original moorings of the Caledonia were very heavy for such a vessel. The Caledonia was fastened bow down the river. He did not think that was the correct way of mooring a vessel, except alongside a wharf. There was heavy rain on the day following the regatta. The river rose about midnight, the rise being gradual. The current was strongest about 3 a.m. on Wednesday, the rate being about 13 knots. Witness did not know of any reason why the Harbour Board's tug could not go up the river on the night of the 10th October. Between two and three a.m. he drew his ferry boats ashore. As he was beaching the last boat he saw the Caledonia floating down.

Spiera Carroll, fisherman, James Henry Carey, and George Wm. Phoebe, all of East London, were called to speak mainly in regard to the tug Caledonia.

George Edward Austin, salvage contractor and shipwright, East London, gave details as to the specially strong

moorings which were laid for the hulk Nini.

Witness was cross-examined at some length in reference to certain wire-ropes which had been used for the first and second moorings of the Nini. He considered that the first wire would, with the aid of the anchor, have been sufficient to enable the Nini to ride out the flood.

Mr. Schreiner: I put it to you that the Nini, riding to a 4-inch wire, was riding to a stronger mooring than she was at the first mooring?

Witness: I cannot agree that it was a 4-inch wire. I agreed with all the surveyors, and they did not find that. There was some talk at the time of its being a 4-inch wire, but we all agreed that it was  $3\frac{1}{2}$  inch.

In further cross-examination, witness said that he did not think the Nini was riding more strongly at the second mooring than the first. He had had about eight years' acquaintance with the Buffalo River. He knew that anchors dragged in places there. He did not think the Caledonia would have dragged from her first moorings during the flood; her anchor was in blue mud, and would not have shifted. If the Caledonia had remained at her first berth, there would have been considerable risk of collision from the New Blessing, and the Caledonia might have been pushed on to the west bank. He did not remember having seen ships moored in the river, stern up, as the Caledonia was, except ships at the wharves. He remembered now, however, having seen H.M.S. Pelorus moored in the river stern up. He saw three ships moored stern up in the photograph of the Buffalo River produced. He still thought the fact of the Caledonia being moored stern up was the principal reason of the breakage of her stern moorings.

Albert Edward Brown, a storeman employed by the Colonial Fisheries Co., said that he saw Pilot Barrie and other employees of the Harbour Board taking steps to move the Nini from her moorings early in October. Permission was not asked for. After the Nini had stranded, about 50 tons of Welsh steam coal were submerged or lost. It would cost 4s. to 5s. per ton extra to get out the rest of the coal.

Hopley, J., suggested, as a means of shortening the evidence, that the parties should agree upon some figure as the value of the coal, say £90 or £100.

Counsel accepted this suggestion.

George Frederick Monck, manager of the Fisheries Company, said he was not consulted by the Harbour Board or anyone else as to the moving of the Nini from her moorings in October. The Nini was brought up in the company's books at £300.

Cross-examined: Witness heard that the Nini was being shifted, and he raised no objection at the time, though he



made a report to the company. He had not made any complaint to Captain Munn that Austin had not properly moored the Nini in the first instance. The contract stipulated that the work must be done to the satisfaction of Captain Munn.

By the Court: Witness took no part in getting up the regatta. He had expected that the Nini would be moved to clear the course, as was done in previous years. The storeman reported to him on the day the Nini was moved, and witness raised no objection until after the hulk had stranded.

John Gilbey Wiggins, local attorney for plaintiffs at East London, said that during part of 1904 he was chairman of the Fisheries Company. Some question arose in 1904 as to moving the Nini to clear the course for the regatta, and he communicated with Captain Munn by telephone, in these terms: "We have no objections, provided you take responsibility for her, and undertake her safe return to her moorings." Captain Munn said, "Oh, yes, that is all right."

In cross-examination, witness said he was quite sure that he had this conversation with Captain Munn, and not with the secretary of the regatta.

[De Villiers, C.J.: It does not carry the law much further, whether the port captain said so or not.]

George Smith, manager at East London for Richard Irwin and Sons, said that about half-past eight on the night of the flood he saw the hulks Nini and Alpha ranging. He tried to communicate with the port office, but could get no answer by telephone.

Joseph Martyr said that he resided at Kenilworth, and was a master mariner, and one of the younger Brethren of Trinity House. He had during the past fortnight, visited East London. Vessels moored together, as the Caledonia, Nini, and Alpha had been, when the flood occurred, were decidedly not as safe as vessels in separate berths. He considered that it was decidedly wrong to tie the Caledonia stern up the river. The Caledonia should have been bow up the river. As the Nini was moored, she would be taking the pressure of both the Alpha and Caledonia. He had inspected the chains of the Caledonia, and found them to be amply sufficient for her first mooring—sufficient, in fact, for a ship double her class. There ought to have been some means provided on board for enabling the Caledonia to be brought up in case she broke her moorings. He thought the Caledonia would have been quite safe on her first moorings, with her anchor and cable, in case of a freshet. He had often moored vessels abreast in the Buffalo River, and in the Thames. There were no freshets in the Thames, because they were con-

trolled by locks. He did not know the nature of the bottom of the Buffalo River. In his opinion it would have been better to have used a "stock" anchor than a "stockler," which was used.

Captain W. E. Cliff, Harbour Master at Port Elizabeth, stated he knew the Buffalo River well. He had supplied the moorings to the Caledonia. They were much heavier moorings than her tonnage required, and were quite sufficient to hold her in the river. It was more dangerous to moor three vessels alongside each other than to give them separate berths. He thought the Caledonia was quite as safe with a stockler's anchor as with a stock anchor. He valued the Caledonia at £3,800.

William Gowan, at one time Lloyd's surveyor, stated that vessels moored as these were were not safe, because they were entirely dependent on the Alpha. The long cable would allow the Nini to range and part her breast ropes, and then bump against the Alpha. He thought a 10-inch coir rope was sufficient to attach the Caledonia to the Alpha. He objected to the way the Caledonia was moored. In cross-examination, the witness admitted that the Chamber of Commerce at East London agitated to get him out of his position. The Harbour Board also had something to do with it. He often visited East London.

Captain Harrison, marine superintendent for the Union-Castle Company, at East London, gave corroborative evidence, and added that on the night in question the river was running very strong.

In answer to Mr. Schreiner, the witness said he knew the port of East London for many years. He had never witnessed such a rough time as he did on the day in question at East London, and he hoped he would never see such a time again. Witness did not suggest that the Port Captain had been guilty of negligence in putting the three vessels together.

In reply to Mr. Searle, the witness said the Port Captain should not have left the vessels in that position, as they knew the river was coming down.

[Hopley, J.: Did you expect trouble that night?—Yes, and made arrangements for it.

What arrangements did you make?—We put out extra lines.

Did you sleep aboard?—No, but I was convenient if wanted.

Mr. Searle closed his case, and intimated that the correspondence between the parties was being arranged, and would be put in.

Captain Munn, Port Captain at East London, stated he was a master mariner, and his last command was the Trojan. He had been Port Captain for twelve

years, but knew the port well before that, having visited it in the Trojan and other craft. The plans of the port as put in were correct. As Port Captain, he had control of the harbour. On the occasion of the regatta in 1905, he received no instructions from the Board with regard to giving facilities. What he did, he did of his own accord. He had never heard of any application being made to the Board for facilities. The bottom of the river was not good holding ground. He had been averse to putting hulks in the river. There were screw pile moorings, which were for the purpose of securing large craft. The Nini had been secured to screw-pile moorings. He remembered when the Caledonia was brought round from Port Elizabeth. Witness sent Pilot Barrie to superintend her mooring. The port was a compulsory pilot port, but he had the right to allow small vessels to go in and out without a pilot in fine weather. He selected the position at the second creek because he understood the Caledonia would not be required for some time. She was well found in appliances. The Caledonia arrived on August 30. The Nini had been there for some years. He had taken exception to the mooring appliances of the Nini. Witness requested the owners to get new rope for her. Witness saw the wire produced when she was moored in August. On the day witness went aboard the Nini, the river was very quiet. He saw the wire produced on board, and it certainly seemed an old wire. He did not consider it could bear the strain of the Nini. He presumed it was just a steady wire, for fear a gust of wind might come down. In his opinion, even in the moorings which she originally occupied, she would have been swept away through the river coming down.

[Hopley, J.: What is the width of the river where she was moored?]-250 feet.

Witness (continuing) said he thought it was probable that the "New Blessing" would have collided with the Caledonia, and there would have been a snapping of the weakest link in the cable. During further evidence, witness described the effects of the storm on October 10 as disclosed from observations on the river. He denied plaintiffs' allegation that there was negligence or want of proper care in fastening the Nini or Caledonia to the Alpha.

Cross-examined: Witness had power to move a vessel without consulting the Harbour Board. The boats were moved by Harbour Board employees during working hours. He did not know whether the members of the Board were aware that the boats would be shifted for the regatta. He had not specially brought the matter under the attention of the Board. The Nini was specially moored in August at his request, so as to make it quite safe. The work was

done by Austin, and witness was quite satisfied with the fresh moorings. Witness did not suggest that anything that passed between himself and Womersley shifted the responsibility as to the lower moorings. But it was with Womersley's knowledge and consent that the Caledonia was taken lower down. Witness had no communication with the Fisheries Company as to moving the Nini, but he thought the company had knowledge through their Mr. Brown. The Nini had been moved on similar occasions in previous years. He remembered Mr. Godfrey making objection some years ago to other vessels being tied to the Government hulk Alpha. The matter was adjusted on that occasion. Mr. Godfrey making objection some years ago to other vessels being tied to the Government hulk Alpha. The matter was adjusted on that occasion.

Further cross-examined, witness said that the Nini was slacked down and her stern anchors were not of much use to her. These anchors were for the time being dispensed with. There was no strain on any wire or cable, because the ship was quite stationary. He had intended to put the two ships back as soon as possible. Witness was not at the regatta. He was at the Port Office at 11.20 on the night of the disaster. On Tuesday, the 10th October, there was a strong south-easter blowing, and rain was falling. In the afternoon he had advised the berthing masters to give special attention to the moorings of the ships on the wharves. He had not thought there was any danger to the Caledonia and Nini. He did not go down to them, but he had the report of his subordinate. The range would not be so extensive where the Caledonia and Nini were lying. He did not think there was any need to specially strengthen the moorings of these boats on the day in question.

Mr. Searle: With regard to the practice of tying three vessels together, is there no danger in case of a range?

Witness: If they are well moored they would be all right. Where those vessels lay there is little or no range in the river.

In answer to the Court, witness said that he put the accident down to the tremendous current from the freshet.

Re-examined: When witness used the term "range" he meant a range coming from the mouth of the river, caused by the heavy sea at the bar and the swell. Witness had not desired to get the boats back as quickly as possible because he feared for their safety. The reason was that he had moved the vessels and he wanted to put them back.

By the Court: If witness had taken back the ships he should have done so as Port Captain, because he should have sent port officials to do it.

[De Villiers, C.J.: You acted as Port Captain under authority of the Board?]

Witness: Yes, on the authority of the Board regulations, which give me certain powers in certain paragraphs.

Some argument ensued as to the position of the Harbour Board on the pleadings.

Mr. Searle said that plaintiffs founded their case upon the Board's negligence.

Mr. Schreiner: We say we are under no liability for anything done by Captain Munn outside the scope of his authority as an official of the Board.

Ernest Charles Barrie, pilot, of East London, said that he had been on the Buffalo for ten years. Witness moved the two boats lower down the river preparatory to the regatta, under directions from Captain Munn. He left the Caledonia's old moorings where they were. It would be a wicked thing to leave her moorings behind unless they put down as good instead. He took the Caledonia alongside the Alpha. It was a common thing to moor vessels stern up the river. He had often done it, even with men of war. He considered that the moorings of the Caledonia were sufficient and satisfactory: he considered that she was lying in a safer berth than the one from which she had been taken. He thought it very probable, if she remained in her old position, that she would have been struck by the "New Blessing." Witness described the steps he took to moor that "rotten old tramp," as he called the Nini. He considered that she was well and sufficiently moored in her temporary berth. Witness did not remember such a big flood occurring in the river as on the night of October 10. It was a daily thing to moor three boats together, as was done in this case. Anchors dragged a good deal in the Buffalo River. He would like to find some of the "hard blue ground" that certain witnesses had spoken about. Dropping an anchor into the Buffalo bed was like dropping an anchor into a keg of soft soap. Even screw pull moorings, which had hitherto been regarded as their safeguard, went on the night in question. Witness would not deny that he might have told Womersley that the Nini was the cause of it all. He did not know why he should have said that, because the poor wretch (the Nini) was a victim—she was lying on the beach high and dry.

Ernest Charles Barrie, Harbour Board pilot, was recalled. In cross-examination by Mr. Searle, witness said he did not profess to have a very good memory. The Nini at her first mooring had two stern chains and two stern anchors, while at the moorings to which she was temporarily moved she had only a  $\frac{3}{4}$ -inch wire rope at her stern. That was equal to an  $\frac{1}{2}$ -inch chain.

Witness remembered that they had had lots of trouble with the "Bravo," "Nini," "Alpha," and every hulk they had on the river. The "Nini" was not in good condition. The "New Blessing" was a derelict old schooner which had been on fire. She was beached as high as she could go. During the storm she dragged her anchor. She could not have helped going into the middle of the river; she would not go down on the side of the river. The "Alpha" had now been moored with a rope to the shore and an anchor forward and stern. The head moorings of the three vessels tied together were in soft mud, but the anchorage was not in soft mud. Witness did not think there was anything extraordinary in mooring two vessels abreast as was done with the "Alpha" and "Nini." He would not call the "Caledonia" a "vessel"; she was only a little tug.

By the Court: Witness had been in this country ten years. He had known previous freshets, but no mischief had resulted. The storm in October last was the worst he had known on the river. He had seen three ships tied together on the Buffalo during the war. He was not aware of any accidents arising from that cause.

Robert Stirling, port coxswain, East London, speaking from 27 years' experience of the Buffalo, said that the freshet or flood of October last was the worst he had known. On the evening in question he went out to haul the lifeboats on the ship. The lifeboat jetty was carried away about half an hour after a craft that he assumed to be the Caledonia went down the river. A tremendous quantity of trees and debris began coming down the river about nine o'clock at night. He thought both the Nini and Caledonia were as safely moored in their temporary berths as they would have been in their first berths.

S. R. Pockley, secretary of the defendant Board, was next called.

Cross-examined: As far as he was aware, the Board had no record of a flood in 1874. That was beyond his recollection.

Re-examined: His Board, as a Board, had no knowledge of the moving of either the Caledonia or the Nini before the freshet occurred. He had never heard of 20 ships being wrecked when the river came down in 1874.

William Henry Fuller, chairman of defendant Board, said he had occupied that position a little over two years. He used to be chairman of the old Boating Company. The flood in October last was the most serious he had known. Within his recollection the river had never previously come down and done damage to the shipping. He had had search made in the records concerning the flood in 1874, but as far

as he could find the damage was nothing like so serious. About a quarter to six on the morning following the storm, the river was coming down in a boiling flood. He found that very extensive damage had been done. He considered that the Caledonia was in greater safety in her temporary moorings than she would have been in her original moorings. On the 10th October, the Board had had no warning of heavy water coming down the river. Usually, when the river was heavy, they had a communication from King William's Town. Among the debris brought down were numbers of live snakes, showing how sudden and heavy had been the flood. Witness was acting Lloyd's agent at East London. It was a custom of the port to moor two ships abreast. He had never known any accident from that cause. Ships were as frequently moored with their bows down the river as otherwise. Gunboats like the Pelorus had lain stern up the river. During the war the Barrosa lay for nine months with her stern up the river. The Board had never framed any regulations or adopted resolutions for mooring ships to clear the course for the regatta.

By the Court: The Port Captain had put ships to fresh moorings, so as to clear the course.

[Hopley, J.: If he does it, he does it *qua* Port Captain?]

Witness: I understand, my lord, that that is a more or less legal point.

In further evidence, witness said he considered that the Nini and Caledonia were placed in less risk of damage in the position they occupied than if they had been left in their first position.

By the Court: Even if they had received intelligence that a big freshet was coming down the river, he was not aware that they would have done anything different from what was actually done.

Cross-examined: Witness had been acting Lloyd's agent for 21 years. As to the equipment of the Caledonia, she was given a buoy when she was removed, which replaced her anchor. The Port Captain had instructions as to mooring vessels, with the assistance of the pilot. It was an ordinary thing in the port to tie two vessels together or two hulks together. Witness did not remember any other specific instance in which two hulks had been tied together. Witness was president of the Rowing Association.

By the Court: In case the Port Captain had declined to clear the course, he supposed the Regatta Committee would have sent a deputation to the Harbour Board.

[Hopley, J.: What would you do then?]

Witness: I do not know, in the light of this case.

Mr. Searle: Yes, but apart entirely from this case?

Witness: One thing I can distinctly answer—the Board would not have accepted any responsibility for the mooring of the craft or their value.

Cross-examination continued: Witness had not previously heard of the objection raised by Mr. Godfrey to the mooring of other vessels to the Government hulk "Alpha." He thought the only way to avoid such a risk as this in future would be not to moor vessels in the regatta course. It was impossible to mark out another course. He should not describe the New Blessing as a "derelict"; he regarded her as a hulk. He thought that the "New Blessing" was driven out into mid-stream, and was afterwards dragged back towards the bank by her anchor.

Re-examined: His opinion was that if the "Caledonia" had been lying in the position from which she was temporarily moved the "New Blessing" would have collided with her during the flood.

Erick Walburn, sub-foreman of East London Harbour Works, and James Cohen Morrison, a berthing master at East London, also gave evidence.

Charles John Neill, master mariner, said he had been 14 years with the Clan Line, and nine years as a chief officer. He had been nine years at East London. He had been engaged in stevedoring. Witness bought the "Nini" in 1902 for £250 on behalf of the East London Fisheries. He afterwards sold the plant, and so on for £7,000. He took her value at that time to be £250. Witness saw the "Nini" last year, and estimated her value at £170. Witness agreed with the report prepared by Captain Munn and others upon inspection in June last of the position and moorings of the "Nini." Witness considered the "Nini's" moorings at the time of the flood to be good and sufficient. He gave evidence as to the dangers to which the "Caledonia" and "Nini" would have been exposed if they had remained in their first position. It was not unusual for vessels to be moored together on the Buffalo. Vessels, he believed, were more often moored stern up the Buffalo than bow up. The ship was almost invariably turned round before being berthed. Witness did a good deal of stevedoring at East London during the war. He mentioned three large vessels which had been moored together on the Buffalo during the war. On the Thames boats were moored in tiers of four and five.

Cross-examined: Witness was in London (England) when the freshet happened on the Buffalo. There was great pressure at the port about the time of the war. Putting a ship's stern up the river did not submerge her any more. He agreed that in case of a strong current ships were safer in separate berths.

Re-examined: Witness had never known a freshet at East London cause



damage to shipping. The only thing that they feared on the Buffalo was the range.

Hopley, J., asked counsel if any evidence were to be given in regard to the flood in the Buffalo in 1874.

Mr. Schreiner said they had no witnesses who could speak to the events of 1874.

[De Villiers, C.J.: Surely there must be some old inhabitant at East London who would remember that flood?]

Mr. Schreiner: I should think there must be, my lord. It is a very healthy place. Our witnesses only go back 29 years.

[De Villiers, C.J.: There seems to be a tradition about 1874; but there is nobody who can tell the Court what happened.]

Mr. Schreiner: Mr. Fuller went there in 1875; but he could not remember that there had been any serious damage to shipping. The flood then did not go nearly so high as the flood last year. Besides, there was no shipping in the river at that time; the port was not made.

William Henry Seaward, marine surveyor, East London, gave similar evidence.

Harry Augustus Fuhr, assistant divisional engineer, employed by the Public Works Department, and stationed at King William's Town, spoke to the exceptional character of the freshet on October 11 last, as disclosed by observations at Buffalo Bridge, King William's Town. The flood was, he said, at least 2 ft. higher than the 1874 flood, when the river rose 24 ft.

Wm. Craig, Chief Engineer, Public Works Department, said that for purposes of bridge building on the Buffalo they had taken the 1872 flood as their record. They had no official record of the 1874 flood. The 1905 flood, however, created a new record—quite beyond 1874.

Cross-examined: The 1905 record was 5 ft. 6 in. higher than the 1872 record, while 1872 was 3 ft. below the 1874 record.

Wm. R. Crabtree, assistant engineer, Buffalo Harbour, proved a plan showing positions of shipping on the Buffalo when the freshet occurred.

De Villiers, C.J., drew attention to a remarkable feature of the rainfall returns of the East and West banks at the date of the flood, viz., that all the rain seemed to have been on one side of the river.

Mr. Schreiner said the readings certainly were remarkable. The gauges were about two miles apart.

De Villiers, C.J., observed that, in view of what had taken place the Harbour Board would no doubt have the returns from the upper parts furnished to them, so that they might have warning of any flood.

Norman Lee, employed at the Electric Power Station, East London, also spoke to the exceptional character of the flood.

Nathaniel W. P. McLeod, acting mate of the Harbour Board dredger Agnes; Patrick Moore, sailor, East London; James W. Glee, formerly of the hulk Cerastes; and Wm. Balsbeck, seaman, also gave evidence, mainly to vindicate the severity of the freshet and the fact that other ships, although well moored, got adrift.

Mr. Schreiner closed his case.

Certain correspondence having been put in,

Mr. Searle said that there was really no conflict of evidence on the principal facts of the case. It was really a question of law, and the action was founded on the negligence of the Harbour Board in dealing with the "Caledonia" and the "Nini" as they did. If the position taken up in the plea, that no one in the scope of the employment of the Harbour Board did deal with them was not substantiated, thus the onus was on the defendant. The "Nini" was dealt with without any request or consent, and the consent of the Caledonia people was not proved. The first defence was that the shifting was not done by the Harbour Board or its servants; the second defence, that, East London being a compulsory pilotage port, the Harbour Board was not liable under section 87 of Act 36 of 1896; and the third defence, that what was done was done in accordance with lawful regulations, and therefore the Harbour Board was not liable.

Now, under Act 36 of 1896 the control and management of the harbour was vested in the Harbour Board, and the Harbour Board had power to make regulations. The Harbour Master and Port Captain were under the control of the Harbour Board. By section 44, the master of a vessel shifting was liable to a penalty, except on emergency. Under the regulations no tug was allowed to shift without the permission of the Port Captain. No vessels could be made fast to buoys, wharves, or other vessels without the permission of the Port Captain.

No contributory negligence was pleaded. It was clear that Captain Munn did what he did as the representative of the Harbour Board, and that he had full power to act. The case of *Gifford v. Commissioners of the Table Bay Docks* (B 1874, 96 at p. 110), was very similar to this case in many points, e.g., *res ipsa loquitur*, and the scope and authority of the Port Captain.

[Hopley, J.: But this is not a case of *res ipsa loquitur*, which applies where no natural forces come in.]

[De Villiers, C.J.: The point you have to prove is negligence. It was a most unprecedented occurrence. If no such



flood had within the memory of man occurred, was it negligence not to have taken steps to meet such a flood?]

Mr. Searle: The same thing occurred in 1874.

[Hopley, J.: But they did not know of any damage done then to shipping.]

[De Villiers, C.J.: What effect had the flood of 1874 on shipping? If none, why should defendants take steps against floods?]

Mr. Searle: I don't think there were any craft in the river in 1874. Where they knew a tremendous flood had come down before and where they kept in communication with King William's Town, that shows that they anticipated trouble.

Continuing, Mr. Searle said the Harbour Board had taken these vessels away, and they were therefore at their risk. He would not say that the Harbour Board were insurers, but they had to show an extra degree of care.

[De Villiers, C.J.: Does that not throw on them the onus of showing that they were not negligent? There can only be one kind of negligence, but the question of onus is very important.]

Mr. Searle: The Nini was specially moored, and reported on on June 21, 1905. It was the Nini's breaking adrift that did all the damage.

[Hopley, J.: It was the breast ropes that parted, and not any part of the deck or hull of the Nini.]

Mr. Searle: That was because she was not fastened up properly.

[De Villiers, C.J.: The letter of June 21, 1905, seems to contemplate that some part of the Nini would give way. Did any part of her give way?]

Mr. Searle: She broke adrift. It must have been something of the sort. They used old ropes for mooring the Nini, and, in the face of the report they got, it was a dangerous thing to tie up two hulks and a valuable tug in the river.

Proceeding, he said that the question of compulsory pilotage did not arise. The plaintiffs did not want any new berths—they had berths. The onus was cast on the defendants of disproving negligence. The circumstances of the prior special mooring of the vessels and their voluntary removal by the Harbour Board cast on the Harbour Board the onus of showing that there was no negligence. The vessels in their original position were quite safe. The position they were put in was unsafe. Three moored together was improper. They put a wire rope in place of two chains, and the wire rope was not equivalent to one anchor chain. When the breast ropes parted the Nini was on a very long cable. She would then sheer across and come back with violence. So she did, and bumped the Alpha three times, and did the damage. When the breast ropes broke, the longer cable

gave her more room to range. There was gross negligence in depriving the Caledonia of her anchors. It would actually vitiate her insurance policy.

There was no necessity for putting craft where the Caledonia and Nini were placed. They might have been put alongside the wharves with a little more trouble. The Harbour Board was in the position of bailee of these vessels—he would not say of trespasser. The Nini paid £20 for a hulk licence.

[De Villiers, C.J.: The Harbour Board in this case took upon themselves the work of mooring, a work usually done by the crew of the boat moored.]

Mr. Searle: Under the regulations vessels that are moored pay on a certain scale. I am instructed that the Harbour Board points out a berth and the crew of the vessel does the mooring.

[De Villiers, C.J.: There was no one on board the Nini.]

Mr. Searle: No. The Harbour Board knew that and should have taken steps to protect them. There was only an old man on the Caledonia. Trouble was anticipated by three witnesses. The valuable Caledonia should never have been fastened up to these hulks, which were always regarded as dangerous. Even if the Caledonia was full of men and the Harbour Board shifted her for its own purposes, the Harbour Board had the duty of fixing the moorings. The Harbour Board had a special duty, which they did not discharge. Captain Munn and the Harbour Board knew there was not good holding ground in the river, and in 1874 there was a big flood; all these things threw a special duty on the Harbour Board. The same kind of principle applied as did to people who had a licence to do a certain thing and went beyond that licence. Counsel cited Bevan on Negligence, p. 142. The onus of proof was shifted by the conduct of the Harbour Board (Pollock on Torts, p. 380). The plaintiffs could not have objected to what the Harbour Board did; the Port Captain did not exceed his authority.

Mr. Schreiner said that the actions were brought, as the declarations set out, on the unlawful removal of the ships, and Mr. Searle had not said whether it was lawful or unlawful for the Harbour Board to shift the craft.

[De Villiers, C.J.: Then you can take it they admit the lawfulness, except as to the onus. They confine themselves to the point whether the mooring to the Alpha was negligent or not.]

Mr. Schreiner: We don't admit that the Port Captain was acting within the scope of his authority. The business of the Harbour Board is to carry on the business of the port. The clearing of the course for a regatta is not part of the operations of a Board. Probably they would act *ultra vires* if they gave their money to a regatta.

[Hopley, J.: What authority have you for saying that the Harbour Board can't shift ships to avoid accidents at regattas?]

Mr. Schreiner: The Harbour Board said they would not sanction the shifting of vessels for such purposes if owners objected.

Proceeding, he said that even supposing ships were shifted for the purposes of the work of the port, the Harbour Board would not be liable, and they were not liable in this case either. The only shifting contemplated by the Act was contained in section 38 of Act 36 of 1896: "If it appear to him (the Port Captain) necessary." "Necessary," either included for the purposes of a regatta or not; if not then there would be an unlawful shifting.

[De Villiers, C.J.: The question is, not whether the regatta was necessary, but, admitting the legality of the regattas, was the shifting then necessary?]

Mr. Schreiner: "Necessary" meant "necessary for the work of the port." The Court would never order a ship to shift for a regatta. The fact that the regatta was lawful did not make steps to facilitate it necessary.

[De Villiers, C.J.: Do you say it is unlawful for the Harbour Board to permit regattas?]

Mr. Schreiner: It is unlawful for them to do anything to promote a regatta.

[De Villiers, C.J.: From your plea, I don't gather your present point, that it was *ultra vires* of the Board to shift the ships for regatta purposes. This goes to the root of the whole matter, and should have been specifically pleaded.]

Mr. Schreiner: The declaration does not mention the regatta. The Court often takes legal points not raised on the pleadings. *Dibbin v. Cape Divisional Council* (14 S.C., 454).

[Hopley, J.: Have they any control over pleasure craft?]

Mr. Schreiner: Only so far as the Act and the regulations framed thereunder allow.

[De Villiers, C.J.: Is the Harbour only for business. Is it not for the convenience of the public, and is not a regatta a lawful amusement of the public. When once they give permission, does not the clearing of the course become necessary?]

Mr. Schreiner: The regatta does not need the permission of the Board; it is lawful without it. He quoted *Shaw, Saville and Albion Company v. Timaru Harbour Board* (15 A.C., 429), and went on. The Board can't be held liable for an Act which they are not given power by their Act to do.

Continuing, he said that regulation 9 was auxiliary to section 38. The Harbour Board could not under this section order the master of the *Caledonia* to shift her position for regatta purposes.

If the Board was right on this point then the case failed.

Supposing that the Port Captain was acting within the scope of his authority, the argument of the onus would fail. It would be an ordinary case of shifting, and the plaintiffs should have complied with their duty. Pilot Barrie acted as a volunteer servant of the owners of the ships. He thought he was acting as pilot under section 87 of the Act. When there was no one to moor, it was either the pilot's duty to make fast—and section 87 freed the Harbour Board from liability—or if it was not the pilot's work it was something else, and beyond the powers of the Harbour Board, and therefore the Harbour Board would not be liable. Under section 16 of the Act, if the master had not sufficient hands the Port Captain could provide extra hands at the expense of the vessel. The Port Captain and the Harbour Board were not liable for negligence if they provided proper persons (*Table Bay Harbour Board v. Bucknall Steamship Lines*, 21 S.C.) In *Gifford v. Commissioners of Table Bay Docks* (B. 1874, p. 96) the slip was part of the Board's machinery, which the ship was going to use in the ordinary course of business. The judgment was based on bailment. If this shifting had taken place in the course of ordinary business shifting, then everything was done that ordinary care and prudence would dictate.

De Villiers, C.J., intimated that before Mr. Schreiner went on to the point of negligence, the Court would like to hear Mr. Searle on the legal point.

Mr. Searle said that point of *ultra vires* was not raised in the plea and was contrary to the Board's position in the correspondence. It would make the working of the port impossible if the Harbour Board could only move vessels for certain purposes. Then shippers would need to find out in every case why vessels were being shifted. They would be at the mercy of the Port Captain. The Harbour Board was given, by section 5, the control and management of the harbour. The Court would not restrain a Port Captain who had a general discretion, from moving a vessel because the owner thought it was for a reason *ultra vires*.

[De Villiers, C.J.: I am rather in your favour on that point, but where is the authority to the Board actually to shift the boats themselves?]

Mr. Searle: They are given general control in the Act. For the construction of Acts of this kind, he referred to *Attorney-General v. Great Eastern Railway Company* (42 L.T.N.S., 810, and 5 A.C., 478).

Mr. Schreiner (resuming) discussed the evidence at great length. He said

one might say that none of this litigation would have been heard but for two things, (1) the idea that there was wrongful and unlawful conduct by the Board in the removal of the Nini; and (2) because the Nini's wire, which broke, was not used in attaching her to the rock anchor. The former idea had been abandoned. As to the wire, it was clear that it was such that Pilot Barrie would not use it for the re-mooring. It had also been condemned by Port Captain Munn. He submitted that under all the circumstances there was no proof such as must be produced of negligence by the Board or its officers.

In the course of argument Counsel referred to regulations 40, 50, 56, 71 and 72 of the East London Harbour Board.

Mr. Searle was not heard in reply.

De Villiers, C.J.: In this case the owners of the Caledonia and the owners of the Nini sue the Harbour Board of East London for damages for injury done to their respective vessels by reason of the negligence of the defendant Board's servants within the scope of their employment. The Caledonia was a tug, a comparatively new vessel owned by the Caledonia Company, and she had been brought from Port Elizabeth to East London because there was no work for her there, and it was considered safer and cheaper to have her in the Buffalo River rather than at Port Elizabeth. She was accordingly brought round, and the master mariner who brought her round (Captain Scholefield) has described how she was moored. Now, it is common cause that she was well moored at the place which was assigned to her by the defendant Board's officials. In regard to the Nini, which belonged to the Colonial Fisheries Company, she was at a spot somewhat lower down the river, but she also was properly moored, and to the satisfaction of the Harbour Board authorities. They had superintended the mooring, and they were quite satisfied that she was properly moored. She had, in addition to two anchors at her stern attached by a chain, a bow anchor, and she was attached by means of a wire rope, a portion of which has been produced in court. It has been suggested to the Court that that wire rope at all events was of no use to her, because that wire rope at present is in a very bad condition indeed. But that wire rope could not then have been in the condition that it is in now, bearing in mind that the rope has been submerged and exposed to weather and water for a considerable time afterwards, nearly ten months after the time this had happened. Certainly, she had attached to her bows the two anchors, one in the river, and one on shore. In addition to that, she was properly attached to two stern anchors, which

would help to keep her in position, even in a strong current, and would have prevented very much ranging from the effect of the tide and from the effect of the freshet. From these safe positions, these two ships were removed by the defendant's servants, and attached to a hulk called the Alpha, which lay a little lower down the river, and somewhat nearer the shore, the Caledonia placed on one side and the Nini on the other. Both of them were fastened to the Alpha by means of breast ropes, and, in addition to that, they were tied at the stern to a buoy, which was attached to three anchors, and all three vessels were attached by means of a steel wire to this buoy. In order to bring the Nini into position, it was necessary to lengthen the chain by which she was attached to one bow anchor. She was loosened entirely from the shore anchor, which had up to that time assisted in keeping her in position, and as to the two stern anchors, they ceased to be of any use whatever to her. She was kept in position, as I have said, by the wire rope attached to the buoy. The Caledonia was attached in the same way by a wire rope to the buoy, and I think that the evidence shows that a 10-in. coir rope was fastened from her bows to the chain attached to the anchor of the Alpha, and that was the only manner in which she was kept attached to the Alpha. I am satisfied, from the evidence of Captain Martyr especially, that it was not a proper proceeding to remove the Caledonia without any anchor on board. There was no anchor on board; she was entirely free from her anchors, and Captain Martyr says it would be quite possible to have had an anchor placed on board her in such a position that in case of danger even the old man who was left in charge might have tipped it over, and so he might have kept the ship in hand in case she dragged. If that had been done, the probabilities are that she would not have undergone the fate of being dragged across the bar and lost entirely. In regard to the Nini, the chain attached to her bow anchor was very much lengthened, and I am satisfied the consequence was that there was a considerable amount of ranging which helped to create considerable friction, and that friction caused the breast ropes to break, and when once the breast ropes were broken the strain of the Nini bumping up against the Alpha was, in my opinion, so great as to be really the cause of a great part of the mischief, which subsequently followed. The only person who was a witness of everything that happened was Anderson, who happened to be on board the Alpha, and who gave his evidence in a very fair manner. He may on some points be mistaken. I think he is mistaken, for instance, on the question of whether the Nini and Caledonia were brought up

on the same day. I think the Nini was brought on the day after the Caledonia, but I do not think there was any desire on the part of Anderson to give other than truthful evidence. He has no interest whatever in the case, and he seems to me to have been carefully watching things as the night wore on. After quoting at some length from Anderson's evidence, his lordship proceeded: Now, if this is a truthful statement of what happened, then I think there can be no doubt that there was negligence on the part of the person who tied these ships together, and, of course, every attempt has been made to throw doubt upon the evidence, to show that Anderson could not possibly have seen what he says he saw, but I am satisfied that he spoke truthfully, and wished to speak truthfully. It was a dark night, no doubt, but there were continual flashes of lightning, and he was awake all the night and watching how things went. If that evidence is believed, it goes far to establish negligence on the part of the defendants. But the evidence does not rest there, because it is clear from the statement of Pilot Barrie that he himself did not attach much weight to the security of the breast ropes. He considered that all that was necessary was to keep her steady, and that it was not necessary that these ropes should be very strong. He admits that they were old ropes that were used, and the same admission was made by Captain Munn, who added that they were not good ropes. It is not necessary to inquire where these ropes came from, whether from the Harbour Board or elsewhere. It was the duty of the Harbour Board's servants to see that the thing was done in a proper manner, and to use the proper appliances for it. The result of the breast ropes of the Nini giving way was, in my opinion, such as to cause the ultimate mischief. The bumping was so great as, in my opinion, to cause the wire ropes attached to the buoy to give way. It is said, if that were so, why were there not more marks upon the Alpha and upon the Nini to show that such bumping had taken place. No evidence was given as to whether it would be necessary that such marks should be upon the vessel. There may have been some amount of elasticity in these vessels which would enable them to bear a considerable amount of knocking about without signs of much external injury. At all events there has been no evidence given as to whether it would be necessary that such marks should appear on the ships after there was such severe bumping. But there was this ultimate result. When once the Nini had broken loose, and when once the attachment to the buoys was gone, with the swirl of the river and the heavy current, the rest followed, and seemed

to me to follow as a matter of course. The Caledonia had no anchor on board. As soon as her fastenings were loosened she was at the mercy of the current, and she was carried away into the sea with the old man on board. It is important to observe that the mischief had begun before nine o'clock, and it was twelve o'clock when the flood was at its greatest. As to the expert evidence, there has been a good deal given on both sides. I confess I attach very great weight to the evidence of Captain Martyr, because he is not interested in the case at all, he is an experienced seaman, he has himself been a nautical assessor in shipping cases in England, he is one of the younger brethren of Trinity House, and he gave his evidence very fairly and very intelligently. Now, Captain Martyr considers there has been considerable negligence, and his remarks as to tying three vessels together seem to me to be very reasonable. He says that in the position of the vessels as shown on the model the Nini would be taking the weight of the other craft, because she was moored very forward. He also shows how the effect was that the first vessel would catch the debris coming down and pass it on to the second and the second would pass it on to the third, whereas had these vessels been moored apart the obstruction would have passed either on the one side or the other. Now, in face of that evidence, and in face of the facts proved in the case, the Court is asked to say that the same thing might have happened, if the ships had never been moved. The Court cannot enter into speculations as to what might have happened. All the Court knows is, that every precaution had been taken in the position in which the ships originally were to provide against mischief. As to the Nini, my belief is that the shore anchor, together with the other anchor, might have, and probably would have, assisted in keeping her in position, and that the dragging might not have taken place; but, in addition to that, I am of opinion also that the two stern anchors would have served to keep her in position, and would have prevented the dragging in her original moorings, and that she would have safely ridden the storm, and I hold that opinion still more particularly in regard to the Caledonia. It is suggested now that a vessel called the New Blessing might have drifted upon her. Of course, it is a possibility, and even may be a probability, but speculations of this kind cannot induce the Court, if the subsequent moorings were negligently laid, to hold that the disaster would have occurred at the original moorings. I have come to the conclusion, therefore, that the mooring of the two vessels alongside the Alpha was negligently done. It is said that it was only a temporary mooring, but if this be so



there was ample time after the regatta and before the flood began to return the vessels to their original berths. Then I come to the other important question, raised by Mr. Schreiner, and that is, assuming that there was this negligence, is the defendant Board to be held liable? Counsel for the defendant has relied particularly upon the 38th section of Act 36 of 1896, which provides: "Each harbourmaster or port captain shall, between sunrise and sunset, board any vessel arriving in port as soon as practicable after her arrival, and if possible previously to her coming to anchor, in order that he may point out to the master of the vessel a proper berth; and in case he should be prevented from so boarding in consequence of the quarantine regulations he shall point out a proper berth for such vessel arriving under such circumstances, and may, if it shall to him appear necessary, order any vessel to shift or change her berth to any other berth to be pointed out." Now, by this section, the harbour master or the port captain is made the judge as to the necessity. He has the discretion alone to decide, but the contention is that it should only appear to him necessary in case it is required for the business of the port. Then, what is the business of the port? The business of the port is that the public shall have access to it. I don't think that the business of the port would mean the exclusion of rowing boats and pleasure boats; it is all part, to my mind, of the business of a port of that kind, and certainly it is admitted that a regatta would be a perfectly lawful use of the river, and I would go further and say it is a legitimate use of the river. If a regatta is occasionally held, and the harbour master comes to the conclusion that it is necessary for him to order any vessel to shift or change her berth, I am of opinion that the Harbour Master is entitled to give the order, and if there were a vessel anchored in the Bay, with her master and crew on board, I think the master would have to obey his orders, and they would not be entitled to inquire whether it were for a regatta or not. This, to my mind, seems to be recognised by the regulations of the Board itself (regulation No. 9 read). That is a rule that would apply where there are a master and crew on board. But what would happen if no master and crew are on board? The regulations contemplate such a case, contemplate that there may be a hulk, or a condemned vessel for which an annual licence is required. If there be no master and crew on board I presume either previous notice must be given to the owners of the ship to come and move it, or the harbour master may remove it. In the present case no such notice was given. Neither the owners of the Nini, nor of the Caledonia, were asked to come and move their vessels. The

harbour master took it upon himself to remove them, and if in the course of such removal and remooring there is negligence, it seems to be that the work being done in the ordinary course of the employment or service of the Harbour Board, and that the Harbour Board should be held liable. I see nothing *ultra vires* in it. A case has been cited, that of *Shaw, Savill, and Albion Co. v. Tamaru Harbour Board* (15 Appeal Cases, 429), which in my opinion does not affect the present case. The other case which has been cited on behalf of defendants was that of *the Rhosina* (10 Probate Division, 24). It is an important circumstance that in the last case the Harbour Commissioners were held liable because the harbour master was held to be acting within the scope of his authority when he gave the directions to beach. He gave the directions to beach at a particular time, and the effect of that beaching was that the ship came down upon the anchor, and this was held to be negligence on the part of the harbour master and the Harbour Commissioners were held to be liable. But I do not think that this case gives any support to the conclusion of the defendants. I am quite satisfied that it was quite within the power and within the authority of the Harbour Master to act as he did, and to give instructions to the servants of the Board to do what was necessary for the removal of the plaintiff's vessels. Those servants, acting within the scope of authority, did the work. The damage was caused by the negligent manner in which the work was done. That work was superintended by Pilot Barrie, but not in his capacity as pilot and, therefore, the 87th section of the Act does not apply. The result is that the defendant Board must be held liable for the damage done to both these ships. As to the Nini, she was a very old hulk, and we have it she had some coal on board. The Court estimates her value to be about £150, and the value of the coal to be about £100, so that there will be judgment for the owners of the Nini for £250, with costs. With regard to the Caledonia, her cost price was £4,500, she had seen some wear and tear, and there does not seem to have been a very good market for tugs of that kind, and, under the circumstances, the Court is of opinion that she was worth about £3,000, so that there will be judgment for the owners of the Caledonia for £3,000, with costs.

Hopley, J.: I do not propose to give in detail my reasons for concurring in the judgment which has just been delivered. In the main I agree with the reasoning of His Lordship the Chief Justice as to the causes of the disaster to the two vessels in question and as to



the finding that the servants of the defendants were negligent in the matter. I do not think that great blame should be attributed to them for such negligence, since the circumstances which took place were unexpected, and probably unexampled in human memory, and they had provided for an ordinary and normal state of things. Still I agree that to moor three vessels together in the manner in which these vessels were tied and moored in a river liable to be affected by abnormal occurrences, such as freshets and floods, was a negligent act liable to cause damage in the event of anything unexpected or abnormal occurring. With regard to what actually caused the mischief, I think that no one has given enough attention to the combined effect of the local and inland rainfall and the subsequent floods in the local creeks and from the headwaters and inland tributaries. The evidence shows that the rainfall was very heavy on the East Bank of the Buffalo at and near East London, that the first and second creeks were flooded and that they discharged an immense volume of water into the river. This water, no doubt, caused a considerable rise in the river at a comparatively early hour of the evening, and when the inland waters began to arrive the waters from the creeks meeting these at right angles would naturally set up powerful swirls and eddies, which it would be difficult for any craft moored within their circuit to resist. Especially I think the waters from the First Creek meeting those from the Second Creek and from inland would set up such a swirl just where the Alpha, the Caledonia and the Nini were tied together, and in my opinion the action of such an eddy is sufficient to account for the tearing away of the stern moorings of these three vessels from the anchors to which they were fastened. I do not think that these steel ropes were broken by the "Nini's" getting loose and bumping against the "Alpha," because I am of opinion that had that bumping been hard enough to have had such an effect it would have smashed the two hulks, or at all events would have left severe marks upon them. I have no doubt but that there was some bumping, but I think that it probably happened after the vessels were loosened from their stern moorings. I am aware that no one has relied upon the theory of this swirl, but it seems to me certain that there must have been such a result of two mighty forces of water acting at right angles to each other; and it also seems to me to account for all the phenomena of the night in question and for all that happened to the shipping in the river. But, if I am right, it does not seem to me to exonerate the defendants, but rather to add an additional reason for finding them negligent.

They should know their harbour and the probable effects of such floods upon the shipping; and, if at a time when rain was threatening and actually falling, they moored and left three vessels in such a position, they cannot be said to have done what was reasonably careful and diligent under the circumstances.

On the application of Mr. Searle, the Court certified Mr. Womersley (representing the owners of the Caledonia) and Mr. Monk (representing the owners of the Nini) as necessary witnesses, and allowed expenses of preparation of model, used in the case.

[Plaintiff's Attorneys: Van Zyl and Buissinne. Defendants' Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. § 1906.  
( Aug. 30th.

Mr. Toms moved for the admission of Raymond Barrett Gray as an attorney and notary.

Application granted, oath to be taken before R.M. of Glen Grey.

### PROVISIONAL ROLL.

WIENER AND CO., LTD. V. ALLIE.

Mr. Douglas Buchanan moved for a provisional order of sequestration to be superseded.

Provisional order discharged.

ESTATE VILLET V. COLLINS.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

KERR V. NEWMAN.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £239.

with interest; counsel also applied for the property specially hypothecated to be declared executable, and for arrear and future rents to be attached.  
Order granted.

**BASSON V. LAMBRECHTS.**

Mr. Douglas Buchanan moved for the final adjudication of defendant's estate as insolvent.  
Final order granted.

**SOLOMON V. HALL.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £750, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and rents attached.  
Order granted.

**NIMMO V. STURCK.**

Mr. Douglas Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment for £150 and costs.

Defendant said he could not pay more than £2 a month. He owed about £270. He was paying off his overdraft at the bank at the rate of £3 a month at present. He was without property, except for certain shares.

Decree granted, execution to be suspended upon payment of £3 a month, first payment on the 1st September, with leave to plaintiff to apply for an increased order when so advised.

**GENERAL ESTATE AND ORPHAN CHAMBER V. ERFORT.**

Mr. M. Bisset moved for provisional sentence on a mortgage bond for £2,300, with interest, less £24 paid on account; counsel applied for the property hypothecated to be declared executable.  
Order granted.

**IMPERIAL COLD STORAGE AND SUPPLY CO. V. HUTCHINGS.**

Mr. Uppington moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court at Wynberg for £18 7s. 6d. and costs (£2 15s. 4d.), and for certain land in Grey's Pass, Cape Town, to be declared executable.  
Order granted.

**ILLIQUID ROLL.**

LOTTER V. MARITZ. { 1906.  
Aug. 30th.

Mr. M. Bisset moved for judgment, under Rule 329d, for £86 7s. 6d., price of sheep sold, with interest and costs.  
Order granted.

**NESER V. DELPORT.**

Mr. Close moved for judgment in terms of consent paper.  
Judgment in terms of consent paper.

**IMPEY V. HARRIS.**

Mr. Russell moved for judgment, under Rule 329d, for £61 19s., professional services rendered, and costs.  
Order granted.

**INSOLVENT ESTATE STEVENS V. SACCO, LTD.**

Mr. Douglas Buchanan moved for judgment, under Rule 329d, for £250, salary, and £28 2s. 6d., cash lent and advanced.  
Order granted.

**MONARCH COLLIERIES V. DAVIS BROS AND JACOBS.**

Mr. Inchbold moved for judgment, under Rule 329d, for £285, balance due upon certain shares.  
Order granted.

**REHABILITATION.**

Mr. Sutton moved for the discharge from insolvency of Franz Joseph Katzenstein.  
Application granted.

**GENERAL MOTIONS.**

BRIGHT V. THOMPSON. { 1906.  
Aug. 30th.

Dr. Rainsford moved for an order authorising amendment of certain judgment granted on the 2nd August, and restraining the official liquidator of the Owl Ltd. from paying over to respondent any sums found to be due to him (Thompson), pending payment of certain costs. Counsel filed a consent by respondent.

Order granted as prayed.

Dr. Rainsford also moved for formal confirmation of a certain writ or arrest against Thompson.

[Maasdorp, J.: But you have discharged the order now.]

Dr. Rainsford: We have released the respondent on these terms. It is necessary to make formal application.

Writ of arrest confirmed.

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*Ex parte* THE ESTATE COETSEE.

Mr. Toms moved for an order authorising transfer of certain quitrent ground in the division of Middelburg.

Order granted as prayed.

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*Ex parte* VAN LOGGENBERG.

Mr. Pohl moved for leave to raise a mortgage of £70 upon certain property in the division of Aberdeen, in which minors are interested.

Order granted as prayed.

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*Ex parte* PRETORIUS.

Mr. J. E. R. de Villiers moved for an order for leave to have transfer passed to petitioner from one J. H. Pretorius of certain property at Barkly East.

[Maasdorp, J., said that no date had been fixed in the original order by which transfer must be passed. Notice of the application must be given to respondent.]

Mr. De Villiers said all they asked was that what respondent should have done should be done now by the Deputy Sheriff.

Rule nisi granted, calling upon respondent to show cause on the 12th September why he shall not pass transfer to applicant on or before the 1st October, or why, in default of passing such transfer, such transfer shall not be passed by the Sheriff, and why respondent shall not pay costs.

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*Ex parte* THE COLONIAL GOVERNMENT.

Mr. M. Bisset moved, on the petition of the Commissioner of Public Works, for rectification of transfer of certain land in the division of Oudtshoorn.

Order granted as prayed.

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*Ex parte* LOUW.

Mr. Howes moved for leave to sell certain property in the division of Calvinia, in which minors are interested.

Order granted in terms of Master's report.

*Ex parte* FAIRBAIRN.

Mr. Payne moved for three months' leave of absence from articles of clerkship to enable petitioner to take matriculation examination.

Order granted as prayed.

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*Ex parte* VAN STRAATEN.

Mr. J. E. R. de Villiers moved for extension of a certain order, so as to appoint Attorney R. R. Dower to be curator to pass transfer.

Order amended as prayed.

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*Ex parte* ROBINSON.

Mr. J. E. R. de Villiers moved, on the petition of G. F. W. Robinson, an officer of Customs, for leave to sue his wife by edictal citation for divorce. Respondent had been convicted of bigamy at Durban.

Leave to sue granted, citation to be returnable on the 15th October, personal service to be effected upon respondent (who is at present undergoing imprisonment).

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*Ex parte* BOTHA.

Mr. Roux moved for an order on the Registrar of Deeds to register a certain bond passed in lieu of existing bond.

Order granted as prayed.

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*Ex parte* KRIEL.

Mr. Van Zyl moved for leave to raise certain loan on mortgage of landed property.

Order granted.

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*Ex parte* ESTATE HAMMAN.

Mr. Gutsche moved for confirmation of sale of certain property situate at Worcester in an estate, of which petitioner (the purchaser) is executor.

Order granted.

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*Ex parte* ESTATE OLIVIER.

Mr. P. S. T. Jones moved for an order authorising removal of Margaretha Cornelia Olivier (Victoria West) to a lunatic asylum in Belgium. Petitioners said that they had been unable to find a suitable institution in this colony to which they could send their ward.

The matter was ordered to stand over for further information as to the institution to which petitioners proposed to send the lunatic.

*Ex parte* MACOWAN.

Mr. Toms moved for leave to petitioner to sue one Florentina Holst, of Johannesburg, by edictal citation for provisional sentence on certain mortgage bonds and for certain property at Somerset-road, Green Point, to be attached *ad fundandem jurisdictionem*.

Property attached, and leave to sue granted, citation to be returnable on the 15th October, personal service to be effected.

*Ex parte* ALIE.

Mr. Douglas Buchanan moved for an order authorising the High Sheriff to sell the rights and interests of one Charles Makwena under certain agreement of lease at Uitenhage.

Rights of defendant under lease declared executable, costs to be paid by defendant.

*Ex parte* OFFICIAL LIQUIDATORS,  
CLARKE AND CO., LTD.

Mr. Close moved for leave to petitioners to enter into certain agreement with one Frederick James Rowland Horne, managing director of Rowland Horne and Co., Limited, whereby Mr. Horne had purchased certain claims by F. H. Clarke and Co., Limited, against Rowland Horne and Co., Limited. Petitioners said that the arrangement being in the nature of a compromise, they had decided to apply for the authority of the Court.

The matter was ordered to stand over until to-morrow for further information as to the practice of the Court in applications of this kind.

*Ex parte* FOURIE.

Mr. Swift moved for leave to sue *in forma pauperis*. The applicant was the widow of Ocherth Johannes Fourie, who failed to execute the will of his first wife. The son of the deceased was appointed executor dative of the will. Under the ante-nuptial contract, petitioner was supposed to receive £50 yearly, which she had not received. She was too poor to take proceedings against the executor dative. The necessary affidavits were filed.

Leave was granted.

*Ex parte* OTTOSTROM.

Dr. Greer appeared for applicant, and Mr. Burton for respondent.

Dr. Greer said this was an application for leave to sue *in forma pauperis*. The rule *nisi* had not yet been applied for.

Mr. Burton said the opposition was based on the facts.

Dr. Greer said the petitioner was working on a lighter at Port Nolloth, when, owing to negligence, in not properly fastening it, portion of the derrick fell on him. He had been in hospital for three months, and in consequence of his injuries was unable to earn the wages he formerly did. He contended he had sustained damage to the extent of £1,000.

Mr. Burton read affidavits from the respondents, Stephan Bros., which stated that the applicant was in the employment of the Cape Copper Co. He had no right to be standing under the derrick, the accident was mainly due to his own negligence. The employees of the Cape Copper Company were lured by the respondents to do the work.

Dr. Greer said his client set forth certain facts which would be contested at the trial of the case.

Maasdorp, J., said he thought the affidavits made by respondent should be answered and the case made more clear.

The case was ordered to stand over.

*Ex parte* RICKETT.

Mr. Payne moved for leave to sue *in forma pauperis*. Counsel certified.

Rule *nisi* granted returnable on September 12.

*Ex parte* VERSTER.

Mr. Payne moved for leave to sue by edictal citation.

Petitioner was desirous of divorcing his wife, but her whereabouts was unknown. She was last seen in East London, but her present whereabouts was unknown, as it was believed she was travelling with a circus.

Leave to sue by edictal citation was granted, the order being made returnable on November 1. The notice to be issued in the "Indwe Times" and "Cape Times."

*In re* THE B.S.A. ASPHALTE CO. (IN LIQUIDATION).

Mr. Molteno presented the second report of the official liquidators of the B.S.A. Asphalte and Manufacturing Co., Limited.

The report was ordered to lie open for inspection for a fortnight.

*Ex parte* MOHR.

Dr. Greer moved for an order authorising the payment of certain money. The petitioner's affidavit stated that his father had farmed a farm named Klein-

bergvliet at Diep River until about 8 years ago, when realising that his continued ill-health, and also lack of money, were rendering it impossible for him to continue farming, he contemplated selling the farm, but after consulting some of his children, and on the undertaking of the petitioner gratuitously to maintain his parents until death, and to discharge the interest on the bonds affecting the farm, etc., and on the understanding that petitioner be permitted to work part of the farm for his own account, and be allowed, when so disposed, to purchase the farm, the intention to sell the farm was abandoned. Since then the petitioner had carried out his undertaking, and had enhanced the value of the farm, and had maintained his parents, who were invalids, at great expense. Believing that he would ultimately become the purchaser of the farm, petitioner from time to time made various improvements, and erected a cottage, which his brother had occupied for five years rent free. Petitioner's brothers also resided and worked for their own benefit on portions of the farm without paying any rent therefor, or discharging any of the rates. In December, 1880, the father of petitioner and his wife made a joint will, whereby the survivor was appointed heir to the joint estate, which was to be possessed during the lifetime of the survivor as his or her free personal property, and after the death of the survivor to devolve on the children. In a statement of assets and liabilities submitted to the Master after the death of the wife, the farm figured as the only asset, and was valued at £425. Petitioner knew of the will, but thought it gave the survivor (Claus Frederick Mohr) absolute ownership in the farm. Claus Frederick Mohr on several occasions requested petitioner to purchase and take transfer of the farm, and six weeks before Mohr's death petitioner purchased the farm for £1,800. Petitioner received transfer and paid £125 on account, and passed a bond in favour of Claus Frederick Mohr for the balance. In connection with this petitioner disbursed the sums of £36 for transfer duty, and £20 7s. for stamps. About 10 days after the transfer had been effected some of the children of Claus Frederick Mohr, having been advised that their father had no such power of alienation under the will, applied for an interdict against Claus Frederick Mohr and petitioner restraining the former from parting with the bond and restraining petitioner from transferring away, or in any way encumbering, the farm. Before the application could be heard Claus died. Eventually an interdict was granted restraining petitioner, pending an amicable settlement between the parties. After several attempts at an amicable arrangement, it was decided to submit

the farm to public auction, when £4,500 was realised for it. Applicants in the case then wrote and asked petitioner to pay their taxed costs in connection with the interdict, and not desiring to incur further costs he paid their costs, £25 9s. 2d., and his own, £19 18s. 7d. Thereafter, in order that the estate might be transferred to the purchaser, petitioner transferred the farm back to the estate, and incurred an expenditure of £16 4s. 6d. in stamp. Petitioner had applied to the Treasury for a refund of the transfer duty paid by him in connection with the transfer from his father to him, and for exemption from the transfer duty in connection with the transfer back to the estate, to which they acceded. Petitioner concluded he was entitled to receive the other disbursements in connection with the transfer of the property out of the estate.

The affidavit of the respondents, Messrs. A. J. Chiappini and J. H. Brucker, executors testamentary in the estate, and who were represented by Mr. Burton, was to the effect that they admitted that the amounts claimed had been incurred, but were not satisfied that the estate was liable without the express sanction of the courts.

The application was granted, costs to come out of the estate.

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## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

#### PROVISIONAL ROLL.

GRAAFF V. SIFF. { 1906.  
Aug. 31st.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £6,000, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

BOSMAN, POWIS AND CO. V. DAVIS.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.



ILLIQUID ROLL.

KOTZE V. VISSER.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £787 17s., forage, etc., sold, with interest *tempore morae* and costs.  
Order granted.

REHABILITATIONS.

Mr. Mokteno moved for the discharge from insolvency of Willem Petrus Louw.  
Application granted.  
Mr. Bailey moved for the discharge from insolvency of Joseph Muller.  
Application granted.

GENERAL MOTIONS.

HOME V. HOME. { 1906.  
                                  { Aug. 31st.

Mr. Douglas Buchanan moved for a decree of divorce, in default of respondent's compliance with an order of restitution of conjugal rights.  
Decree granted, with costs.

LOUW V. LOUW.

Mr. Russell moved for a decree of divorce, with custody of the children, in default of defendant's compliance with an order of restitution of conjugal rights.  
Decree granted, plaintiff to have custody of the children.

VILJOEN V. VILJOEN.

Mr. Van Zyl moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights.  
Decree granted, defendant to have custody of the children, and plaintiff to have right of access to them.

*Ex parte* ESTATE WILDREDGE.

Mr. Sutton moved for a rule *nisi* under the Derelict Lands Act to be made absolute.  
Rule absolute.

McKINNON V. McKINNON.

This was an application brought by Elizabeth Gordon McKinnon, of Woodstock, upon notice to her husband, John

H. McKinnon, to show cause why he should not pay over to her £50 to enable her to prosecute proceedings for judicial separation, and also for alimony *pendente lite*.

The affidavits were of a conflicting character, and disclosed extremely strained relationships between husband and wife. The parties were married in Aberdeen, Scotland, and they had four children. Applicant said that she was suing for a judicial separation by reason of her husband's cruelty, personal violence, and gross insults, that he had turned her out of the house, and that she was without means. The husband admitted that there had been disagreements, but he denied the alleged violence or cruelty, and said that there was no reason why applicant, who left the house, should not return to her home and live happily with him (the respondent) and the children. He added that he was unable to provide funds for the applicant to proceed with her action. Applicant filed replying affidavits, denying respondent's allegations. It transpired that the wife was living with some friends next door to the husband and children.

Dr. Greer was for applicant; Mr. M. Bisset was for respondent.

Dr. Greer having been heard in argument on the facts,

Maasdorp, J.: The Court will not now decide upon their merits the questions in dispute between the parties, but I must say that the information given by the applicant in this case is of the very vaguest description. We have a general statement that he ill-treated and cruelly treated her, without giving any instances from which the Court can ascertain whether what she complains of were really acts of ill-treatment and cruelty. The information, therefore, as it stood, would have been sufficient for the Court to refuse now to give an order. But the application will be refused on another ground. It seems upon the statement of the applicant herself that respondent earns £14 a month, and that he has to support four children. I have come to the conclusion that he is not in a position, even though the Court might have held that she was entitled to some assistance, now to render such assistance. It is impossible for him to contribute to this litigation when he has got these four children to support. Under the circumstances, applicant having no means, and respondent not being in a position to assist her, she still, if she have a good cause of action, can proceed in another way, and the Court will grant her the necessary indulgence if she puts a better case before the Court. The Court might now have assisted her by allowing her to sue *in forma pauperis* if she had put the requisite information on affidavit. Application refused; no order as to costs.

*Ex parte* LIQUIDATORS, CLARKE AND CO., LTD.

Mr. Close again mentioned this matter, which was an application for leave to petitioners to enter into certain agreement with one Frederick James Rowland Horne, managing director of Rowland Horne and Co., Limited, whereby Mr. Horne had purchased certain claims by F. H. Clarke and Co., Limited, against Rowland Horne and Co., Ltd.

Maasdorp, J., said that all the parties seemed to be before the Court, and the compromise would be sanctioned. Order granted as prayed.

*Ex parte* SOUTH AFRICAN WIDOWS' FUND SOCIETY.

Mr. Molteno moved on the petition of certain elderly ladies, who are the surviving widows of the fund, for an order upon the Master to pay out to petitioners the assets in his hands belonging to the society. The fund dated back to the year 1831, and was formed with the sanction of Sir Lowry Cole, the Governor at that time.

The Master had prepared a lengthy report, from which it appeared that the capital of the fund had been reduced to £1,950. He agreed that the time had arrived when the society might be dissolved. There were only four widows surviving, the eldest being 87 years of age, and the youngest 77. The Master recommended the appointment of Mr. J. E. P. Close as liquidator of the society.

Rule *nisi* granted, calling upon all persons concerned to show cause on the 12th September why the application should not be granted, rule to be published once in the "Cape Times," "South African News," and "One Land."

*Ex parte* SILBERMAN.

Mr. Lewis moved for certain rule *nisi* authorising petitioner to sue her husband *in forma pauperis* by edictal citation for restitution of conjugal rights to be made absolute. It was stated that respondent had completely disappeared, and that substituted service of the rule had been made.

Rule absolute and leave to sue by edictal citation granted, the citation to be returnable on the 30th November, and to be published once in the "Government Gazette" and the "Cape Times." The case was referred to Mr. Lewis as counsel, and Mr. Buirski as attorney, of petitioner.

## ESTATE BLACK V. DOORTJE.

Dr. Rainsford moved for the removal of trial to the ensuing Circuit Court at Prieska.

Trial removed accordingly.

*Ex parte* WATSON.

Mr. Douglas Buchanan moved for the appointment of commissioners to take the evidence of certain persons regarding certain transactions of Jacob Rittenberg and Peter Kaplan, trading as Rittenberg and Co., of whose insolvent estate petitioner is trustee.

Order granted, appointing the Resident Magistrate of East London, or, failing him, the Assistant Resident Magistrate, to take the evidence of witnesses in East London, and Mr. Advocate Giddy to take the evidence of witnesses in Cape Town.

*Ex parte* ESTATE MEINTJES.

Mr. McGregor moved for authority to dispose of certain property in the estate. The application raised a question of construction of a certain will.

Maasdorp, J., ordered the application to stand over, pending further information as to the age of the surviving spouse, whether there are further descendants, and as to the value of the property.

## REYNOLDS V. ZIELTSMAN AND CHURCH.

This was an application upon notice to respondents to show cause why they should not release certain two villas situate at the Grove, Claremont, from the operation of a second mortgage bond for £2,000.

The application was brought to enable applicant to pass transfer of Marie Villa to the purchaser, Mr. Buchanan. Church had bought the other property, Leslie Villa. The bond, it appeared, was raised in 1904 as a security to respondents upon becoming surety to the bank for certain overdraft of £700 against the applicant.

The applicant alleged that respondents refused to release the property from the bond, in defiance of a verbal agreement entered into between the parties. Respondents, however, denied that they were acting contrary to any agreement. Mr. Zietsman said that he had been quite willing to sign the release, so long as Mr. Church would. Mr. Church said that he had not been approached to sign.

Mr. P. S. T. Jones was for applicant; Mr. Roux was for the first respondent, and Mr. Pohl was for the second respondent.

Counsel for respondents intimated that they would be prepared to consent to the release of the property, provided that applicant paid the costs.

Mr. Jones then proceeded to argue the question of costs.

Maasdorp, J.: It seems in this case that upon the two respondents guaranteeing the payment of an overdraft in the bank due by the applicant, a bond was given

upon the two properties mentioned in the application to secure the respondents in case they should be called upon to pay the overdraft. Well, under ordinary circumstances, they would be entitled to retain this bond until the overdraft is settled; until their indebtedness upon their guarantee is satisfied by the applicant. But it is stated by the applicant that there was a verbal agreement under which the respondents, under certain circumstances, set forth in the affidavits, would consent to the release of the bond. Now, the question is whether such a verbal agreement was entered into. On the one side there is the statement of the applicant that it was, and on the other the respondents say that they never entered into such an agreement at all. It would, therefore, be quite impossible upon these affidavits to decide the dispute between the parties. It now appears, however, that the respondents, as I take it, merely to accommodate applicant, are prepared to consent to the bonds being cancelled. It is not, therefore, necessary now to go further into that part of the case. The matter now resolves itself merely into a question of costs, and, under all the circumstances, I think that, if the respondents had not now been willing to give their consent, the applicant would necessarily have failed. The Court will make no order on the application, but the applicant will be ordered to pay costs. The application is refused, with costs.

HEPWORTHS, LTD. V. GRESHAM LIFE ASSURANCE SOCIETY, LTD.

Mr. McGregor appeared for applicants, and Mr. De Waal for the respondents.

Mr. De Waal said he intended applying for a postponement of the case to September 12. The papers in the case had only been handed to him at 10.30 this morning, and Mr. Searle had also been briefed in the case, but was unable to appear. The postponement could not effect the applicant.

Mr. McGregor explained Hepworths, Limited, had agreed to pay one Ohlsson the sum of £100 a month for ten months to satisfy a claim made on the lessor of the estate, and which consisted of £75 a month, the rent of the premises, and £25 a month which the lessor had to pay Hepworths. The respondents held a bond over the place. They had an action pending against the applicants. The difficulty that arose was that provisional sentence had been obtained for £22,000, and the rents had been declared executable. Hepworths had agreed to pay Ohlsson £100 a month on the first of each month, and if the amount was not paid there might be trouble.

The matter was ordered to stand over, the costs to be costs in the cause. The rents not to be paid over to the Sheriff in the meantime.

GELDERBLOM V. GELDERBLOM.

Mr. Van Zyl moved on behalf of applicant, Isaac Johannes Geldenblom, to have a certain award made a rule of Court.

The affidavit of the applicant stated that he and respondent subscribed to a deed of submission dated March 8, 1906, wherein they submitted to arbitration the division of three farms situate in the Riverdale district. They agreed, with regard to division of two of the farms, but with regard to the division of the third farm, Rietvlei, they could not agree, and called in the assistance of an umpire. The umpire made his award, which was erroneously dated March 4, 1906, instead of April 4, 1906, and applicant was desirous of having the award amended and made a rule of Court.

Mr. Upington, who opposed the application, read the affidavit of the respondent, Christian Johannes Geldenblom, who stated that he admitted all the facts contained in applicant's affidavit, with regard to the finding of the arbitrators and the calling in of the umpire, but alleged that the umpire made his award in his absence and the absence of his arbitrator, and that he did not divide the farm in a partial or fair manner. The decision of the umpire would necessitate the cutting up of the farm into four parts, which would ruin it.

The replying affidavit of the applicant stated he asked the respondent to accompany the umpire to the farm or to send his arbitrator, and he did not do either. He contended that the award was a fair one.

The affidavit of the umpire stated that on the day he was called in to deliberate between the parties he asked respondent to accompany him and show him the division lines, but he refused to go. He was accompanied by applicant and his arbitrator, and when he returned he stopped with respondent, who pointed out some lines of division. He drew up his award without being influenced by anybody, and while quite alone.

[Maasdorp, J.: Was the division to be an equal division?—Yes, taking everything into consideration.]

Mr. Upington contended that in the applicant's replying affidavits there were many allegations which required to be answered.

[Maasdorp, J.: Then we had better settle that point at once.]

Mr. Upington: In the applicant's original affidavit he just makes the bald statement that the award has been made.

Maasdorp, J., said the matter would have to stand over, as the allegations now contained in the replying affidavit raised new ground.

The matter was ordered to stand over.

#### N'KOMO V. UTSHING.

Mr. P. S. T. Jones appeared for applicant.

Mr. Russell appeared for respondent and applied for a postponement.

Mr. Jones said he would agree if the respondent agreed not to sell the cattle in dispute until the case was heard.

Mr. Russell said he could not undertake to do that. He had communicated with his client and asked him if he would consent, but had not received a reply.

The matter was ordered to stand over until September 12, an order interdicting the respondent from disposing of the property in the meantime to issue.

WALKER V. SYFRET, GOD- ( 1906.  
LONTON AND LOW. ( Aug. 31st.

Attorney and client — General agency work — Taxation of costs.

*No provision is made by the Rules of Court for the taxation of costs between attorney and client. It is however, the practice for the taxing officer to tax such costs if requested to do so by the attorney, and should the attorney proceed to sue for his costs without having had his bill taxed, the Court can order this to be done, provided that the items in the bill relate either wholly or chiefly to litigious business and not to matters of general agency.*

This was an application calling on the respondents to show cause why they should not have a certain bill of costs taxed.

The affidavit of John Francis Hartnady, of the firm of Messrs. Dold and Van Breda, attorneys, stated he had charge of the applicant's business with the firm. The respondents had been his attorneys, but in February, 1905, his business was transferred to Messrs. Dold and Van Breda, when all his papers were transferred. Certain bills of costs due to respondents were submitted to applicant, and one entitled "general business" he declined to pay until it had been taxed.

The answering affidavit of Mr. Godlonton, of the respondent firm, stated that they agreed to undertake the applicant's business on his paying £100 down and sending money when it was required. Although they transacted a considerable amount of business for him, he did not for some time after they began to practice for him lodge £100. They declined to act further for him in February, and later on the respondents received a letter from Messrs. Dold and Van Breda enclosing a letter from respondent accusing them of unprofessional conduct. They replied that he would either have to withdraw his statement or prove it in a court of law. The respondents contended that a bill for general business did not come within the jurisdiction of the Taxing Master.

Mr. Russell appeared for applicant and Mr. Upington for the respondents.

Mr. Upington, in argument, contended that the respondents had been very badly treated by the applicant, and consequently that he did not deserve any clemency. Under Rule 36 of Court, general business between an attorney and a client did not come under the Taxing Master, as it did not refer to litigation.

Mr. Russell contended that the bill of costs was liable to taxation. In Van Zyl, page 808, it was stated that costs between attorney and client were taxable on the same principle as those between party and party. This decision was adhered to by the Chief Justice in an unreported case. On page 816, Van Zyl qualified his statement by saying the taxing officer cannot tax a bill of costs for general professional services, or in respect of non-contentious matter only. Still, if the client desire it, and could show reasonable cause for it, there was nothing to prevent the Court specially referring such a bill to the taxing officer for taxation, even though it contains merely charges for general professional services or non-contentious matter.

[Maasdorp, J.: If an action is brought against you on the Bill, then the Court need not go through all the items, but can refer the Bill if it wishes to the taxing master, but when the matter is not before the Court, how can you compel taxation?]

Mr. Russell: They have demanded the money from us. I understand that the bill has been paid.

[Maasdorp, J.: Then why this motion?]

Mr. Russell: They had some money belonging to my client, and they stopped the amount of their bill out of it.

[Maasdorp, J.: Are there any items for litigation in the account?]

Mr. Russell: It looks like it, my lord. There is the preparation of an appeal case in England.

[Maasdorp, J.: But that does not come within the jurisdiction of this Court.]

Mr. Russell: There is an item for copying pleadings on August 4.

[Maasdorp, J.: I do not see that date in the copy before me.]

Mr. Russell contended that many of the items seemed as though they were connected with litigation.

[Maasdorp, J.: Some of them do.]

Mr. Upington: None of this is on affidavit. I object to the elaborate explanation of each item by my learned friend.

[Maasdorp, J., said he would like to have some information on the point that the respondent's had funds in their hands to pay themselves when they complained that they hitherto could not get funds.]

Mr. Upington submitted that the Bill was one for general professional services, and certainly the Taxing Master would experience considerable difficulty in allocating the different items to different suits.

Maasdorp, J., said it appeared that the respondents acted as attorneys for the applicant, and did the work of general agency for him. They made out three bills for work done by them for the applicant, two of these seemed to have reference to work done by them as attorneys in respect of matters of litigation. The third was the Bill before the Court, and on which the present application was made. The two bills that had reference to litigation were properly taxed by the taxing officer and duly paid. The present Bill the respondents regarded as having connection with matters of general agency, and not with matters of litigation before the Court, and they did not put it before the taxing master on the ground that the work was not done as attorneys in matters of litigation, and that under the Rules of Court the taxing officer would not consider it his duty to tax such a Bill. Now, the question was whether this was a Bill referring to matters of litigation or not. It was a very long Bill, and the great bulk of the items that he had looked at seemed to have no reference at all to matters of litigation, but referred to general work of agency done by the respondents for the applicant. Taking the Bill as a whole, it was not such a Bill as a Court would refer to the taxing officer. It was quite possible that there might be some little item here and there which the applicant might have good ground to object to as being introduced into such a Bill, and if the matter was properly brought before the Court, and such items questioned upon the respondent suing the applicant for his debt, these particular items might be considered proper items to put before the taxing officer, but it was impossible for the Court to pick them out, for they were of a very trivial

character, and were few in number. The Rules of Court did not provide for the taxation of Bills as between attorney and client, but undoubtedly the Court had the power to refer such matters to the taxing officer, and, moreover, it had become the practice of the taxing master to tax them if they were put before him, as was often done, by attorneys at the request of their clients, but if the attorney refused to put them and proceeded in the Courts to recover the amount of his Bill, then the Court could order them to be taxed. The question before the Court was whether this Bill which contained a vast number of items of general agency should be sent to the taxing master. He held that that particular Bill did not fall within the authorities cited, and was not a Bill that the Court should refer to the taxing master. Therefore the application would be refused, with costs.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

FINLAYSON V. FINLAYSON. { 1906.  
Sept. 3rd.

This was an action brought by Alexander Finlayson, of Oudtshoorn, against his wife, Catherine Finlayson, of Cape Town, for restitution of conjugal rights, failing which a decree of divorce and custody of the child of the marriage. Respondent claimed in reconvention a judicial separation from the plaintiff on the ground of his alleged cruelty and intemperance, and custody of the child.

It transpired that there were proceedings between the parties some years ago, when the present respondent proposed to institute an action for judicial separation on the ground of her husband's cruelty. Since that time Mrs. Finlayson, who had supported herself by nursing, had had custody of the child.

Dr. Greer was for plaintiff; Mr. Upington was for defendant.

Formal proof of the marriage having been given,

Alexander Finlayson (the plaintiff) said that he was married in community of property at the Resident Magistrate's



Office, Cape Town, on the 1st May, 1900. After marriage, they lived for some time at Wynberg. They continued to live happily together until her mother interfered. His wife left him in December, 1901. Witness was sick at that time. He requested his wife to come back to him. Her father sent her back to him the first time, but that was before December, 1901. After December, 1901, she never came back to him. Witness denied that he had been cruel to his wife. He denied that he was of intemperate habits. He was willing and able to provide his wife with a home if she would return to him. He was a linesman in the Telegraph Department.

Cross-examined: Witness was formerly employed by the Tramway Co. as a motorman, and was dismissed from that appointment because he was drunk on duty. He admitted that the statement in his affidavit to the effect that he left the company's service of his own accord was untrue. He had got drunk at times. After McGuinness's wedding he had to be helped into a tram, because he was drunk. He denied that on that occasion he assaulted his wife when he got home. He remembered a moonlight walk that they had round the Kloof. They called at the Round House, where witness had a drink. He denied that he assaulted his wife on that occasion, or that he assaulted one Woodthorpe. He remembered that one Sullivan tackled him and put him to the ground. On the night of the 11th December, 1901, his wife went out to see her parents. He admitted that he barred the house. He refused to open the door when his wife came at six and nine o'clock that evening.

Mrs. Finlayson alleged that her husband used constantly to be intoxicated, and frequently ill-treated her. She did not consider that he was a fit person to leave a young child with.

Cross-examined by Dr. Greer: She refused to go back to him now. She had not been influenced by any other person in this matter.

By the Court: Plaintiff had assaulted her mother, and had been charged for this at the Wynberg Police Court.

Cross-examination continued: She believed that plaintiff had given up drink recently.

James Stephen, sergeant in the City Police, stated that on Friday morning last plaintiff was brought to Wale-street Police Station charged with drunkenness on railway premises. His bail was estreated.

Edward Sullivan, tramway conductor, said that about 1901 witness and the parties to the suit went around the Kloof. On this occasion plaintiff struck his wife, and tried to throw her over an embankment.

Buchanan, J.: The plaintiff was in the habit of giving way to intoxication, and on one occasion,

when his wife visited her parents, he locked her out. This was the alleged desertion. She was prepared to go back to him, but he was intoxicated, and then she went back to her parents and refused to return. It had been proved that the husband did strike his wife, and she said that he also kicked her. Husband and wife took each other for better or worse, and in this case, happily, there was no evidence of unfaithfulness on either side. But the husband had bad and vicious habits that might lead to great unhappiness unless overcome. The desertion of the wife had not been established, and therefore judgment could not be given for the plaintiff. As to the wife's plea for a separation, her case almost entirely rested on the intemperance. His lordship held that nothing whatever justified a man in raising his hand or foot against a woman. But for the fact that the plaintiff arrived in Cape Town drunk so recently as Friday last, there would have been little ground to justify a judicial separation. But he was still intemperate in his habits, and there would be an order for judicial separation, in the hope that the plaintiff would still reform and exercise more self-control, and there would then perhaps be some hope of the parties coming together again. The plaintiff's petition would be dismissed. The wife would succeed on her claim in reconvention, and she would have the custody of the child; plaintiff to have reasonable access to it, and pay £1 10s. per month to its support, until the child was 16 years of age. The plaintiff would pay the costs.

## GENERAL MOTION.

### *In re* ERLANK.

In this case petitioner asked for leave to sue his wife by edictal citation for his interest under an ante-nuptial contract, and to attach her interest in a certain flock of sheep to found jurisdiction.

Mr. Douglas Buchanan was for applicant.

Rule nisi granted, personal service to be effected, rule returnable on October 18.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*In re* INSOLVENT ESTATE { 1906.  
RITTER. { Sept. 4th.

Mr. M. Bisset moved, as a matter of urgency, for the appointment of provisional trustees in the insolvent estate of Charles Wm. Ritter, lately carrying on business as a toy and fancy dealer and commission agent, in Burg-street, Cape Town. Petitioners suggested the appointment of Messrs. W. A. Currey (secretary of the General Estate and Orphan Chamber) and H. W. Abbott as provisional trustees, with leave to carry on the business pending the election of trustees by the creditors.

Order granted as prayed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. JEBINS. { 1906.  
{ Sept 5th

Magistrate — Irregularity — Stock theft.

De Villiers, C.J.: In this case the accused was tried before the Assistant Resident Magistrate of Fraserburg, sitting at Williston, for theft of stock, under Act 35 of 1893. He pleaded not guilty, but was found guilty, and sentenced to be imprisoned for three months, with hard labour, and to receive ten lashes. Against this judgment and sentence the accused appealed, and it appeared on the appeal that the accused had gone to a kraal, where seven sheep had arrived, and one of the sheep being caught, accused went up, and said, "That is the sheep I have to get," and thereupon that sheep was handed over to him. It seems that the day before this took place, he had been sent by his aunt to a neighbouring farm to buy a sheep for her. The farmer said she could have a sheep,

and he would send some sheep into town on the following day, when she could send for the sheep. The following morning the aunt sent the boy to go and fetch the sheep in the kraal, because she had seen the sheep coming in. It was this message from the aunt which induced the accused to ask for the sheep. It appears there was some mistake. A man called De Klerk, who was the head constable of the place had also bought a sheep, and this sheep which had been caught was not intended for the aunt, but for the chief constable. The chief constable says on oath he saw this boy carrying the sheep. He asked the boy, "Whose sheep are you carrying?" and he said, "That is my sheep," meaning, of course, the sheep which the boy believed was his aunt's. It afterwards appeared that this sheep had been caught and removed to the aunt's house, and he sent a constable for the accused. A constable went there, and found that the sheep had been killed. He told the boy then to take the sheep to the Magistrate's office; there it was taken possession of apparently by De Klerk, and he then seems to have instituted these proceedings against the boy. Upon that the boy was found guilty. When the case came before the Court of Appeal, it was directed that there should be further evidence taken so as to ascertain whether there was not a mistake. The boy was not examined on oath at all; he did not tender his evidence; it seems that his aunt heard of the case the first time after the trial. He carried the carcass to the Magistrate's office, and there and then he was put into the dock. The poor boy was taken aback, and did not know what to say. The Court has exercised the power which in this case turned out to be a very beneficial power, of authorising further evidence to be taken. The Magistrate, after taking further evidence, reports: (1) At the hearing of this case before me on the 25th July last, the accused was found guilty, and sentenced, notice of appeal being lodged the same day. (2) In accordance with the judgment of the Chief Justice, delivered on 6th inst., further evidence for the prosecution, as well as for the defence, was taken by me on 24th idem. Had that evidence been given at the trial, it would have entirely satisfied me as to the innocence of the accused, and my finding would undoubtedly have been one of "Not guilty." (3) I sincerely regret that further inquiries were not instituted before the case was tried. At the trial I endeavoured to elicit as many facts as possible during the examination of the witnesses, and if the accused had but made a statement in his own defence, I should have been bound to adjourn the case, in order to afford him an opportunity of producing confirmatory evidence. But he declined to make any statement—his explana-

tion now is that he did not know how to make a statement, and having no knowledge of his antecedents, I came to the conclusion that he did not wish to commit himself. (4) Head Constable De Klerk, who was in charge of the case; stated, in the course of his further evidence (p. 10), that before the trial he brought certain information to my notice. I think he is under a misapprehension, for although he consulted me as to what crime (if any) could be charged, I have no recollection of his mentioning any point in the case. As police officer, the investigation of the case was entirely in his hands, but his evidence (pp. 9 and 10) shows that, although in possession of the information referred to, he did not investigate the same, as he thought it would not materially affect the case. In the light of the facts disclosed by the evidence of William Higgs, Lydia Klaagen, and the accused, it is apparent, if such investigation had been made, the whole matter would have been cleared up. I think that the Magistrate, under the circumstances, might at the trial have made some further inquiries, because it was so palpable that this boy did the whole thing openly, and that he could not have been guilty of theft. But this chief constable was not only acting in his public capacity, but also in his private capacity, because he said that he thought the sheep was intended for him, and when the boy brought back the sheep he thought the sheep was his own. I wish to refer to some of the evidence given by the chief constable. It is somewhat curious. He says: "It is not usual to meet charges such as the present one with summonses. Arrests are made with or without warrant. Upon the accused being charged at the office with the crime of the theft of stock, I treated him as being under arrest. I hold that my action is consistent with section 28 of Act 35 of 1893." Now, that section says: "If there be reasonable ground for believing that any person is or has been in unlawful possession of any stock or produce, it shall be competent for any justice of the peace, Field-cornet, landholder, or police constable to apprehend or cause to be apprehended such person without warrant, and convey him, or cause him to be conveyed, in custody before any Resident Magistrate having jurisdiction, and, if it be found that he is or has been in possession of any such stock or produce, and is not able to give a satisfactory account of such possession to such magistrate, he shall be deemed to be guilty of the crime of theft of stock or produce, and shall thereupon be dealt with as if he had originally been charged with such crime." In this case there certainly is no reasonable ground for believing that this boy was not entitled to possession of this stock. The practice of arresting without warrant has really be-

come far too prevalent in this colony. In ordinary cases of crime being committed, the Ordinance 40 of 1828 (section 23) does not give those large powers which are generally supposed to belong to constable and police officers: "The Sheriff and his deputies, Superintendent of Police and his deputy, and field-cornets and all constables, police officers, or other officers of the law proper to the execution of criminal warrants, have the power of arresting in cases of crimes or breaches of the peace committed in their presence, or of the commission of which they have credible information from others, and after taking the offender, such Sheriff or other officer shall immediately carry the offender before the nearest magistrate, to be dealt with according to law." Then the 12th section of Ordinance 73 extends the power somewhat: "... police officers . . . shall be hereby authorised and required to arrest every person who shall commit any crime or breach of the peace in their presence; as also every person whom they shall have reasonable grounds to suspect of having committed any murder, culpable homicide . . . , or theft of any cattle, sheep, or goat; or any other crime of equal degree of guilt with the crimes aforesaid; as also every person whom they shall see engaged in committing any affray, or whom they shall find attempting to commit a crime, or clearly manifesting an intention so to do." Now this case does not, in my opinion, fall within any of those classes. There was no reason whatever to suspect this boy of theft. He had come there openly on behalf of his aunt to ask for the sheep, and when he was found skinning the sheep at his aunt's, some explanation ought to have been asked for by the constable of the aunt of the boy. There is no explanation asked; this boy is shoved into the dock, evidence for the prosecution is given against him, there is no opportunity for him to defend himself, and but for the interference of the Supreme Court appeal, the boy might have had his ten lashes and imprisonment for three months. The appeal must be allowed, and the conviction and sentence quashed.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* UNION-CASTLE ( 1906.  
STEAMSHIP CO. (Sept. 5th.

Mr. P. S. T. Jones moved, as a matter of urgency, for the attachment of certain barque lying at East London, pending an action to be brought by petitioners, the Union-Castle Steamship Co., Ltd. Petitioners stated that on August 18 last the R.M.S. Briton arrived at East London from Port Elizabeth, having on board the captain and

crew of the Norwegian barque Cingalese, who were taken off the said barque at their special request, and after considerable danger and risk, owing to the heavy weather prevailing, as they said she was in a sinking condition, and that, in their opinion, she would not remain afloat for an hour longer. Captain W. H. Harris, the company's marine superintendent at East London, decided to make an attempt to save the barque, and the company's steam tug Stork was sent out to look for the barque, and she brought the Cingalese into port next morning. The Cingalese was owned by the Cingalese Company of Ziansand, Norway, and was carrying a cargo of mangrove bark from Mozambique to Hamburg when she was abandoned by her captain and crew. Petitioners had submitted to the owners a claim for £2,000 for salvage, but as the amount had not been paid, and no undertaking or guarantee had been given for its payment, petitioners were desirous of taking proceedings for its recovery. Petitioners added that the cargo was deteriorating, owing to salt water getting in.

Order granted: giving leave to petitioners to attach the ship and cargo *ad fundandam jurisdictionem*, and to sue by edict as prayed, citation, intedit, and necessary notices to be served personally on owners of ship and cargo, citation returnable on November 14, and the Deputy Sheriff of East London to have authority to deal with cargo in such manner as may be necessary for its preservation, costs to be costs in the cause.

## SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

WOLFAARD V. NEL. { 1906.  
{ Sept. 5th.

Mr. Van Zyl moved as a matter of urgency for an interdict restraining the transfer of a certain farm, pending an action.

The petitioner, Johannes Cornelius Wolfaard, is a farmer, and owns a farm called Rondekop, being a portion of the divided quitrent farm Floriskraal, in the Laingsburg division. Applicant's petition set forth that previous to October, 1894, the farm Floriskraal was held in equal undivided shares by three brothers—Johannes Paulus Nel, Jan Abraham Nel, and Petrus Jacobus Nel—who in 1894 mutually agreed upon a partition of the farm, at the same time defining the water rights to which each of them should be entitled. In this agreement it was provided that the farm Rondekop, which was allotted to Jan

Abraham Nel, should have the sole and exclusive use of all the water rising in the Buffel River (flowing through the farm), on the portion allotted to Johannes Paulus Nel. The petitioner purchased Rondekop from Jan Abraham Nel, receiving transfer on April 10, 1897, and had ever since had the sole and exclusive use of the water allotted to that property. Johannes Paulus Nel who by the partition became the owner of the remaining extent of Floriskraal, had recently sold a small portion thereof, including the section of the Buffel River, in which rises the water allotted to Rondekop, now owned by the petitioner, and was about to give transfer thereof to the purchasers—Solomon Lewin and Jacob Adamstein. The latter had informed the petitioner of their intention to divert and make use of the water to which he was entitled, and the petitioner therefore desired to secure his right to the water by registration on the transfer deeds of the development, and of Johannes Paulus Nel and Petrus Jacobus Nel, before transfer was passed by Johannes Paulus Nel. Petitioner's property, Rondekop, was entirely dependent on the water allotted to it under the agreement, and he would suffer serious and irreparable loss if he were deprived of that water. The petitioner asked for an interdict restraining Johannes Paulus Nel from transferring the portion of the farm Floriskraal, pending an action to be brought against him to have the petitioner's right to the use of the water declared, or such further and other relief as to the Court might seem fit.

A rule *nisi* was granted, returnable on October 15, in terms of the petition, applicant to commence his action forthwith, both Nels to be joined as defendants.

NOLTE BROTHERS V. KRAMER.

Despatch of urgent order—Time of essence of contract.

*Defendant on Oct. 26th instructed plaintiffs as a very urgent order to forward a quantity of chaff forthwith. The chaff was not despatched till Nov. 2nd, and did not arrive till Nov. 7th.*

*Held, that plaintiffs having failed to perform their contract, defendant was justified in refusing to take delivery.*

This was an action for goods sold and delivered.

The plaintiffs are produce dealers, of Somerset West, and defendant is a produce broker, of Cape Town.



Plaintiffs, in their declaration, stated that defendant was indebted to them in the sum of £28 10s. 1d., for goods sold and delivered, of which details were annexed. Defendant refused to pay the said sum, and defendant claimed for the amount with interest *a tempore morae* and costs.

The defendant, in his plea, stated that on October 26, 1905, he instructed plaintiffs to forward immediately, as a very urgent order, certain chaff, as per item of the account to Messrs. Hirschovitz and Co., at Pretoria, in the Transvaal Colony. It was of the essence of the contract that the chaff should be forwarded forthwith, and plaintiffs so accepted the order. The chaff was not despatched from Rust Siding until November 2, 1905, and did not arrive at Pretoria till November 7, 1905. Hirschovitz and Co. thereupon refused to accept delivery of the chaff, by reason of the delay in despatching, and as a result, defendant likewise refused to accept delivery, and forthwith notified the same to plaintiffs. Defendant said he was justified in so refusing by reason of plaintiffs' breach of contract in not immediately forwarding the said chaff, and by their delay in despatching the same, which delay defendant said was unreasonable, in face of the instructions given by the defendant. Defendant has not since, nor had anyone on his behalf, accepted delivery of the chaff. As to the other item, of £3 13s. 3d. sterling, being the balance of an account, defendant said that he had always been, and still was, ready and willing to pay the same, that he tendered payment of this sum to plaintiffs before issue of summons, and hereby again tendered payment. Wherefore, defendant prayed that, subject to the above tender, plaintiffs' claim be dismissed with costs.

The plaintiffs' replication was as follows: The plaintiffs admit that on the 26th October, 1905, the defendant instructed them to forward the chaff in question to the persons mentioned in paragraph 2 of the plea, and that he informed them that the said order was urgent. The plaintiffs say that they executed the order with all reasonable despatch, the chaff having been consigned by rail to the said Hirschovitz and Co. on the 31st October, 1905, such consignment and delivery of the said chaff being accepted by the defendant, who was aware of the same. They admit that thereafter, on or about the 8th November, 1905, after the said chaff had reached Pretoria, to which place, upon the defendant's instructions, it had been despatched, he notified them that he declined to accept responsibility therefor; but they say that the defendant was not entitled to decline such responsibility in the premises. The plaintiffs admit the tender referred to in paragraph 6 of the plea, but say that the same is wholly inadequate. Save as above set forth, and

save as to admissions contained in the plea, the plaintiffs join issue with the defendant thereon.

Mr. Burton was for plaintiffs, and Dr. Greer for defendant.

Evidence having been called, and Mr. Burton having been heard in argument, Buchanan, J.: This action is brought to recover the sum of £24 16s. 10d. for a load of chaff sold by plaintiffs to defendant. The contract between the parties is proved by documentary evidence, and from the correspondence the Court has mainly to draw its conclusions. On October 26 defendant telegraphed to plaintiffs asking them if they could forward a truck load of chaff immediately. On same day plaintiffs replied that they could, and requested an order "to-day," and defendant replied: "Forward bogey of chaff to Hirschovitz and Co., Johannesburg. Very urgent." That was the contract entered into between the parties, and from these telegrams it might be inferred that the chaff was intended to be sent off on that very day. We find, however, that the plaintiff, who received the telegram, wrote to his brother on October 26 to tell him to get the chaff. At the time the contract was entered into the plaintiffs had not the chaff, nor had they a truck ready in which to send it. On October 27 they wrote to defendant: "Your order will be attended to at once." On receipt of this letter defendant wrote back trusting that the order had been despatched. Now, nothing was clearer than this, that it was thought by defendant that the chaff could have been despatched on that day. Plaintiffs, however, made no reply to this letter, so that by their conduct they justified the assumption by the defendant that his order had been complied with. On October 30 defendant had again to write to plaintiffs, and he said, "I hope you have forwarded the chaff, as I have no further information from you in regard to its despatch." He again assumes that they had sent it off, but a clerk of the plaintiffs, in forwarding letter to plaintiffs' store, puts a pencil note to the letter: "If you cannot do chaff, please write at once." There was no answer either to this letter, and the defendant writes asking that the advice notes should be sent to him not later than Monday, the 30th October. It was only on this Monday that one of the plaintiffs actually started to purchase the chaff which defendant had the right to assume had been forwarded some days previously. The first intimation defendant got that the order had not been carried out was in a letter dated October 31, written from Somerset West, in which plaintiffs said, "We have just received telegraphic advice that the chaff is being loaded." Defendant wrote back saying that he was very sorry to hear of



the delay, as it was now several days since he had given the order, and he was afraid that the delay would cause some unpleasantness between him and Messrs. Hirschovitz. This letter was relied on by plaintiffs as acceptance of the chaff, notwithstanding the breach of contract, and they say that if the defendant had then countermanded the order they might have been able to stop the load of chaff while *en route* to the Transvaal. If the defendant had added to his letter "I hold you responsible," there would have been an end of the case. It was only on the 1st November that the defendant received an intimation that the chaff had not been sent off, whereupon defendant says to plaintiffs, "You know the conditions, and this is not immediate despatch." Naturally there was unpleasantness with the consignees and the plaintiffs as well as defendant were fully acquainted with the course of business and must have understood that the risk caused by the delay would attach to them. Of course if the consignee accepted delivery, as they all hoped he might, there would be an end of the risk, but if he did not the plaintiffs must be held answerable. They now come into court to enforce a contract which they themselves broke. Under the circumstances the Court cannot give them judgment. Judgment will, however, be given them for £3 13s. 3d., being the small amount owing by defendant on balance of previous transactions, and plaintiffs must pay the costs of this action.

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

*Ex parte* ROGERS. { 1906.  
Sept. 6th.

Articled clerk—Breach of continuous service—Matriculation.

*The Court granted applicant three months' leave of absence to prepare for the matriculation examination, but directed that after passing the said*

*examination he should serve two years continuously.*

Mr. Watermeyer moved on behalf of Raymond Rogers for leave of absence from his articles of clerkship for three months to enable him to take his matriculation examination.

Buchanan, J., in granting the application, remarked that the indulgence of the Court was being presumed upon, and he certainly thought the Law Society should have made an appearance in this case. Practically this was an application to allow the petitioner to go back to school. He (his lordship) would certainly set his face against breaking into the short period of three years for which students were articulated. However, as leave had been granted in other cases, he would grant leave in the present application, though he did so with much reluctance. The petitioner would have to serve two years without any break after he had gone through his matriculation.

### BRINK V. CLANWILLIAM DIVISIONAL COUNCIL.

This was an appeal by J. A. Brink, of Clanwilliam, against the decision of the R.M. of Clanwilliam dismissing an action brought by appellant against the Divisional Council of Clanwilliam for £5 damages sustained through the breaking of the wheel of a wagon through the bad repair of the section of the main road between Clanwilliam and Van Rhyn's Dorp.

From the record it appeared that appellant's son was a transport rider between Eendekuil and Clanwilliam. In December last he left Eendekuil with a load of transport, which weighed about 6,400 lb. Near Clanwilliam boundary the wagon got stuck in a hole in the main road, and although the front wheels passed through all right, the back wheel collapsed in the hole. The hole was over 18 inches in depth, and was in the main spoor. The wheel was a new wheel. It cost £3 to replace the wheel and £3 to hire another wagon.

For the defence in the lower court the secretary of the Divisional Council stated that from 18th December no complaints were received by him with regard to the state of this road. The road was generally repaired by a road repairing party. It was done between the 14th September and the 25th October and commenced again on the 27th December at Clanwilliam. Limestone had been used in repairing this road. In February he again visited the place, and found no dangerous place there. The post-cart owner, in an affidavit,

stated he knew the road well, and did not think any part of it dangerous.

The Magistrate, in his reasons for dismissing the case, stated, firstly, that he considered all the requirements of the Act had been complied with by the Councils; secondly, that the holes in the road were not caused by neglect, but that the transport wagon had caused the hole in the road, and the existence of the hole was unknown to the Divisional Council; and, thirdly, that no other wagons met with an accident in passing through the road. Plaintiff's wagon was driven by his son, and it was admitted that when he saw the hole he might have taken the precautions of building up the hole with bushes and sand. He (the Magistrate) considered that the Council had maintained the road in such a manner as to make it safe to travel over, and he held that the accident might have been prevented by the plaintiff's son taking ordinary precautions.

Mr. Burton appeared for appellant, and Mr. Van Zyl for respondent.

Mr. Burton contended that the road was a main road, and the obligation to maintain it in a proper state of repair was an absolute one (section 141 of Act 40 of 1889). If the accident occurred it was idle for the Council to say they had done their best.

Mr. Van Zyl quoted *Jordans v. Cape Divisional Council* (11 J., 158), and said it was sufficient for the Council to show that they had done all that could reasonably have been expected. There were inspectors who examined the roads every two months. The driver could have prevented the accident if he had exercised due care and diligence. The local conditions should also be taken into consideration.

Buchanan, J.: The appellant had a transport wagon, which was being driven along the Clanwilliam road by his son, a youth of 18 years. While on the Eendekuil road the wagon passed through a hole in the road, and the hind-wheel, when it got into the hole in the road, broke, whereupon the appellant sued the Divisional Council for the damages sustained in consequence. The Magistrate, after going through the evidence, arrived at the conclusion that there was no default on the part of the local Divisional Council, and also that the accident might have been prevented by due precaution being taken by the son who was driving the wagon. I think it is clear that the Divisional Councils Act, section 141, imposes a duty on all Divisional Councils, requiring them to keep in repair and preserve all main roads within their division. This was one of the main roads, and the question is whether or not the Divisional Council has been negligent in the discharge of the duty imposed upon it by the statute. From the evidence it would be seen

that the driver passed along this road 16 days before, and there was no hole there, but on the return journey he found one. The only witness called to prove the existence of the hole before the day of the accident was one Van Horst, who stated he found the hole there eight days prior to the accident, but that he drove through it without suffering injury. He said the hole was not then so deep or large as it was subsequently, and that he had a light wagon. The Divisional Council had a road inspector, who, if I read the evidence correctly, inspects the whole of the roads in the division once every two months, and he had inspected this road early in December, and the road was then in good order. There is no contradiction of his evidence, in fact it is supported by the evidence of the plaintiff's son. The accident took place on the 28th December. The hole was on the boundary of the district, and the Magistrate arrived at the conclusion that considering all the circumstances there was no negligence on the part of the Divisional Council. This is a conclusion which he deduced from the circumstances. It has been contended, and I think fairly, that this Court is in a position to draw its own conclusions from the evidence which has been recorded. I agree with the Magistrate that one must take into consideration the circumstances of the district as to the nature of the repairs which are reasonably required to be made to main roads. In one division main roads may be kept in a very much better state of repair than is required upon roads in another division, and local circumstances may be such that it would be impossible to keep these latter roads in an equally good condition as other roads are kept in. Still the Act requires the Divisional Council to keep the roads in such reasonably good repair as to allow traffic to pass over them in safety. The question is whether there has been negligence on the part of the Council or not. The customary inspection and repairs had been executed without any report having been received of the accident. The inspector was, in fact, so convinced that the road was in good order that he said the accident must have occurred elsewhere. The Court requires a stronger case than that made by the appellant before it can say that the Magistrate was wrong in his finding. It was purely a finding on facts. If it had been shown that there was a knowledge of the existence of this hole, there might be better evidence of negligence on the part of the Council, though the absence of such knowledge does not necessarily exonerate the Council altogether. Although it is with some hesitation I can only say that upon the reading of the record I am not in a position to upset the

finding of the Magistrate. It may be that another Magistrate might not have come to the same conclusion, but at any rate it could not be urged that this Magistrate was influenced by local considerations. He was brought from another district to hear the case, and was a Magistrate of considerable experience. There is one point which I have not referred to, which is, that the Magistrate calls attention to the admitted fact that notwithstanding that the son discovered the existence of the hole he determined to drive through it. He knew this when the front wheel of his wagon had gone through it and he determined to go on. He did not draw up the wagon as he might have done, but he went on and the wheel broke. Under these circumstances I do not think I ought to interfere with the judgment of the Magistrate; and the appeal must be dismissed with costs.

[Appellant's Attorney: G. Trollip.  
Respondent's Attorneys: Van Zyl and Buissinné.]

**BURGER AND OTHERS V. BURGER.**  
**Magistrate—Jurisdiction—Counterclaim.**

*Appellants had sued plaintiff in a Magistrate's Court for £20 as and for rent. In reconvention respondent had claimed £63. The Magistrate took evidence as to the bona fides of the counterclaim, and, being satisfied therewith, dismissed the case.*

*Held, that the Magistrate should have tried the plaintiff's claim and dismissed the counterclaim.*

This was an appeal from the decision of the Resident Magistrate at Montagu deciding that a certain case in which the appellants were plaintiffs and respondent was defendant, was outside the jurisdiction of the Court.

In this appeal the plaintiffs, Messrs. Gert Christian Burger, Allwyn Petrus Burger and Schalk Gehardus Burger, sued the defendant, Johannes Hendrik Burger, for the amount of one year's rent at £25 per annum for portion of certain farm Concordia, in the Montagu division—the claim being reduced to £20 to bring it within the jurisdiction of the Court, and interest thereon from May, 1904, with costs of suit. An exception was raised by the defendant in the Court below that the summons was vague, embarrassing and insufficient in law, inasmuch as it did not explain or give particulars of the lease in respect

of which the amount sued for was claimed. The exception was overruled. The defendant then pleaded—admitting the allegations, but stated that the lease was entered into for three years—of which period he had only one year's beneficial occupation, the plaintiffs having at the expiration of that year forcibly and without the consent and against the will of defendant resumed possession of the property—and thereby broke and cancelled the lease in respect of which the defendant claimed in reconvention the sum of £50, the value of eighteen muids of potatoes, destroyed by plaintiffs' cattle on or about March, 1904; and further, the sum of £4—the value of certain oat crop standing on the land on the date on which the plaintiffs resumed possession. The defendant excepted to the jurisdiction of the Court below in so far as the counterclaim exceeded the jurisdiction of the Court. To establish the *bona fides* of the claim in reconvention, which amounted to £63, the defendant was called in the Court below, after hearing whom, the Court was satisfied with the *bona fides* of the claim, and dismissed the case with costs, holding that it was ousted of its jurisdiction.

Mr. Murray Bisset appeared for appellants and Mr. McGregor for respondent.

Mr. Bisset said the Magistrate was clearly wrong. He ought to have tried the claim and the counterclaim for £13 and dismissed the counterclaim of £50; or he ought to have tried the claim and dismissed the whole counterclaim.

Mr. McGregor said that he would not argue that the magistrate was right in his reasons for holding that he had no jurisdiction, but he would take the point that the defence raised, that was that the lease was one for three years, was a *bona-fide* one which would have the effect of extinguishing the whole of the plaintiff's claim. If so, the Magistrate would have had to try the validity of the lease, and that was beyond his jurisdiction. Counsel quoted the cases of *Bertram v. Wood* (10 J., 177), *Wienand v. Goldschmidt* (5 E.D.C., 257), *Basaramadoo v. Morris* (6 J., 28), *Grotius* (3-19-12), and *Voet* (19-2-17, 19-2-22, 19-2-27).

[Buchanan, J.: In Goldschmidt's case the question whether the rent was due depended on the existence of the lease, but here it is admitted that the rent is due.]

Mr. McGregor: Here the breach of contract is such that the respondent can cancel the whole contract. The contract-breaker cannot come into Court to enforce a contract which he himself has broken. He proceeded to quote *Grotius* (3-15-3).

Mr. Bisset, in reply, said that the argument that the contract was indivisible, was wrong in law. The rent was

payable yearly and each year's rent could be sued for. He quoted Grotius (3-19-11) and *Dale v. Winship* (9 J., 509).

Buchanan, J.: The plaintiff's sued in the Magistrate's Court for a year's rent of a farm let to the defendant at the rate of £25 per annum. The claim was reduced to £20 per annum to bring the matter within the jurisdiction of the Magistrate. The defendant admitted the allegation of the summons, but set up a claim in reconvention for damages which was outside the jurisdiction of the Magistrate. The Magistrate inquired into the question whether the claim in reconvention was *bona fide*, and considering it was, dismissed the whole case. In doing so, the Magistrate has departed from frequent decisions of this Court which decide that where there is a liquid claim—not necessarily a claim on a liquid document—such claim may be a liquidated claim, but a claim for unliquidated damages cannot be set off against any liquidated claim. Several cases have been referred to which are to the effect that where a Magistrate's jurisdiction is ousted by a counterclaim being set up beyond the Magistrate's jurisdiction such counterclaim must have the effect of entirely extinguishing the plaintiff's claim. In the case of *Micuwenhuys* to a claim on an alleged lease the defence set up was that no such lease was in existence. The Court held that if the defence was good, as the validity of the lease involved an amount beyond the Magistrate's jurisdiction, the Magistrate was right in dismissing the case, because the defendant would entirely extinguish the plaintiff's claim. So also in the case of *Bertram v. Wood* (10 Juta, 177), the defence set up, if *bona fide*, would have extinguished the claim made by the plaintiff. There the claim in reconvention was beyond the Magistrate's jurisdiction, and the Court held that the Magistrate was right in refusing to hear the case.

In the case before us the Magistrate referred to the case of *De Jager v. De Jager* (3 Juta, 69), in which the Court laid down that the mere allegation of a counterclaim was insufficient but that the Magistrate should be satisfied, before dismissing the case that the claim of the defendant was a *bona fide* claim and beyond his jurisdiction. But in this case the Magistrate has overlooked the fact that in *De Jager v. De Jager* the claim set up in reconvention was a liquid claim and not a claim merely for damages. As it was such a liquid claim it was competent to be set off against the plaintiff's claim and thus extinguish it.

No claim for unliquidated damages no matter how large it may be, can oust the Magistrate's jurisdiction where the claim made by the plaintiff is a liquid claim. That is the general principle which runs through all these cases

and, I think that, it quite covers the present case.

The Magistrate therefore ought to have heard the plaintiff's claim, though it was competent for the defendant to set up any claim in reconvention within the Magistrate's jurisdiction.

The appeal must therefore be allowed with costs and the case will be remitted to the Magistrate for hearing on the merits. Leave will be given to the respondent to make any counterclaim which he may be advised to make within the jurisdiction of the Magistrate.

Costs must certainly be allowed, because it was the agent for the defendant who specially raised the point which is now decided against him.

[Appellant's Attorneys: Treëgold, M'Intyre and Bisset. Respondent's Attorneys: Herold and Gie.]

#### CARROL V. VAN ZYL

#### Lessor and lessee—Sub-tenant— Novation.

This was an appeal from a judgment of the R.M. of Worcester, in an action brought against the appellant by the respondent to recover £20, for rent due on premises situate in Britstown, and known as Van Zyl's Chambers.

Mr. Upington appeared for appellant, and Mr. Benjamin for respondent.

From the evidence given in the Court below, it appeared that Van Zyl leased to Carrol, who at the time was residing in Britstown, certain premises known as Van Zyl's Chambers at £80 a year, and the defendant owed him £20, a quarter's rent from December 1, 1905, to March 1, 1906.

The defendant, in his evidence, stated that up to May, 1905, he owned the Britstown Hotel. When he was running that hotel, he hired Van Zyl's Chambers to be used as an adjunct to the hotel. When he left Britstown in 1903 he let the hotel to Marcuse and Wernberg. They also took over Van Zyl's Chambers from plaintiff. After witness left Britstown, they paid the plaintiff the rent for the chambers. Cohen and Fortes paid the rent from March to December, 1905, to Van Zyl. Cohen and Fortes surrendered their estate at the beginning of this year.

Van Zyl, in his evidence, said he only looked upon Marcuse and Wernberg as managers of the hotel, and he had never released Carroll from his liability under the lease.

Counsel having been heard in argument,

Buchanan, J.: In this case the plaintiff leased to the defendant certain premises known as Van Zyl's Chambers. They were used as bedrooms and as an annexe to an hotel which belonged to the defendant. In 1903 the defendant handed over his interest in the hotel to



certain purchasers. He entered into an agreement with these purchasers under which he allowed them the benefits of the lease of the plaintiff's premises. This agreement was for five years,, renewable for another five years. Whilst this agreement was running the lease between the plaintiff and the defendant expired. The tenants of the defendant then wished to hire these Van Zyl's Chambers from Van Zyl, who asked £100 per annum rent. This amount the tenants of the hotel refused to give. Subsequently defendant hired in his own name these chambers for £80 per annum from the plaintiff. This new lease gave defendant express permission to sublet the premises, and, shortly afterwards, upon Marcuse and Weinberg giving up the hotel, defendant entered into an agreement with the new tenants, Cohen and Forbes, by which he gave them the benefits of his rights in Van Zyl's Chambers. In other words he sub-let to them these premises. The plaintiff was not consulted, nor was he asked to accept the new tenants.

There is, in my opinion, a total absence of a novation in this case. Mr. Upington has gone thoroughly into the evidence, but he has failed to convince the Court that these sub-tenants were accepted by the plaintiff in lieu of the defendant. If a person takes a lease of a property and sublets it, unless the lessor released the person who leases from him such original lessee still remains liable. Mr. Upington says that the evidence is overwhelming. I agree with that, only I think that it is overwhelmingly in favour of Van Zyl. I think the Magistrate was amply justified in his decision. There is no ground, either legal or equitable, upon which his judgment can be impugned. No such thing as a novation has been proved and the appeal must be dismissed with costs.

### GENERAL MOTIONS.

*Ex parte* TRUSTEE OF THE { 1906.  
MARSH MEMORIAL HOMES. } Sept. 6th.

Mr. Bisset, as a matter of urgency, moved for the appointment of J. H. N. Roos as provisional trustee in the insolvent estate of Samuel Jacobs, and also in the insolvent estate of Barney Jacobs, to carry on the administration of the estates, pending the election of trustee.

Applications granted, and Mr. Roos appointed.

### *In re* PONTER.

Mr. Benjamin appeared in this matter, on behalf of one Friedman to move to set aside a *rule nisi*, granted on September 5, interdicting the sale of

certain property belonging to the estate Ponter pending further order of Court.

The applicant intervened, on the ground that he had bought certain property from the estate prior to the *rule nisi* being granted. His property had been sold by one of the co-executors, without the knowledge of the other executor.

Mr. G. W. Steytler (the intervener) took up the position that he had bought *bona fide* and for valuable consideration and from a co-executor who had been entrusted by his fellow executors with the administration of the property.

Mr. P. S. Jones, who appeared to oppose the discharge of the rule, on behalf of Mr. G. W. Steytler, was not called on to reply.

Buchanan J., said that the late F. Ponter had appointed Ponter and G. W. Steytler as executors testamentary of her estate. Mr. Steytler had allowed his co-executor to collect the rents and look after the bonds in the property. Ponter had advertised certain of the property for sale without consulting his co-executor, who first learned of the fact from the advertisements in the newspapers. Thereupon Mr. Steytler came to the Court and obtained a *rule nisi*, interdicting the sale from proceeding. Friedman had intervened, and alleged that he had bought some of the property before the rule was granted. The terms of the sale, as set out in the affidavit, did not incline the Court to assist him. It was said that the furniture was bought for a sum of £120, and that he had also hired the house, Margarete Villa, Annandale-street, for a period of six months, and paid in advance. The petitioner had not at present made out his case. It might be that he could afterwards show that Ponter was authorised to deal with the estate. If so, he would get his property. But at present the application must be refused, with costs.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

SAACKS V. THOMAS. { 1906.  
} Sept. 7th.

This was an appeal from a judgment of the Resident Magistrate of the Cape in an action brought by appellant against respondent to recover damages in the



sum of £14 1s. 2d. for alleged misrepresentation.

The respondent, it appeared, was the voluntary liquidator in the estate of Fisher, Hamilton and Co., and the appellant bought at public auction on the Grand Parade for £3 3s. a certain list of outstanding debts. Since the purchase he had found that a number of the debts in the list had already been paid, and that the alleged debtors held receipts. The total amount of disputed debts was £14 1s. 2d. The respondent set up the defence that the debts were sold subject to the conditions of sale, which were read before the contract of sale, and that there had been no misrepresentation.

The Magistrate granted absolution from the instance, with costs.

Dr. Greer was for appellant; Mr. M. Bisset was for respondent.

Dr. Greer submitted that on the Magistrate's finding he ought to have drawn a different conclusion. It was found that after these debts were sold there were certain persons on the list whose debts were erroneously included by the defendant's clerk. These debts had either been settled by compromise or some other way, and through want of supervision on the defendant's part they had not been deleted from the list. The Magistrate held that the defendant was covered by the conditions of sale. The plaintiff certainly could not set up the case that he was not acquainted with the conditions of sale, but he (counsel) submitted that the conditions of sale were never intended to cover a case of this kind, where the Magistrate had found that there was negligence or what amounted to negligence on the part of the defendant. The defendant said he did not know that the firms in question were on the list, but his clerk knew, and, from the point of view of the law, the defendant must be presumed to have knowledge. Mr. Thomas must be taken to have acted recklessly in this matter.

Without hearing Mr. Bisset,

Buchanan, J.: The defendant, one Thomas was liquidator in the estate of Fisher, Hamilton and Co., and as such liquidator he endeavoured to collect outstanding debts. His clerk was employed for this purpose, and his clerk got in certain of the amounts due, and in others he entered into a compromise. Thomas advertised a sale of the outstanding debts by auction, and a list was produced at the sale. On this list were some 30 odd debts of a total amount of £96, and in the margin some are marked disputed, some persons insolvent, and some are given as doubtful, and consequently, to protect himself, Thomas sold them under these conditions, that the claims were sold as free from responsibility or recurrence on the trustee, either on account of incorrectness, payment, partial payment, counter-claim, and so forth.

He protected himself as far as it was possible for words to protect him for any responsibility in regard to these debts. They are debts in liquidation. The purchaser must have known that they probably would not be sold if they could easily be got in by the liquidator. The purchaser attends the auction and buys this list of debts, amounting to £96. for £3 3s. He knows there is great risk, and he takes this risk. It now appears that before the sale the clerk had received one or two small amounts on account of this list of debts, and an action is now brought on what is alleged to be constructive fraud, founded on the constructive fraud of the clerk upon payment of some of these debts. It is clear, from some of the authorities cited by Mr. Greer, that a contract which is tainted with fraud cannot be insisted upon, that fraud would vitiate the contract entirely. If this had been a suit for *restitutio in integrum*, and such fraud or reckless mis-statement had been made, which amounted to constructive fraud, the Court might have considered the case. But there is no such action brought before the Court. The Magistrate has found, and I think properly found, that there is a total absence of anything like fraud on the part of the liquidator. There may have been some inadvertence in not checking the clerk's return, or verifying the list with the books, but there is no fraud of any kind. There are absolutely no grounds for upsetting the Magistrate's decision, except perhaps, if there had been a cross appeal, the judgment might have been changed to judgment for the defendant, instead of absolution from the instance. Appeal dismissed, with costs.

Hopley, J.: I concur. I do not wish to condone the carelessness of liquidators, but for an action like this to succeed, you must prove not only inadvertence, a mistake on the part of the principal or his clerk, but you must prove actual fraud.

ROODT V. LAKE AND OTHERS. { 1906.  
Sept. 7th.

Transkei — Magistrate's jurisdiction—Courts of appeal—Acts 21 of 1876, 38 of 1877, Sec. 2, 43 of 1885.

*The civil jurisdiction of Resident Magistrates in the Transkei as to amount and in respect of claims founded on liquid documents was regulated by Act 21 of 1876; and Act 43 of 1885 does not apply. By Act 38 of 1877, Sec. 2 (see also Act 29 of 1897, Sec. 1), the Governor is empowered to*

*legislate for the Transkei by proclamation, and by such proclamation he subsequently conferred upon the Resident Magistrates of that Territory unlimited jurisdiction as to amount in illiquid civil cases, and the Magistrate has no power to remove such cases.*

*But non constat that the effect of this proclamation was to extend the jurisdiction under Sec. 3 of Act 21 of 1876.*

*Semble, the only Superior Court having appellate jurisdiction in native cases in the Transkei is that of the Chief Magistrate: but in cases in which a European is concerned an appeal lies either to the Supreme Court, the Eastern Districts Court, or a Circuit Court within the District.*

This was an appeal from a judgment of the Acting Resident Magistrate of Maclear, in an action brought by appellant against respondent to recover £271, value of certain cattle alleged to have been wrongfully taken from plaintiff, and £2,026 damages.

When the case came on for hearing in the Court below, application was made for the removal of trial to the Circuit Court at Umtata. The Court ordered further proceedings to be stayed, and the case removed to a superior Court, question of which Court to remain in abeyance.

The ground of appeal was that plaintiff was entitled to have the case tried in the Magistrate's Court, Maclear being situated within the Native Territories, and the Magistrate's jurisdiction being unlimited.

Mr. J. E. R. de Villiers was for appellant; Mr. McGregor was for respondent.

In the course of counsel's argument, attention was called to the extreme difficulty in tracing the Acts of Parliament bearing on the Territories.

[Buchanan, J.: These Acts are in a most jumbled condition.]

[Hopley, J.: Yes, an absolutely chaotic condition.]

Counsel on both sides having been heard.

Buchanan, J.: An action was brought in the Magistrate's Court of Maclear, in the district of Griqualand East, to recover 22 head of cattle, or their value (£271), and damages to the amount of £2,026 6s. When the case was heard, the defendant objected to the jurisdiction of the Magistrate, and wished the case referred to a superior court. Un-

der the Griqualand East Annexation Act the law then in force in the Cape Colony was extended to the territory annexed subject to such modifications as the Governor might introduce by Proclamation. At the time of the annexation in 1879, the Act 21 of 1876 was in force in the Cape Colony, as well as the Magistrate's Court Act, No. 20, 1856. By the older Act the Magistrate had jurisdiction to the extent of £20 only in cases of damages, but by Act 21, 1876, this jurisdiction was extended in cases of liquid documents to an amount of £100, and section 3 of the Act of 1876 enacted that such cases, viz.: cases upon liquid documents when the claim was over £40 may, on objection taken by defendant and on security being given, be removed to a superior Court. The section as it reads must be confined, and is intended to be confined only to cases brought on liquid documents, and it gave to the defendants only in such cases power to object and request cases to be removed to a superior Court. Part of the Act 21 of 1876, as far as the Colony is concerned, has been repealed, and amended by the subsequent Act 43 of 1885, which extends the Magistrate's jurisdiction in other cases in addition to cases on liquid documents, and gives the defendant in those other cases the same right to object where more than £40 is claimed, as he had to object in the case of liquid documents, under the Act of 1876. Unfortunately, the Act of 1885 has not been extended to the Transkei, and, as the Act of 1885 has been passed since the annexation, it is not part of the law of the Transkei, because Parliament has indicated that no subsequent Acts of Parliament shall be in force in the Native Territories unless they have been expressly extended to those territories. There has been no extension of the Act of 1885. Consequently, the only Act in force in the Transkei is No. 21 of 1876. The conflict of laws thus created leads to a great deal of difficulty in dealing with questions arising in the Transkei, and it is really time that this chaotic state of affairs should be removed. When the Transkei was annexed, as has been stated, power was given to the Governor to legislate in that territory by proclamation. The Governor has by proclamation modified the Colonial law in so far as it affects the jurisdiction of Magistrates. Previous cases decided in this Court show that the Governor's proclamation must be read as giving Magistrates in the Transkei in civil suits unlimited jurisdiction. Even if we hold that the Act 21 of 1876 is part of the law which was transferred to the Transkei, the 3rd section of that Act does not apply to this action, it is limited to actions on liquid documents. This is not such an action, and, consequently, so far as this par-

ticular case was concerned it is immaterial whether that law is in force in the Transkei or not, and, as matters stand now, the Magistrates in the Transkei have unlimited jurisdiction to try actions for damages, and there is no law in force in the Transkei which gives the right to the defendant to object to the Magistrate trying such cases. In this case the defendant did object, the Magistrate upheld the objection, and ordered the case to be removed to a superior Court. There is no law in the Transkei which enables a Magistrate in an action for damages to order the case to be removed from his Court, which has jurisdiction to a superior Court. The question might arise as to which is a superior Court in actions in a Transkeian Court. Where the action is between natives, it is quite possible that in such a case the only superior Court to which such an action could be removed would be the Court of the Chief Magistrate of the Transkei. But where Europeans are interested, the superior Courts to the Magistrates' Courts in the Transkei, would be the Supreme Court, or the Eastern Districts Court, or a Circuit Court held in the district. If the action had been upon a liquid document I think it is quite possible that the Magistrate might have ordered the case to be tried in one of these superior Courts. In an action for damages there is no statutory provision to enable him to order it to go to a superior Court. This Court has not the power to say what the law ought to be. We cannot legislate: we must take the law as we find it, and, as we find the law, we hold that the Magistrate has no authority to remove this case out of his own Court. The appeal must, therefore, be allowed, with costs, and the case remitted to the Magistrate for trial.

Hopley, J.: I concur. The Magistrate decided that the defendant could object, and he so decided simply on the ground that there was this section 3 of Act 21, 1876. It seems to me that the Magistrate is wrong for the reasons stated by my brother Buchanan, and I also think that in all probability the Magistrate might not have gone wrong if he had had the original Act before him which, it seems to me, it is almost impossible now to get anywhere in the country unless one happens to have some old volume of the Acts of Parliament, the almost mischievous compilation of the statutes very frequently reducing such matters as this to obscurity where there ought to be no doubt at all.

#### MORRISON V. KOLOBENI.

This was an appeal from a judgment of the Acting Resident Magistrate of Matatiele in an action brought by appellant against respondent for the re-

turn and delivery of certain six bags of tobacco, which respondent was alleged to have wrongfully and unlawfully and without appellant's knowledge and consent removed, or caused to be removed, from his possession, and thereby to have committed an act of spoliation.

In the Court below exception was taken to the summons on the ground that it was vague and embarrassing, and for other reasons. The Magistrate upheld the exceptions.

Mr. Benjamin was for appellant (David Charles Morrison, of Umtata); Mr. P. S. T. Jones was for respondent (Kolobeni, of Khuapa's Location).

Counsel having been heard in argument,

Buchanan, J.: The plaintiff sued in the Magistrate's Court at Matatiele for the return of certain six bags of tobacco which he alleged the defendant "wrongfully, unlawfully, and without the knowledge and consent, removed or caused to be removed from his plaintiff's possession, and thereby committing an act of spoliation." Several exceptions were taken to this summons as being bad. The principal exception now relied upon was that the summons is vague and embarrassing. In the Magistrate's Court Act, schedule C, there is a plaint which has been followed in the summons in this case, the only variation being that the value of the article is not stated in the summons, but no exception is taken on that ground. There was also an exception taken on the ground that the date of the alleged spoliation was not mentioned in the summons, but that was cured by the plaintiff at once giving the date and asking to amend the summons accordingly. The form of plaint the schedule to the Act does not seem to require that the date should be given. Another exception was that there is nothing to show that the Court had jurisdiction. "as action may have been committed where no such relief as spoliation exists." I hardly know what the excipient means by this. I suppose he means that the taking of the goods might have been done at a place where spoliation gives rise to no cause of action. The only locality where one can imagine that this state of affairs exists would be where the "good old plan" prevails, that where, according to the old lines:

"He may take who has the power,  
And he shall keep who can."

That is not the law of this colony, at any rate. The exceptions are unfounded, and the appeal will be allowed, with costs.

Hopley, J., concurred.

#### SMUTS V. RONDGANGER.

This was an appeal from a judgment of the Assistant Resident Magistrate of

Wynberg in an action brought against appellant by respondent to recover £12 19s., balance of account for goods sold and delivered.

From the record it appeared that the question in the case was the amount actually paid by appellant to one Sylvester Rosseau (plaintiff's agent), on account of his indebtedness. Plaintiff said that Smuts owed him £20 19s., and he claimed that a balance of £12 19s. was still owing. Sylvester said that he only received £8. He (Sylvester) was illiterate, and he put his mark to the receipt produced under the impression that he was acknowledging receipt of £8. Defendant said that he paid to Sylvester the full amount of the account.

The Magistrate gave judgment for £12 19s., as prayed, finding that the defendant had only paid £8 on account.

Mr. Upington was for appellant (Chas. Duncan Smuts) Mr. P. S. T. Jones was for respondent (Johannes Rondganger).

Mr. Upington having been heard in argument on the facts.

Buchanan, J.: The plaintiff sued in the Magistrate's Court for £12 19s., balance of account of £20 19s. for gravel sold. Plaintiff sent his servant, Sylvester Rosseau, on the 23rd March to the defendant with an account for this amount. Sylvester brought back £8 to the plaintiff, and said that was all the defendant had paid him. Defendant said that he paid Sylvester the full amount, £20 19s., and he called a little boy, aged twelve, to corroborate him. The plaintiff said that Sylvester brought back the message that the defendant would pay the balance of the account in the following week. The plaintiff said that he afterwards went himself to ask for the balance, but the defendant put him off. Sylvester was again sent to the defendant, and was also put off. A boy named Martinus was also sent, and he said that defendant would "send the money down." The Magistrate found that the statements made by the plaintiff and his witnesses more reliable than the statements made by the defendant, and he consequently held that only £8 had been paid on account. The defendant, in support of his allegation that he paid the full amount of £20 19s., produced a receipt signed by Sylvester Rosseau, but when we come to examine this receipt we find that Rosseau, who is an illiterate man, who could neither read nor write, simply put his mark to the document. The defendant also produced his book, in which he says that £20 19s. was entered at the time that it was paid. When we look at this book it certainly shows a very extraordinary circumstance, that the coins crowded, in which Sylvester was supposed to be paid, are specified in the book. This entry is made at the end of the page, very close to the addition page of the amounts at

the bottom at the end of the book. When these payments which are entered are totalled up we find that a considerable amount over the total which is entered in the book has been paid out. I cannot follow the figures very distinctly; I make something over £20 or £30 more than is totalled up in the book. In the circumstances, we are driven back to the verbal testimony of the witnesses who were called in this case. The Magistrate has heard the witnesses, and, after recalling some and carefully sifting the evidence, he has come to the conclusion that the plaintiff's witnesses are to be believed, and not the defendant's. Under the circumstances, there is no ground on which we can interfere with the Magistrate's finding on this question of fact, and the appeal must be dismissed, with costs.

Hopley, J. concurred.

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. LOURENS AND } 1906.  
OTHERS. } Sept. 7th.

This was an application for removal of trial from the Criminal Sessions, Cape Town, to the ensuing Circuit Court to be held at Swellendam.

Mr. Burton was for applicants; Mr. Nightingale was for the Crown.

Mr. Nightingale said that since the matter was before the Court previously they had communicated with the Resident Magistrate of Bredasdorp, and they had received a wire that morning, in which the Magistrate said that there was an objection to the application on the ground that there might be difficulties in the way of a fair trial in the Swellendam district. There was no objection, however, to the trial being taken at the Circuit Court at Worcester.

Mr. Burton opposed any change from the venue to which the accused belonged, and urged that no reason had been shown why the accused should be put to the extra expense of taking their witnesses to a Circuit Court outside their own district.

Buchanan, J., said that under the circumstances the trial would be removed to the ensuing Circuit Court to be held at Worcester. Trials, as a rule, should be dealt with in the district where the alleged offence arose, and the officials ought to be very loth to remove the case out of the jurisdiction; still, when they had representations made to them that there was likely to be a miscarriage of justice if the trial took place in that district, the Court must place some reliance on the representations of the high officials of the Colony.



**BARTMAN V. BARTMAN.**

Mr. Payne moved for the removal of trial to the ensuing Circuit Court at Uniondale.

The case was removed accordingly, costs to be costs in the cause.

**KUSSEL V. KUSSEL.**

Mr. P. S. T. Jones moved for removal of trial to the ensuing Circuit Court to be held at Oudtshoorn. It was stated that plaintiff was suing her husband for judicial separation, and that the defendant had not pleaded to the declaration.

Case removed accordingly, costs to be costs in the cause, notice of date of trial to be given to defendant.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN  
and the Hon. Mr. Justice HOPLEY.]

**KEYSER V. ALSTADT.** { 1906.  
Sept. 10th.

This was an appeal from a judgment of the Resident Magistrate of Uniondale in an action brought by appellant against respondent for damages for alleged trespass and interference with water rights.

Mr. J. E. R. de Villiers was for appellant; Mr. Burton was for respondent.

Mr. De Villiers having been heard in argument,

Buchanan, J.: Plaintiff and defendant are in joint occupation of the farm Grootfontein, in the division of Uniondale. The plaintiff brought an action in the Magistrate's Court against defendant for damages. The summons, which stood for a declaration, set forth that, according to the title deeds under which the parties held, there were certain servitudes, one of rights of roads and footpaths, and the other the right to water, and the first complaint is that the defendant trespassed and did not keep to the footpaths; and the other is that he interfered with the rights of water. The parties live on the same erf. It appears that only a brick wall divides the dwelling-houses of the two parties, that the defendant keeps a shop on the farm, that the defendant's shop had once been broken into, and it is alleged that he

accused the plaintiff's children of having broken into it, which plaintiff denies. There is evidently a great deal of ill-will on the farm, because the plaintiff has forbidden his family and tenants from dealing at defendant's shop, and defendant says that he and the plaintiff are bad friends, and the fact is that he is afraid of the plaintiff, and "plaintiff and I do not love each other, and the plaintiff persecutes me." With this state of feeling existing on the farm, it would not be difficult to raise a dispute between the parties. This action was brought purely for damages, because the Magistrate has no jurisdiction where there is any title or a question of a fee or duty or office or servitude in question, or where his decision would bind future rights. The action must be regarded as one for damages actually suffered, and not one for any declaration of rights or which would affect the future use of the water. The summons complains that the defendant did not keep to the footpath, but that he went off the footpath, and in so doing injured the orchard of the plaintiffs. It appears that some young peach trees were growing near the footpath; and the defendant, it was alleged, trod upon one, and broke another of these trees. The defendant denied the alleged trespass, and the Magistrate, after hearing the evidence, was not satisfied that the defendant committed the damage alleged. He dismissed this part of the claim, and the learned counsel does not now on appeal attempt to carry the matter further. There only remains the question of water. The first complaint as to interference with water by the defendant seems to be divisible under two heads. The first is that the plaintiff complained that the defendant, by keeping ostriches in a camp, through which camp the furrow which brings the drink water to the houses runs, had polluted the furrow, and so injured the plaintiff in his use of the drink water. It appears that the defendant's ostriches do get to the furrow, but it is further shown that the plaintiff's ducks and fowls and sheep and oxen also get to the furrow, and that if there is any pollution it is as much due to the plaintiff's own stock as the defendant's ostriches. The Magistrate held that the pollution did not arise solely through the defendant's acts, and, although he says that two blacks do not make a white, both parties carried on their operations in such a way that there was no material damage suffered by the plaintiff. The second head is that the defendant's servant on a certain occasion washed some tobacco in the common watercourse. It is a matter of dispute whether the tobacco was washed at the dam or on the defendant's own ground. Here the Magistrate has again found on the evidence against the plaintiff. It was a question of fact, and there is evidence to support the Magistrate in his finding that



the washing of the tobacco was not done in such a way as to injure the plaintiff. Then there is a further allegation that the defendant turned off or caused to be turned off all the water coming down, so as not to allow any to run for domestic purposes. Here, according to the evidence, the Magistrate has found that during the summer months the flow of water is so weak that both plaintiff and defendant suffer from the want of drink water reaching their place owing to the extra evaporation and the defective condition of the furrow. It appears that the amount of drink water sent down is such as can escape through an inch hole in a stone; and if the furrow is at all defective, it is easy to imagine the failure of the water to reach the homesteads. Then there is another charge that the defendant abstracted the water on a certain occasion. The evidence seems to point to an occasion in January last when plaintiff had allowed one Klue three hours' water for threshing purposes, which water Klue was to return. Klue returned this water, commencing at 6 o'clock. The question arose as to when the supply ceased. The defendant produced a watch at the time to show that it was really 9 o'clock. The Magistrate, considering that it was only a trivial dispute, found that the plaintiff had not proved any damage on that head. There was another question as to where the water was taken by the parties at the commencement and termination of their respective turns. Well, the servitude on the farm does not fix any particular spot at which the water is to be taken. I have gone through the list from beginning to end, and I think it is impossible for this Court now to interfere with the finding of the Magistrate on this question of fact. No specific damages have been found. All counsel can now argue is that nominal damages should have been given. The Magistrate finds no damages have been proved, and he gives judgment of absolution from the instance. I think we cannot interfere with the Magistrate's judgment, and the appeal must be dismissed, with costs.

Hopley, J., concurred.

#### BERGMAN BROS. V. MARY.

This was an appeal from a judgment of the Resident Magistrate of Herbert in an interpleader action brought at the instance of the respondent against appellants, to determine the ownership of a certain bull.

From the record, it appeared that Mary was a native, living in a location; one of her sons was called Scholtz. Appellants, who were tradesmen, had had transactions with Scholtz, and had obtained judgment against him, and, among other things, had attached a cer-

tain bull of cream colour, described in the record as a "cream bull." Mary brought an interpleader claim to have the bull declared her property, and the Magistrate found in favour of the claim, with costs, and ordered the bull to be returned to the claimant.

From the evidence, it appeared that the bull had been registered with the Inspector of Locations in the name of Scholtz. Mary was a widow, and it was stated to be the custom among natives for the eldest son to take charge of the stock on the death of the father.

Mr. Burton was for appellants; Mr. Benjamin was for respondent.

Mr. Burton said that this was an appeal on a question of fact, and he recognised that his position was a difficult one, but he submitted that the circumstances were certainly of a most suspicious character. It was clear from the evidence of Mr. Orpen, Inspector of Locations, that he took very great pains indeed to see that the registration of stock by natives in locations, as provided by the Act 37 of 1884, was carried out carefully, and that he had a foreman there who was acquainted with the regulations as to the registration of stock, and he told the Court that the people were well acquainted with these regulations.

Buchanan, J., said that the registration seemed to have been very lax. The ticket on which the stock and owner were described was an old servants' registry ticket, and the printed particulars had not been struck out.

Mr. Burton said that the copy of the ticket given in his brief was quite neat. Proceeding, he said the point was clear that this cream bull had been registered as Scholtz's brother's from the very beginning. He submitted that the matter was of such a suspicious character that judgment should have been given for appellants.

Buchanan, J.: Messrs. Bergman Bros. obtained judgment against one Scholtz, a native, residing in No. 5 Location, district of Herbert. In execution of this judgment, a writ was entrusted to the messenger, who attached a wagon and 12 oxen. This wagon and two of the oxen belonged to Scholtz, and were sold in execution. Of the other cattle, seven were claimed by different people, and were returned to them, but one, a bull, was claimed by Scholtz's mother, Mary. Acting upon instructions from the attorney for Bergman, the messenger refused to give up this property. Mary filed an affidavit and claimed it, and there was an interpleader suit. Unfortunately, through an irregularity in the messenger not having applied for the summons, the first interpleader suit was dismissed on an exception taken by the defendants, Bergman Bros., and Mary had to pay the costs. The second interpleader suit was brought by her in proper form through the messenger, and the evidence heard

in that interpleader suit established beyond all doubt the fact that this bull belonged to Mary. The Magistrate has found upon the evidence of a great number of witnesses, who traced the bull from its birth, that it was the property of Mary. Scholtz, at the death of his father, as elder son in the family, registered the property belonging to the family with the inspector of native locations under Act 37 of 1884. He registered all the property in his own name, though the property belonged part of it to his brother, part to his mother, and part to other members of the family. It is now contended, and was contended before the Magistrate, that this registration was conclusive proof of the ownership of Scholtz in the bull. The Magistrate says that he took that fact as a presumption to be met. I think the Magistrate's reasons in this case state very clearly the facts of the case, and he goes on: "I held that the presumption raised by the registration in Scholtz's name was not sufficiently strong to disprove the ownership of Mary." The Magistrate's judgment seems to be quite correct, and is amply supported by the evidence led in this case. The appeal must, therefore, be dismissed with costs. Hopley, J., concurred.

WILSON V. LEWIS.

{ 1906.  
{ Sept. 10th.

Insolvency—Petitioning creditor  
—Trustee—Costs.

*The plaintiff in the Court below was the petitioning creditor for the compulsory sequestration of a certain estate. He had incurred certain taxed costs in connection with his petition. The bill of costs had been presented to defendant before his election as sole trustee of the estate. Plaintiff had filed a claim on the estate, but had not therein included the bill of costs and never had demanded payment from the trustee (defendant) after his election. Plaintiff had sued defendant for these costs, and the Magistrate dismissed the summons.*

*Held on appeal, that while it might have been competent for the respondent, as trustee, to have paid these costs on demand, and that while appellant might have proved for them on the insolvent estate,*

*the respondent trustee could not be held personally liable for the same.*

This was an appeal from a judgment of the Resident Magistrate of the Cape in an action brought by appellant against respondent to recover a sum of £14 18s. 5d., costs of certain proceedings in an insolvency wherein appellant was petitioner and respondent was the trustee.

The summons called upon defendant, Henry Lewis, accountant and auditor, Cape Town, to defend an action, in which plaintiff (Andrew F. Wilson) claimed £14 18s. 5d., being the amount of certain taxed bill of costs incurred by plaintiff in presenting a petition to the Supreme Court for the final adjudication of certain estate, which said petition was duly granted. Plaintiff said that the bill was handed by the plaintiff's attorney to the defendant prior to the second meeting of creditors held on the 29th September, 1905, and at which the defendant was elected sole trustee, and it was the duty of the defendant, when framing the liquidation and distribution account, to include the said bill of costs. Plaintiff claimed £14 18s. 5d. damages by reason of the defendant's omission and negligence in not so including the bill of costs. Defendant took exception to the summons on the ground that it disclosed no cause of action. He said that the liquidation and distribution account had been duly confirmed by the Supreme Court. Plaintiff filed his claim in the estate, but did not include therein the bill of costs now sued for. Defendant had filed a plan of distribution, and the same was allowed, and distribution had been made accordingly. Defendant further excepted that the sentence of the Supreme Court was a final judgment and a bar to further proceedings.

The Magistrate dismissed the summons, holding that it did not disclose a cause of action.

Mr. McGregor was for appellant; Mr. Burton was for respondent.

Mr. McGregor submitted that it was the duty of the trustee to reimburse the plaintiff for costs to which he had been put in petitioning the Supreme Court for sequestration of the insolvent's estate. From the terms of the Ordinance, the trustee had notice that there were these claims in the case of a petitioning creditor where there was a compulsory sequestration, and he must provide for them. The Ordinance specially mentioned the case of a man who petitioned and protected him for his costs in bringing about the sequestration. Counsel quoted *Du Preez v. Botha's Trustees* (2 Juta).

Buchanan, J.: I take it that under the Act all creditors are called upon by the Master and afterwards by the trustee to

file and prove their claims. Still, after the decision in the case of *Du Preez v. Botha's Trustees*, I think it would have been competent for the trustee, on demand being made upon him, to have paid the costs incurred in securing the sequestration, as administrative costs of the estate. But, before any lack of duty on the part of the trustee in not paying these costs can be alleged, they must either have been demanded from him or have been proved on the estate. For, although they might have been paid by him on demand, there was nothing to prevent the creditor from proving on the estate for these costs. As a fact the creditor did prove on the estate for the amount which he alleged to be due to him, but omitted to include this taxed bill of costs in his claim. We also find that, after the defendant was elected trustee, no demand or intimation was given to him as to this taxed bill of costs. Under these circumstances, the Magistrate held that the defendant, on the summons, was certainly not liable to the plaintiff, and it seems to me indisputable that the Magistrate was right in this case. The only possible ground of action that the plaintiff has against the defendant seems to be founded on the fact that while he was a private individual, when he had nothing whatever to do with the estate, the plaintiff gave him this bill of costs. But it does not appear what he gave it to him for. It could not then have been as a demand upon the estate, because he was not then the trustee. If it were given to him as plaintiff's agent for the purpose of making a demand upon the estate for this taxed bill of costs, the answer is that that is not the action brought before the Court, and, as Mr. McGregor candidly acknowledges, the mere delivery of a bill of costs to a person who is not a trustee would create no liability on his part, unless it were covered with a mandate or some other instructions to act on the bill of costs so delivered. If the bill of costs had been given to him in his private capacity, with instructions to take certain action thereon, he might possibly be liable for failure to take that action, but as far as the breach of duty on his part as trustee is concerned—and that is the ground upon which this action is brought—the plaintiff has failed on the summons to show that such a breach of duty exists at all. Under these circumstances, I think the Magistrate was perfectly right in dismissing this case. The appeal must be dismissed with costs.

Hopley, J., concurred.

*Ex parte* PATERSON.

Mr. Russell moved, as a matter of urgency, for a temporary interdict restraining one James G. Hamilton from removing certain goods from premises

in Plein-street Cape Town, pending an action for rent. Petitioner, who was acting through his agents, E. R. Syfret and Co., stated that respondent was sub-lessee of a portion of premises, 51, Plein-street, and owed petitioner a sum of £46 10s. for rent. Respondent was leaving this (Monday) evening for Mossel Bay, and was about to remove his samples and stock.

Rule *nisi* granted, to operate as a temporary interdict, preserving the landlord's lien for rent over the property in the premises, pending an action to be instituted forthwith, with leave reserved to respondent if so advised, to move to set aside the rule.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. HAVENGA. 1906.  
1 Sept. 10th.

Liquor—Act 28 of 1883, Sec. 2.

*Three coloured men purchased from appellant some 12 gallons of wine, which they did not consume on the premises. The Magistrate treated this sale as three separate sales and convicted appellant under Act 28 of 1883, Sec. 2.*

*Held on review, that there had only been one sale and conviction quashed.*

Hopley, J.: A case has come before me on review from the R.M.'s Court at Brodasdorp against Jan Havenga of contravening section 75 of the Liquor Licensing Act (No. 28, 1883), in that he had sold liquor when he was not authorised to do so. The evidence shows that there came to his farm, he being a farmer who distils spirits and makes wine, a cart with three coloured men upon it, and these men bought from him there on the farm at one time wine in three lots—one in an anker, one in half an anker measured into various vessels, and another four bottles of wine poured into four bottles. In all 12 gallons or more wine was sold at the time. None of it was consumed at the place, and it was all delivered at one time, put into the cart, and taken away. The Magistrate convicted Havenga, looking upon it as three transactions, and not one simply, and, therefore, as not being covered by the protection afforded by the third subsection of section 2 of the Act, which is as follows: "Nothing in this Act shall apply to any person engaged in agriculture who may sell, upon the property occupied by him, intoxicating liquors in quantities of not less than seven gallons at one time, such liquors being the pro-

duce of grapes or other fruits respectively of his own growth, or purchased or procured by him: Provided that such liquors shall be distilled or made upon such property, and shall not be drunk or consumed on his premises." Now, it is common cause that this liquor had been made upon this farm, it was not drunk upon the farm, and the only question that remains is whether it was one transaction or three. I submitted the matter of this query to the Chief Justice and the other Judges and we sent it to the Attorney-General to see whether he could support the conviction and the Attorney General has now sent back an intimation that he cannot support the conviction, and the feeling of the Judges is that the sale must be looked upon as one transaction, a sale of more than seven gallons of wine not consumed on the premises and the produce of the grapes of the farm, and therefore protected by the third subsection of section 2 of the Act. The conviction must, therefore, be quashed.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

COHEN V. FELTMAN. { 1906.  
Sept. 11th.

This was an action brought by Conrad Cohen, of Woodstock, against Morris Feltman, of Cape Town, for an account. Plaintiff appeared in person; Mr. Gutsche was for defendant.

Plaintiff applied for a postponement until next term. He said he had been under the impression that the case would not be taken until next term. It had appeared in the list for the 2nd October. He desired to engage counsel.

[Hopley, J.: It is such a stupid little case that I don't know whether it is worth while putting it off. Of course, it may not be stupid to you, though it strikes me in that light.]

Mr. Gutsche (in answer to the Court) said that he should not object to a postponement provided plaintiff paid costs of the day.

[Hopley, J. (to plaintiff): You will have to pay wasted costs if the case is postponed.]

Plaintiff assented.

[Hopley, J.: The matter will be put off until next term, but you must pay any costs that are wasted by your not being ready to-day.]

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

### PROVISIONAL ROLL.

RICHES V. SAMUEL. { 1906.  
Sept. 12th.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WARREN V. ANDERSON.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

HART V. SMITH.

Mr. P. S. T. Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted, subject to papers being put in order.

BOARD OF EXECUTORS V. BOOYSEN.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £2,500, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MALMESBURY BOARD OF EXECUTORS V. DE GOEDE.

Mr. Douglas Buchanan moved for provisional sentence on certain mortgage bonds for sums of £625, £1,350, and £1,600, with interest, less £92 7s. 11d. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

COLONIAL GOVERNMENT V. VAN DER WESTHUIZEN.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £52 16s., with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**ESTATE BORCHERDS V. CROUS.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £250, with interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**FLETCHER V. EXECUTOR ESTATE JALIEL.**

Mr. Toms moved for provisional sentence on a mortgage bond for £170, with interest, less £4 7s. 1d. paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**ARDERNE AND OTHERS V. AIREY.**

Mr. Douglas Buchanan moved for provisional sentence on a mortgage bond for £1,120, with interest, less £10 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**HAYNES V. DU PLESSIS AND ANOTHER.**

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £850, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**CAUVIN AND ANOTHER V. BOUCKER.**

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £1,800, with interest, less £17 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Mr. Burton (for defendant) presented an affidavit by his client applying for an extension of time.

Mr. Jones said that there were certain motions on the list in which the defendant was concerned, and he should have to ask that those motions stand over also.

Buchanan, J., said that the provisional case would stand over until the motions are called.

**MARAIS V. JOUBERT**

Mr. Bailey moved for provisional sentence on a mortgage bond for £150, with interest, bond due by reason of non-payment of interest; counsel also ap-

plied for the property specially hypothecated to be declared executable.

Order granted.

**VAN RYNEVELD V. STOFFELS.**

Mr. Pohl moved for provisional sentence on certain two mortgage bonds, with interest, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**FULLER V. PERROTT.**

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £500, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

**NEETHLING V. WALKER.**

Mr. Long moved for provisional sentence on a mortgage bond for £1,000, with interest. Counsel also applied for the property specially hypothecated to be declared executable, and the rents attached.

Order granted.

**NORTHERN ASSOCIATION CO. V. FRIEDGOOD.**

Mr. Toms moved for provisional sentence on two mortgage bonds for £600 and £3,500, with interest, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

**BANK OF AFRICA V. HOULDER BROS. AND CO., LTD.**

Promissory note—Agent—Liability of principal—Power of attorney.

Mr. Searle, K.C., moved for provisional sentence on a promissory note for £2,550, signed on behalf of Messrs. Houlder Bros. and Co., by J. M. Keene, and dated 29th June, 1906.

Mr. Upington read an affidavit by W. Westray Bell, manager in South Africa of the African Shipping and Agency Co., who said that Keene had no authority from Houlder Bros. and Co. to enter into any transaction of this kind. Furthermore, the matter did not appear in the books of Houlder Bros. and Co.



Mr. Searle read a replying affidavit by P. C. Blair, manager of the St. George's-street branch of the Bank of Africa, who said that the promissory note was given in part renewal of a bill previously discounted in the ordinary and usual way.

Mr. Upington said that the defence was two-fold. In the first place, there was no authority in the power of attorney held by Keene to make or sign a promissory note. He submitted that in a matter of this kind the power of attorney should be strictly construed. Keene had authority to negotiate or endorse promissory notes, but no express power was given to him to make or sign promissory notes on behalf of the Houlders' business. In the second place, upon the affidavits the transaction in respect of which the signature was attached to this promissory note was not a transaction on behalf of the business. Counsel quoted from Story on Agency (section 68), and cited *Hambro and Son v. Burnand and Others* (1903, 2, K.B.D. 399). The latter case was, he said, tried in the Commercial Court before Mr. Justice Bigham, and Mr. Justice Bigham's judgment was reversed on appeal, on the ground that he had not given due weight to the American authorities. Surely, in a matter of English commercial law, it was not necessary to consider the American authorities. The very fact that the phrase "make and sign promissory notes" did not appear in this power of attorney was conclusive evidence that it was never intended to give Keene power to do that. Keene, by making this note, could not bind Houlder Bros., and the principal was not liable under all the circumstances.

Without calling upon Mr. Searle,

Buchanan, J.: This is an application for provisional sentence on a promissory note signed p.p. Houlder Bros. and Co., Limited, J. M. Keene, in favour of Messrs. Black and Co., and by Black and Co., endorsed over and discounted, with the plaintiffs, the Bank of Africa, Limited. The defence set up is that Keene had no authority to sign this note on behalf of Houlder Bros. and Co., and that Keene used this note for his own purposes, and not for the business of Houlder Bros. and Co. It appears from the affidavits that Keene had been in the habit of negotiating numbers of promissory notes signed in this way with customers of both the plaintiff bank and the National Bank of South Africa. The plaintiff bank, when a note signed by Keene in this way for Houlder Bros. was first presented to them for discount required the production of his authority so to sign, and he exhibited his power of attorney, given by Messrs. Houlder Bros., which gave almost unlimited powers to Keene to act for Houlder Bros. in the conduct of commercial transactions. In this power they expressly

authorise him "to draw, accept, endorse and negotiate any bills of exchange, promissory notes, bills of lading," or other documents. The first objection taken by Mr. Upington is one founded on the meaning to be attached to the word "draw." He would admit that if this promissory note had been endorsed by Keene, it would have come under the power of attorney, but the word "draw" he says refers only to bills of exchange, and not promissory notes, and the word "draw" does not justify the agent in signing a promissory note in favour of a third party. I think, looking at the words used and the powers given and intended to be given by this power of attorney, the agent had full power to "make" a promissory note as well as to "draw" a bill of exchange on behalf of his principals, Messrs. Houlder Bros. and Co. I admit at once that if it were known to the bank that Keene had been making these promissory notes for his own purposes, and not for the purposes of the business, they could not rely upon this power of attorney, as charging the principals in this case. But the affidavits state that Keene has been giving these notes to customers of the bank, and they had no knowledge of any irregularity. Mr. Upington has relied upon a judgment of Mr. Justice Bigham, a Judge whose reputation in commercial cases stands very high, in which he had decided against a transaction in which an agent, acting under a power of attorney, had bound his principals' credit for his own transactions. But, when we come to enquire further into this judgment it is found that it was overruled on appeal; it went before a full Court of Appeal, and was overruled, and one of the Judges of Appeal distinctly pointed out that if persons authorised by documents of this nature, acted under these documents, and incurred a liability to an innocent third person, it was not incumbent upon that third person to see that the proceeds received were applied to the business of the principals. This promissory note was discounted with the bank in the ordinary course of business, and the bank was justified in taking the note without going into the details of the transaction. In this case it is clear that they did not know that it was for the agent's own benefit. In the ordinary course of business, and in this case provisional sentence cannot be refused. It is, of course, competent for the defendants, if they chose, to go into the principal action. On the documents as they stand, the Court must give provisional sentence as prayed, with costs.

#### SCHWANER V. HOLMES.

Mr. Burton moved for provisional sentence on certain two promissory notes for £1,000 and £838. On the lat-

ter note a balance of £127 6s. 9d. was sued for.

Mr. P. S. T. Jones (for defendant) read an affidavit by his client, who stated that the notes were given in connection with the purchase of plaintiff's share in certain partnership business in the district of Prieska. Deponent entered at some length into his relations with the plaintiff, and claimed that he was entitled to payment from the plaintiff of £947 10s. 3d. and £127 6s. 9d., being due respectively upon a rectification of the books of the business, and the plaintiff's share of a loss upon certain Government contracts for supplies to the Cape Mounted Police. He said that he had paid the difference between the amount of £1,131 19s. 3d., due to him from the plaintiff, and £1,838, the amount of the promissory notes. Defendant added that, as a matter of fact, a sum of £2 0s. 6d. was now owing to him by plaintiff. He had specially stipulated that the £1,000 note should not be negotiable.

Mr. Burton read a replying affidavit by plaintiff, who said that the defendant was truly indebted to him in the sums that he claimed. The partnership business was taken over by defendant, including all outstandings, and he must bear any losses on that account. Deponent admitted that he was liable for any losses on the C.M.P. contract over and above £500, and said that he had credited the defendant with the sum of £184 9s., claimed by defendant to be due to him in that connection.

Mr. Jones submitted that, in view of the agreement and the account, provisional sentence should be refused, with costs. If the plaintiff wished to persist in his claim, then he should be ordered to go into the principal case.

Mr. Burton said that the agreement of dissolution provided for errors and omissions in the books to be adjusted within a certain date, but the defendant was going quite beyond the deed of dissolution, and claiming to be entitled to set off against his liability under the promissory notes large sums of money, which he said represented bad debts that he had since found to be irrecoverable. Defendant had taken over the bad debts for what they were worth. *Prima facie*, on the deed of dissolution and the promissory notes, the defendant, counsel submitted, was liable.

Buchanan, J.: Provisional sentence is prayed on two promissory notes made by the defendant in favour of the plaintiff. The one is for £838 and the other for £1,000, and both were given on the 15th January, and were payable on the 30th June this year. In the note for £1,000 is embodied this condition: "This promissory note is not negotiable without my consent in writing first had and obtained." The plaintiff annexes to the notes the agreement out of which

they originated, from which document it appears that the parties had been in partnership, and that the defendant agreed to take over the business and buy out the plaintiff. The amount for which the business was taken over was something over £5,000, of which sum £3,500 was paid by the defendant in cash, and for the balance the two promissory notes in suit were given. The agreement contains two conditions. One is that as there was a running contract between the Government officials and the firm for the supply of goods to a police station, until that contract expired it could not be ascertained whether it would result in a profit or loss. Evidently, the parties thought it would be run at a loss, because the plaintiff agreed to pay so much of the loss as might amount to over £500. The contract expired at the end of June, and it was then found that the loss was something over £680, which left a balance of £184 9s. due from the plaintiff to the defendant. At the due date of the first promissory note of £838 odd, the defendant paid the sum of £743. He said that, setting off the share of loss on the police contract, which was to be paid by plaintiff, and setting off certain errors which were in the books, this amount of £743 was the total amount which was due from him to the plaintiff in respect of both bills. The plaintiff now admits that £184 9s. is due from him in respect of his share of the loss on the police contract, and he is willing to set that off. The second condition in the contract is, that the defendant was to have six months in which to examine the books, and that any errors and omissions, if they exceeded the sum of £100, were to be afterwards adjusted. The defendant says that was why the £1,000 note was not to be negotiated. The defendant has made a list of amounts which he says require adjustment, but these the plaintiff disputes. It is clear something will have to come off that note—what amount is not quite clear. Whether these errors and omissions are wholly or partly chargeable against the plaintiff is a matter which cannot be determined on motion. The note was given subject to subsequent adjustment, and seeing that such an adjustment has not been made, I do not think this is a matter for provisional sentence. The parties must either go into the principal case, or I would suggest that they should appoint somebody to go into the accounts between them and adjust the same. At present provisional sentence must be refused, and the parties will be ordered to go into the principal case, costs to abide the result.

NELSON V. VAN SCHOOR.

Mr. Watermeyer moved for provisional sentence on certain two promissory

notes for £67 16s. 3d. and £50 respectively.

Order granted.

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POOLE V. FORBYTH AND PALMER.

Mr. Burton moved for provisional sentence on a promissory note for £6,000, less £500 paid on account, with interest and costs.

Order granted.

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BEYERS V. KINNINGS.

Mr. Long moved for provisional sentence for £23 5s. 1d., on certain acknowledgment of debt.

Order granted, subject to note being stamped forthwith.

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HANAU V. PARRY.

Mr. Uppington moved for provisional sentence for £200 on certain acknowledgment of debt, less £27 9s. 6d. paid on account, and for certain scrip pledged as security to be declared executable.

Order granted.

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VAN ZYL V. WHITEHEAD.

Mr. Swift moved for provisional sentence for £134 16s. 10d., on certain dishonoured cheque.

Order granted, subject to production of certificate of presentment.

At a later stage, Mr. Swift asked his lordship's permission to call his attention to the provisions of section 49 (subsection 1) of Act 19 of 1893. The matter, he said, involved a point of practice. A drawer was in the position of an acceptor. He contended that it was not necessary to produce certificate.

Buchanan, J., said he was afraid that the practice of the Court was against counsel. He thought a certificate of presentation should be produced.

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SELIGMAN V. LAVAK (ALIAS HARRIES).

Mr. De Waal moved for provisional sentence on a judgment of the Resident Magistrate's Court, Middelburg, for £14 and taxed costs, and for certain erf to be declared executable.

Order granted.

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LAWRIE V. GELB AND OTHERS.

Mr. Benjamin moved for provisional sentence against the first and second defendants on a certain mortgage bond for £230, due by reason of non-payment of interest; counsel also applied for the

property specially hypothecated to be declared executable. He said that there was no return of service upon the first defendant.

Order granted as prayed, subject to production of executors' appointment.

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HAZELL V. TRUSTEES, A.M.E. CHURCH, KALK BAY.

Mr. Pyemont moved for provisional sentence on a mortgage bond for £100, due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

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ILLIQUID ROLL.

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SPIILHAUS AND CO. V. { 1906.  
KLAAS. { Sept. 12th.

Mr. Toms moved for judgment in terms of consent for £2,193 6s. 4d., with interest *a tempore morae*, and costs.

Order granted.

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WILLIAMS BROS. V. FERNANDEZ OR GOLDSTEIN.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £32 18s. 9d., for work and labour done and materials supplied, and costs. Counsel also moved for a certain rule *nisi* to be made absolute, interdicting certain funds lying in the bank, and for the said funds to be attached.

Defendant admitted the debt. As to the funds in the bank, he said that a portion must go towards the education of his children. He had offered £2 a month to the plaintiff.

Judgment granted and interdict made absolute, amount in the bank to be attached, less £10 to be sent by defendant to his children.

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MONARCH COLLIERIES V. STRAUSS.

Mr. Inchbold moved for judgment under Rule 329d for £100 in respect of certain 100 shares in the plaintiff company, with interest *a tempore morae*, and costs.

Order granted.

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STEPHEN FRASER AND CO. V. SINDLER.

Mr. Long moved for judgment under Rule 329d for £529 8s. 4d., balance of account, with interest *a tempore morae* and costs.

Order granted.

MACCALLUM V. CAPE MINERALS, LTD.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £25 11s. 4d., bill of costs, with interest *a tempore morae*, and costs.

Order granted.

DOOVEY V. ALLIE.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £48 18s., balance of rent due, with interest *a tempore morae*, and costs.

Order granted.

WILLIAMS BROS. V. ROBERTSON.

Mr. P. S. T. Jones moved for judgment under Rule 329d for £12 2s., work and labour done, and for £1 10s., cash advanced, with interest *a tempore morae* and costs.

Order granted.

BERNARD V. VAN ROOYEN.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £13 3s. 9d. professional services rendered, with interest and costs.

Order granted.

COLONIAL GOVERNMENT V. NICHOLAS.

Mr. Howel Jones moved for judgment under Rule 329d for £27 12s. 11d., maintenance of a certain lunatic in Valkenberg Asylum.

Order granted.

REHABILITATIONS.

Dr. Greer applied for the rehabilitation of Gert Jacobus Oppenheimer.

Granted.

Mr. J. E. R. de Villiers applied for the rehabilitation of Isaao Perel, formerly trading with one Shenker as Shenker and Perel. The Master opposed.

Ordered to stand over for a statement by the Master as to his objections.

Mr. Russell applied for the rehabilitation of Stephanus Petrus Guest.

Granted.

Mr. P. S. T. Jones applied for the rehabilitation of Samuel Ellert.

Granted.

GENERAL MOTIONS.

*Ex parte* GOVEY. } 1006.  
 } Sept. 12th.

Mr. Long moved, as a matter of urgency, for an order authorising the re-

moval of F. St. V. Brooks from the Valkenberg Asylum to a lunatic asylum at Warwick, England. Petitioner was *curator bonis* of the lunatic, whose relatives in England desired him to be removed.

Order granted, authorising the removal of the lunatic, applicant to file his final account in the estate with the Master.

WATSON AND CO. (IN LIQUIDATION) V. WRIGHTHOUSE.

Mr. Searle, K.C., moved as a matter of urgency, on the petition of the liquidators' agent, for the arrest of the respondent, who was about to leave the Colony by the Home-going mail steamer this afternoon. Defendant, the petitioner said, was indebted to the firm of Wm. Watson and Co., in the sum of £55 11s. 9d., and he had just come down to this colony from Johannesburg *en route* for Europe. The debt was incurred in this Colony, and referred to certain clearance charges, and so forth. Defendant had admitted his liability, and offered to pay, but he had failed to redeem his promise. Counsel distinguished this case from *McLeod v. Benjamin* (2 C.T.R., 119). He added that the Registrar had declined to grant a writ of arrest.

Buchanan, J., observed that the affidavit was very bald, and the Registrar would, if the information had been more detailed, have had no difficulty. The Registrar would, under the circumstances, be authorised to issue a writ under Rule 8.

*Ex parte* WILSON.

Mr. Watermeyer moved for a certain rule *nisi*, under the Derelict Lands Act, to be made absolute.

Rule absolute.

*Ex parte* MARAIS.

Mr. W. Porter Buchanan moved for a certain rule *nisi*, under the Derelict Lands Act, to be made absolute.

Rule absolute.

*Ex parte* FOURIE.

Mr. Swift certified in favour of an application for leave to petitioner to sue *in forma pauperis*.

Rule granted, returnable 1st day of next term.

*Ex parte* HOWES.

Mr. Pohl moved for a certain rule *nisi* authorising petitioner to sue *in forma pauperis* to be made absolute.

Rule absolute, Mr. Pohl being assigned as advocate and Mr. David Tennant as attorney of petitioner.

*Ex parte* RICKETTS.

Mr. Bailey moved for a certain rule nisi authorising petitioner to sue in *forma pauperis* to be made absolute.

Rule absolute, Mr. Bailey being appointed to act as counsel, and Mr. David Tennant as attorney of petitioner.

*Ex parte* HAMP.

Mr. P. S. T. Jones moved, on behalf of petitioner, for leave to sue her husband in *forma pauperis* and by edictal citation.

Ordered to stand over, pending appearance of petitioner in person tomorrow.

*Postea* (September 13th).

Petitioner (in reply to the Court) said that their income by her own and her children's earnings was £26 a month. Witness wanted to obtain a divorce.

Hoplt, J., said that he did not know whether it was a sensible course for the petitioner to pursue. He thought she would be very wise if she went on working for herself and her children. The Court could only grant a rule at present. He advised counsel to consider the question of letting the matter stand over at present, as there was a suggested rule now before the Judges in reference to publishing notices of this kind in an abbreviated form. If desired, he would grant a rule at present, and then before the citation was published the suggested new rule might have been adopted.

Eventually, the matter was ordered to stand over until the first day of term for further information on certain points.

*Ex parte* ESTERHUIZEN.

Mr. Toms moved for a certain rule nisi authorising petitioner to sue in *forma pauperis* to be made absolute.

Rule absolute, Mr. Toms being appointed to act as counsel, and Messrs. Fairbridge, Arderne and Lawton as attorneys of petitioner.

*Ex parte* PRETORIUS.

Mr. J. E. R. de Villiers moved for a certain rule nisi authorising the High Sheriff to pass transfer of certain property to be made absolute.

Respondent did not appear.

Rule absolute, with costs.

NKOMO V. NTSHINGA.

Mr. P. S. T. Jones moved for an interdict restraining respondent from parting with certain 29 head of cattle, pending action to be brought in the Resident Magistrate's Court, in the district of Matatiele. Respondent, he said, did not now oppose the application.

Interdict granted, costs to be costs in the cause.

*Ex parte* SOUTH AFRICAN WIDOWS' FUND SOCIETY.

Mr. Molteno moved for a certain rule nisi to be made absolute authorising distribution of the funds remaining in the hands of the Master to the three surviving widows.

Rule absolute.

SOUTH AFRICAN TRADE PROTECTION SOCIETY V. GUTHRIE.

Mr. P. S. T. Jones moved, on behalf of the liquidator of the applicant society, for an order upon the respondent, who is manager of the Kimberley branch, to deliver up the originals of all books and other documents relating to the society, applicant tendering cost of carriage.

Order granted, with costs, without prejudice to any rights which respondent may have to preference for his claim.

LESSEYTON VILLAGE MANAGEMENT BOARD AND OTHERS V. TABATA.

Mr. McGregor moved for an interdict restraining respondent from obstructing, removing, or diverting, or otherwise interfering with the stream of the Lesseyton River, passing over the farm Tabata, to the 32 garden allotments in the Lesseyton Location, division of Queen's Town. Counsel read an affidavit by the chairman of the applicant Board and produced other affidavits.

Interdict granted, with costs against respondent.



# SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

## PROVISIONAL ROLL.

SMITH AND ROLLINS V. JENKINSON. } 1906.  
 } Sept. 13th.

Mr. Palmer (for plaintiffs) moved for the discharge of a provisional order of sequestration, a settlement having been arrived at.

Provisional order set aside.

## KHAN V. AHAMED.

This was an application for provisional sentence on a promissory note for £60, with interest, and for confirmation of a certain writ of arrest.

From the affidavits, it appeared that plaintiff alleged that defendant had signed the promissory note for two sums of £35 and £25 advanced to Ahamed, and that defendant had been arrested, because it had come to plaintiff's notice that he had booked a passage to Bombay per the Prinzerogent, and that plaintiff had no security for his claim. Plaintiff and defendant had been fellow-workmen at the Castle Breweries, and both had lived in Cape Town. Plaintiff said that the defendant signed the note by making his mark. Defendant flatly denied the alleged loans, and declared that he had not made his mark to the note in question. He said that he always signed his name in his own language. He did not deny that it had been his intention to proceed to his home in India. He repudiated any liability under the note.

Mr. Upington was for plaintiff; Dr. Greer was for defendant.

Mr. Upington, in view of the denial of execution of the note, applied for a day to be fixed for parole evidence to be led.

Hopley, J., said it was evident that the matter could not be decided on motion. The plaintiff must go into the principal case.

*Postea* (September 20th and 24th).

[Before the Hon. Sir JOHN BUCHANAN.]

Evidence was led on behalf of the plaintiff.

Bhikhabhai Desai, Indian fruiterer, 138, Caledon-street, said that he drew up the document in question at Feroz Khan's house, No. 1, Selkirk-street, Cape Town, on the 20th June. Feroz was the plaintiff's uncle. The cross was made by Fajale Ahmed. Feroz

Khan signed the document as witness. Plaintiff told witness that he had previously lent defendant £35, and he was going to lend him £25 more, and he asked witness to fill up the document in English. The conversation at the house was in Hindustani. Witness asked defendant if he could sign his name in English or Hindustani, and he said that he could not write in either language. Plaintiff gave a sum of £25 to defendant.

Cross-examined: Witness was sure that the man who signed the note was Fajale Ahmed (pointing to defendant). Witness was paid nothing for writing out the promissory note. He had not told anyone that he had been paid for making out the promissory note. He did not see the man Khirdie on the 2nd September; he had never spoken to the man.

Re-examined: Witness was a Hindu, and plaintiff was a Mohammedan.

By the Court: Witness spoke and wrote a different language from defendant.

Plaintiff said that he lived at 11, Tennant-street, and was employed as a driver at the Castle Breweries, Woodstock. He was sure that defendant was the man who signed the promissory note produced on the 20th June, about 7.30 or 8 p.m. The loan was to be repaid in two months.

Cross-examined: The note was signed at 11, Tennant-street, which was the same building as No. 1, Selkirk-street. The promissory note was written on the 20th June. Witness was sure that defendant could not sign his name when the document was executed. If he could write his name now, he had been taught since the 20th June. Defendant was known by three names. Desai entered on the document the name given to him by defendant. Desai was paid nothing for drawing up the note. Defendant lived in the same house as witness until about a fortnight before he left for India. He denied that defendant left the house because witness had threatened him. There was no truth in the allegation that Ahmed detected him committing a serious crime. The money that defendant had when he was going on board had been got by gambling. Defendant was only employed at Simon's Town for a few weeks.

By the Court: Witness could not read or write.

[Buchanan, J.: Then how do you recognise this promissory note?]

Witness: I know it by the cross and my uncle's signature.

Feroz Kahn (plaintiff's uncle), an elderly Mohammedan (in answer to the Court), said that he had learned to write a few months ago. He wrote his name in English at the request of his lordship.

Kurdy Khan, another Indian labourer, also gave evidence for the plaintiff.

Mr. Upington closed his case,

Alexander S. Roberts, chief time-keeper in the employ of Sir John Jackson, Limited, said that the defendant was employed by Sir John Jackson, Limited, at Simon's Town, on the 20th June. He would be working until half-past seven in the evening. Witness produced his time-book. Defendant, he said, had been employed by Sir John Jackson at Simon's Town for a considerable number of months.

Cross-examined: Witness did not make the entries in the book. They were made by his assistant, Pearce. He was sure that the entries were correct.

Mr. Upington pointed out that, according to the entries in the book, defendant worked on the average over 12 hours per day.

[Buchanan, J.: That is not out of the question. Children in Scotland used to work fifteen hours a day.]

They did, and they died like flies until legislation intervened.

[Buchanan, J.: I mean that it is not a physical impossibility.]

It is not, for a certain time. The troops worked 18 or 20 hours a day. Counsel added that the Court ought to have the evidence of the clerk who made the entries in the book.

Witness (in answer to the Court) said that he was only subpoenaed at 6 o'clock last night.

Buchanan, J., said that witness's assistant had better come to the Court and prove the entries to-morrow morning.

Mr. Upington said that the matter was very serious for his client, and he should like an opportunity of going into it.

Buchanan, J., said that he could not let the case stand over for long. The timekeeper's assistant must come on Monday and give evidence as to the entries.

Fazla Ahmed (the defendant) said that he had lately been employed at Simon's Town by Sir John Jackson. He denied that he had made his mark on the promissory note produced, or indeed that he had ever seen it until he was arrested. Witness was able to write his own name. At the request of his lordship, he proceeded to write his name in Hindustani. Continuing his evidence, he said that he had been able to write his name about twelve years. He had not borrowed money from the plaintiff. When he was arrested he had £94 in his possession; at that time he intended to go back to India, because he had enough money. While in South Africa he had earned about 23s. or 24s. a week. Witness left Feroz Khan's house because he had been threatened by Feroz Khan. Witness saw certain criminal conduct taking place at the house two and a half years ago, and Feroz said that if he made any disclosure he would cut his neck.

Cross-examined: Witness had never borrowed money from either Feroz Kahn or the plaintiff. When he was leaving this country he had altogether £116. It was not his intention to return.

Khirdi, an Indian, said that to his knowledge defendant had been employed at Simon's Town for over two years. Ahmed stayed with witness about a fortnight before he was going away. There was no secrecy about defendant's intention to go away. Witness said that on the day after Ahmed had been arrested at the Docks, he had an interview with Desai, who said that he could not tell him the truth about the promissory note, as he had been paid money to make out the document. Desai said that he had been paid £28. Witness offered to give him £30 if he would speak the truth, and he arranged to meet Desai again in the evening.

Cross-examined: Witness belonged to the same district in India as defendant, plaintiff, and Feroz Khan. Witness had £60 of his own money, and he had been prepared to give Desai £30 if he would speak the truth in regard to the note. Witness had, as a matter of fact, given Desai £30. He had been very angry because the Khans had stopped Ahmed from going to his home, because of a quarrel they had about two years ago.

Harrison Pearce, an employee of Sir John Jackson, Limited, said that the book produced was his time-book, and the entries had been made by himself. On the 20th June last Ahmed started at 7.30 a.m., and gave up at 7.30 p.m. On the two following days he worked similar hours.

Cross-examined: The book produced was entered up from witness's booking in time-book. He took Ahmed's name from his number; Ahmed carried a brass ticket. Ahmed, as far as witness could trace him, had been in the employ of Sir John Jackson, Limited, since February. If Ahmed were able to give his number while employed in other departments, they would probably be able to trace his service with the firm still further back. If a man worked during his lunch-time it would not be counted on to his day's work. Witness had a book which he himself entered up showing the time at which the defendant commenced work; the time at which he ceased work was shown in the overtime book, which, however, was kept by another employee.

Mr. Upington: Do you never make a mistake in regard to these Indians?

Witness: If you made a mistake with an Indian, he would soon be on top of you.

Further cross-examined: They had about 300 Mohammedan and Punjabi Indians at the Docks at Simon's Town; they were employed in forty different gangs.

Mr. Upington having been heard in argument on the facts,

Buchanan, J.: Plaintiff in this case, Merdad Kahn, sues the defendant, Fazla Ahmed, on a promissory note for £60. This promissory note is dated 20th June, 1906, and is payable 20th August, and signed by a mark. The witness to it is Feroz Kahn. The note was written by one Desai, who appears to be an educated Indian compared to the others, and he said he wrote it at the request of the plaintiff. About half-past seven on the evening of the 20th June he was called in to the shop of the plaintiff, and there the defendant was present; he saw £25 paid out to the defendant, he saw the defendant make his mark, and he saw Feroz Kahn witness the mark, and he himself wrote on the note, "Written by B. Desai." Now, as Desai himself knew better than anybody else what was going on, he took care not to sign as witness of the signature. The signature is denied by the defendant, who says that he was not present on the 20th June, and the burden, therefore, is upon the plaintiff to prove that the defendant signed this note. Then Merdad Kahn, the plaintiff, gives a similar story, and so also does Feroz Kahn, his uncle, and the only other witness is another Kahn, who says he is not a relative of the plaintiff, and he gives evidence also as to this £25 being paid over to defendant, but he did not see Feroz Kahn sign any note. He is contradicted as to this fact, and there is no other witness who has been called. From my own experience, the evidence in cases between Indians is apt to be of the most conflicting nature, and so I am not surprised to find that the defendant positively denies all these allegations made by the plaintiff and his witnesses, and that the evidence of the defendant also corroborated. Going outside these Indians, Mr. Roberts, the chief timekeeper employed by Sir John Jackson, Ltd., was called to produce the time-book, showing that the defendant in this case was actually employed at Sir John Jackson's works both on and before and after the 20th June. On the 20th June, from the time-books, it appears that defendant was actually employed from half-past seven in the morning till half-past seven in the evening at Simon's Town, when, according to the plaintiff's witnesses, he was here in Cape Town signing the note. It is suggested that this note might have been made on a different date. But against that we have the evidence of Desai, who said that he knew distinctly from the calendar what the date was. Then to-day we have had the evidence of Mr. Pearce; he actually kept the time-book; he knows the defendant; the defendant was employed at Simon's Town, and he himself from his entries is positive that this man (the defendant),

who is alleged to have been signing the note in Cape Town, was at the time working at Simon's Town. Then, again, the defendant is supposed to have made his mark to the note, but he could write Hindustani clearly and distinctly, and it is not an uncommon thing for notes to be brought into court which are signed in Hindustani. It has been shown in court that he could have written his name in Hindustani characters, and he has not written his name in this case. There is also another point against plaintiff's story. Desai, if I understand him rightly, says he cannot write Hindustani, and if he cannot write Hindustani, that accounts for the note being signed by a cross and not in Hindustani. He spells the man's name wrongly, while, curiously enough, at Simon's Town, where he is employed at the docks, his name is correctly spelled in the time-book. Under these circumstances, I do not wish to go further than is absolutely necessary in the case before me, and I hold that the action brought by the plaintiff has failed. He has failed to discharge the onus of proving that the defendant signed this note, and the arrest of the defendant must be discharged, with costs. Defendant will, therefore, be released, and the bond cancelled. One other point I ought to have mentioned is that the defendant, when arrested on the 12th September, had not only paid his passage to India, but he had also £116 in his possession. It is alleged by the plaintiff that he got this money by gambling, but I do not believe that he got it by this means, for he is shown by the books to be a steady, hard-working man, and he is not the kind of man who would be likely to risk his savings in gambling. That strengthened my conviction that defendant did not sign this promissory note.

#### LAWRIE V. GELB AND OTHERS.

Mr. Benjamin applied for an extension of return day until the 15th October, so far as the first defendant is concerned. Counsel explained that judgment had been taken against the other defendants on Wednesday, but the summons against the first defendant seemed to have miscarried.

Return day extended until the 15th October.

#### ILLIQUID ROLL.

IMPERIAL COLD STORAGE, LTD. V. DISTRIBUTING SYNDICATE FOR COLD STORAGE. 1906. Sept. 13th.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), moved for judgment, under Rule 319, in default of plea for

certain sums set out in the declaration, amounting in all to about £20,000.

Mr. Searle said that the amount was arrived at on certain accounts, which plaintiffs said had been stated as between the parties.

Sir H. Juta, K.C. (with him Mr. McGregor), appeared for the defendants, and read an affidavit by their attorney (Mr. G. Fairbridge), who said that the matters at issue between plaintiff and defendant, related to contracts for the supply of meat extending over a very long period. There were, defendants alleged, over-charges, incorrect accounts, and failure to credit allowances in the accounts rendered by plaintiffs to defendants, and, generally, they said, the accounts rendered by plaintiffs were incorrect and misleading, both in principle and also in matters of detail. Upon debate of the account, it would be found that there was a large balance in defendants' favour. Deponent added that there had been no unnecessary delay in preparing to file a plea, but that, owing to various causes, defendants had not been able to file a printed copy of their plea before they were barred.

Mr. Searle read a replying affidavit by Mr. Reid, secretary of the plaintiff company, who entered at some length into the transactions between the parties. He said that an investigation had been made as to the accounts between the parties, and the syndicate's accountants had reported that they did not find any overcharges. The Imperial Co. were not satisfied as to the *bona fides* of the defence, and they asked for an order upon defendants to pay a sum of money into court under security *de restituendo*. Deponent said that indulgence had been allowed the defendants in regard to filing their plea. The defendant syndicate had not been overcharged, but, as a matter of fact, had been undercharged. If a debate of the pool prices of the meat supplies were desired, the account of the Imperial Cold Storage would have to be increased.

Mr. McGregor read certain answering affidavits.

Eventually it was agreed between the parties that the matter should stand over until the first day of next term, with a view, if possible, of having the matters in dispute then submitted to a referee.

In the meantime, the Court ordered the bar to be removed, and directed defendants to file plea on or before Monday next, costs to be costs in the cause.

#### GENERAL MOTIONS.

SINCLAIR AND ANOTHER V. MATZ. 1906. (Sept. 13th.

Mr. Russell moved for leave to issue a writ of execution pending an appeal to be brought from a judgment of Mr.

Justice Hopley, sitting as a Divisional Court. Counsel added that the applicants' attorney was willing to hold the money in trust, pending decision of the appeal.

Leave granted to execute judgment as prayed, security to be given to the satisfaction of the Registrar, pending result of appeal.

#### *Ex parte* DRURY.

Mr. Upington moved, on the petition of Eugene J. Drury, as executrix in the estate of her late husband, Joseph Herman Drury, for leave to pass a general mortgage bond over the estate, including a special mortgage bond for £1,500 over the landed property. Counsel said that the matter was urgent, and was in connection with a tobacco manufacturer's business at Port Elizabeth, which was in financial difficulties, and the creditors, unless an arrangement were come to by Wednesday next, were proceeding to extremities. Mr. Drury carried on in his lifetime a manufacturing tobaccoist's business in Port Elizabeth as J. H. Drury and Co., and was also the owner of certain landed property there on the Garrison ground. He died in 1898, having in 1896 made a mutual will with the applicant as spouse, under which he left his property to his children in equal shares as sole and universal heirs and usufruct, and administration to applicant. Two of the children were now majors, and supported the application. Early in 1905, the business became involved in difficulties, and it became necessary to apply to the Court for leave to borrow £1,500 to meet the claims of creditors, and, after considerable delay, the Court authorised petitioner to raise £1,500 on first mortgage of the property. Meantime, things had been going from bad to worse, and £1,500, which was sufficient in January, 1905, was not sufficient in May, 1905. It might be said that the manager who carried on the business for applicant was not highly successful in a business sense, and investigation by an accountant showed that, although a good business it was starved for want of capital. Subsequently, meetings of creditors were held, and eventually a deed of inspection was entered into in July, 1906, under which one E. L. Webber was appointed to carry on the inspection, and he was practically in sole control and management of the business. He agreed under the deed to carry on for 12 months, and during that period he advanced £1,500 to enable the business to be continued. At the end of 12 months he was to have the option of leaving the money in the business, and going in as a partner pro rata for his £1,500. To enable this arrangement to go through and to satisfy a recalcitrant creditor, it was necessary that petitioner



should pass a general bond and a special second bond.

Hopley, J.: You may take your order as prayed. The arrangement seems to be the best thing for the business, and for the minors. The Master has reported favourably upon it. Costs will come out of the funds.

CAUVIN AND ANOTHER V. BONCKER (1).  
BONCKER V. S. A. ASSOCIATION FOR  
ADMINISTRATION AND SETTLEMENT  
OF ESTATES (2).

CAUVIN V. BONCKER (3).

In the first matter, Mr. P. S. T. Jones was for plaintiffs, and Mr. Burton was for defendant.

Mr. Jones moved for provisional sentence on a mortgage bond for £1,800, with interest, less £17 paid on account, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Mr. Burton read an affidavit by defendant, who said that Mr. Juritz, of the Colonial Orphan Chamber, had agreed to allow her a few days in which to get her affairs in order, so that she would be able to pay the interest.

Mr. Jones read an affidavit denying that any such undertaking was given.

In the second matter, Mr. Burton moved for an order directing the South African Association to carry into effect an order granted by Mr. Justice Maasdorp in Chambers on the 8th February, 1906.

Dr. Greer was for the respondent association.

Applicant some years ago had had transferred to her certain property in Cape Town in trust for her children, and subject to a life interest in her favour. The property was sold for £1,000 to one Mr. Ford, who gave a bond for £800. Applicant had surrendered her life interest in the trust in favour of her children. She had obtained an order from the Court in February last authorising distribution of the balance of proceeds of the sale to her children. Mrs. Boncker complained that the association had not proceeded for recovery of the bond from Mr. Ford with sufficient diligence. The association said that they had sued Ford for arrears of interest, and that provisional sentence had been obtained, but a *nulla bona* return had been made. The property had been offered for sale, but no bid had been obtained. The whole of Ford's immovable property had been seized under a previous judgment.

Applicant, in a replying affidavit, said that if the association had taken timely steps to recover the amount of the bond from Ford, they would have been successful. The association had acted upon part of the order, and had paid out a

sum of £20 to her daughter Frances. If respondents had duly carried into effect the order of the Court, she would have been able to meet the interest on the bond held by Cauvin and another. The sale of Ford's property was merely voluntary.

Mr. Jones said that there was a third matter, in which Cauvin applied for an interdict restraining Mrs. Boncker from parting with her interest in the trust. The respondent's attorneys had, however, refused to accept service.

Mr. Burton said that he did not appear in the matter of the interdict.

Hopley, J., said that he was not aware of any practice of the Court which would enable such an application to be made.

Mr. Jones contended that a well-defined practice had grown up in the Court, under which the application was quite regular. Here they had a woman who was in difficulties and could not meet her debts proposing to give away a valuable portion of her assets, to the value of £40 or £50 a year, to her children.

[Hopley, J.: It is a free country and you can give away your property if you like. I don't know of any law by which she could be stopped. There must be some distinguishing feature in every case where the Court has interdicted moneys for the benefit of a third party.]

Dr. Greer having been heard on behalf of the South African Association,

Mr. Burton addressed the Court on behalf of Mrs. Boncker, in reference to the three matters. In reference to the motion against the South African Association counsel argued that the Court should grant cession of the bond to the applicant's children. In regard to the provisional case, he submitted that a stay of execution should be granted to enable Mrs. Boncker to meet her liabilities.

Hopley, J.: There are three matters before the Court arising out of the affairs of Mrs. Boncker. The first I shall deal with is the application made on behalf of the Colonial Orphan Chamber, as the agents for Mrs. Cauvin, to interdict Mrs. Boncker from alienating her interest in a certain trust fund under the administration of the South African Association, or otherwise dealing with the fund or her life interest, to the prejudice of the applicants. It would appear that a certain amount, £1,000, as to which Mrs. Boncker had a life interest, and her children are eventually entitled to the *corpus* of this £1,000, was placed in the hands of the South African Association, and as to £200, they have administered that amount, I believe, but, as to the sum of £800 that was invested in a mortgage bond on property belonging to a man called Ford. On the 8th February, 1906, Mrs. Boncker, having made application to the Court in chambers for



leave to surrender her own life interest in favour of her children, who are all majors, the Court, as was natural under the circumstances, granted the order, and she has no longer got any right over that property, because, by that order of February, the South African Association were ordered and authorised to distribute the balance of the aforesaid sum of £1,000, and to pay to each of the petitioner's children the amount falling to his or her share, so that, so long ago as February last, Mrs. Boncker ceased, as far as I can see—unless this order be set aside by some process of which I am not at present aware—to have any right to the *corpus* of this £1,000. It seems, however, that now the Colonial Orphan Chamber, as the agents of Mrs. Cauvin, come and ask that she should be restrained from parting with her interest in this property, but they come a good deal too late, because she long ago did part with her interest in it, and unless the order of Court be set aside, there is nothing to restrain her about, because the property in the hands of the association belongs to the children, and not to Mrs. Boncker. That order, however, Mr. Jones insists that they have a right to get. Without giving a decision on the point, which he most strenuously argued, that such moneys, although not in the slightest degree bonded in any way, were attachable—a position in which I cannot at the present moment give my consent—it seems to me that the application must be refused for another reason, that Mrs. Boncker is no longer in possession of the funds in question. That application will be refused, with costs. Then there is a sort of cross-application on the part of Mrs. Boncker against the South African Association, calling upon them to show cause why they should not hand over the moneys which they hold. It would appear that there has been a good deal of correspondence going on, and that the association has been doing something, but rather by way of working with the debtor Ford than by way of strenuously taking up the case for Mrs. Boncker and her children to get rid of this property, and get the funds into their hands for the purpose of distribution to the children, as they were authorised to do by the order of Court in February last. They have not taken a judgment against Ford, nor have they offered to hand over the bond to the children to enable them to realise the bond in their own way. If they saw a difficulty in realising the bond, and so giving each child a *pro rata* share, they could have made an offer to the children, and have said, "Take your bond and realise it yourself." It was their duty to obey, as quickly as they could, the order of the Court, which was to distribute this money to the children of Mrs. Boncker. Since February a fairly long time has

elapsed, nothing has been done, the property has not been realised. Ford was sued for interest on the bond, and a return of *nulla bona* was made. They did not make Ford insolvent, so that the bond could be proved in his insolvent estate, and realised they did not proceed to sue him on the bond, and get the property attached, and made executable, as they might have done, and the whole thing has been allowed to go on from month to month. In the meantime, the children who have been depending on this fund, as far as I can see, to assist their mother, have been stopped from getting anything, and the result is that Mrs. Boncker has fallen into difficulties. With regard to the action of the association, it seems to me that they have been entirely in the wrong in not being more prompt in this matter. They may have the excuse that the times were bad, and that in their judgment it would not be easy to realise a property like this. They may have a further excuse that Ford put up this property for sale, the place seems to have been offered, and the association seems to have acted for Ford in the matter. The sale was not successful. Things went on until on the 7th of this month the association received verbal notification, and on the 8th a written notification from the Colonial Orphan Chamber asking or ordering them—I don't know what right they had to do that—to refrain from handing to the children or anyone else the funds in their hands. I do not know why they should have obeyed or submitted to the dictation of their sister association. The attitude taken up by the South African Association seems to me to be wrong, and a fair order to make in this matter would be either that they realise forthwith, or hand over the bond to Mrs. Boncker's children, so that they might realise it, and that, as far as the application in which the South African Association are involved is concerned, they should pay costs of this application. As to the application for provisional sentence on the bond, I think that the documents show, and I am satisfied on the statement of Mr. Juritz, that there was no agreement not to sue her, but that they agreed that she should make payments as she could, this, however, not affecting the legal position. They have sued her, and, strictly, they are entitled to their provisional sentence, but I should think that, rather than precipitate matters, it would be a wise thing on their part to wait a little time, instead of ruining the present debtor. Provisional sentence will be granted, with costs, but I think we might, in the circumstances, postpone execution for six weeks from the present date. I do not think the creditor can possibly suffer, and he might gain a good deal by waiting.

Mr. Jones asked his lordship whether it could not be directed that the rents falling due from the property should in the meantime be attached.

Hopley, J., said that execution would be stayed for six weeks, any rents falling due within that period to be handed over to the Colonial Orphan Chamber towards payment of the overdue interest.

Dr. Greer said that there would be certain commission chargeable by the South African Association against Mrs. Boncker.

Hopley, J., said that, in the application by Mrs. Boncker against the S.A. Association, the order would be that the bond be handed over, to be ceded to the applicant's children upon payment of any charges due to the association in the administration of the matter, the association to pay the costs.

OHLSSON V. TURNBULL. { 1906.  
(Sept. 13th.

Landlord and tenant—Hotel lease  
—Partnership—Eviction.

*O. had leased certain hotel premises to D. and P., then trading in partnership. Thereafter the partnership was dissolved, and D. was accepted by O. as sole tenant. T. alleged that, for valuable consideration and with the verbal consent of O.'s manager, he had been accepted by D. as a partner. D. subsequently became insolvent, and his trustee abandoned the lease. O. now applied on motion for the ejectment of T. from the hotel premises.*

*Held, that as it had not been proved that O. had ever accepted T. as a co-tenant or recognized his alleged partnership with D., he was entitled to the order applied for; reserving to T. the right to bring an action for damages for eviction, if so advised.*

This was an application, upon notice, calling upon respondent to show cause why he should not deliver up to applicant, or his nominee (Boffy), certain licensed premises known as the Royal Hotel, Wynberg.

A number of affidavits were read, from which it appeared that respondent refused to vacate the premises on the ground that he had a right to remain in possession under his al-

leged partnership with one Dickson (the late tenant), whose estate had been sequestrated. Applicant admitted that Dickson had been tenant of the hotel under a lease which had been assigned to him, but he denied that he had ever recognised respondent as having any interest in the lease, although he had seen him (Turnbull) at the hotel acting as manager, or in some similar capacity. Applicant said that the lease was put an end to by the insolvency of Dickson, and that he had now leased the house to one Boffy.

Mr. Upington was for applicant (Anders Ohlsson); Mr. Burton was for respondent (James Turnbull).

Counsel having been heard in argument chiefly on the facts,

Hopley, J.: This is an application on notice calling upon the respondent to show cause why he should not be ordered to deliver up possession of the Royal Hotel, Wynberg, and the keys thereof to Anders Ohlsson, the landlord, or his nominee, and considerable conflict of evidence arises upon the affidavits which have been filed, upon which conflict the respondent argues that it is impossible, or, at all events, dangerous or inequitable, for the Court to order any ejectment of the respondent. Now, as a rule, of course, the Court does not, in case of conflict of testimony, order a man in possession of property to quit such possession at the suit of any applicant when there is, as I say, great conflict of testimony, which the Court cannot decide, but in the present instance the first question that arises is whether the respondent is actually in legal possession at the present moment of the lease of this hotel. There is no doubt that he has been there for some years, for four years, I think, and that he has been, in conjunction with one Dickson, managing the place, and there is no doubt upon the papers which have been submitted to me that people, including the applicant in this case, have known that he was there working in connection with Dickson in some sort of way as Dickson's partner. Does it, however, follow from such contract, from such knowledge, that Ohlsson knew that there was anything in the nature of a purchase by the respondent of a share in this lease? The lease clearly says that it should be in writing if there be any assignment or dealing with the rights under the lease. The onus of proving that there was such a partnership as this, the onus of proving that there was such an assignment as this from Dickson to the respondent, and the onus of proving the acceptance of such an assignment by the landlord, all seem to me to lie on the respondent in this case. The fact of his presence does not seem to me to raise any presumption in his favour, because, first of all, the lease had been assigned from one Ricci to

Dickson and Pentelow, and it is acknowledged that Pentelow has, with the landlord's consent, left the partnership, so that, with the landlord's consent, Dickson was left in sole occupation of the place. It does not seem to me that the fact that Pentelow was leaving has not been chronicled on the face of the lease is of any importance, certainly not of as much importance as the omission to put upon it a new person having rights under the lease. A man goes away from the lease, and it is not necessary to chronicle upon it that a person, who is his partner, remains in sole occupation. That person is allowed to go away, and probably there are other documents to show that he is released. But for a new person to come in, in face of the stringent terms of the lease, seems to me to want a considerable amount of proof before such a thing could be accepted as having taken place. It is difficult to conceive that the respondent did, in 1902, simply relying upon the word of Mr. Bultitude, who certainly is the manager of Ohlsson's Cape Breweries, but who could not possibly have authorised any assignment on the part of the landlord, Mr. Ohlsson himself; it is difficult to believe that the respondent, simply relying upon Bultitude's word, casually given, that he would be accepted by Mr. Ohlsson, was induced to part with so large a sum as £4,000 for the purpose of joining in this lease. It is still more difficult to imagine that if he did part with so much money, he did not see that it was put into writing. He did not get the consent in writing of Mr. Ohlsson, nor does he in any interview with Mr. Ohlsson himself, for a couple of years after he has paid his money, and relied, as he says, simply upon the word of Mr. Bultitude. All these things make it very difficult, and there is a considerable conflict, but it is very hard in such a state of affairs to say that the respondent is in possession of the leasehold at the present moment. Taking the terms of the lease, I should say that the position would be, as far as one can see from the written documents, the person who is in possession of it is the insolvent. We know that he has gone insolvent; we know further that his trustee has abandoned that lease, and abandoned it, therefore, to the landlord, and therefore, one would say, on the legal state of facts the landlord has a right to get possession of this place. The respondent sets up rights there, and it appears to me that it is for him to prove, and the onus would be upon him to prove that he is there as of legal right in some way or other. I wish to express no opinion as to how the matter would stand if there were an action in this matter, but, upon the documents as they stand, the fact that there is nothing upon the lease showing any rights on the

part of the respondent inclines me to believe that the legal position is that he has no rights whatsoever. There are documents produced by him certainly showing the course of trade with the breweries by a firm apparently of Dickson and Turnbull, but it does not follow by any manner of means that in recognising such a firm the breweries were at all thinking of or in any way contemplating the position with regard to who actually were the tenants under the lease. There are other documents, such as cheques and letters, signed in various ways Dickson and Turnbull, and sometimes by Turnbull alone, and some of them are sent to Mr. Ohlsson or his representative. They do not seem to me to prove that they necessarily drew the attention of the landlord to the fact that respondent was claiming any rights as being a participant in this lease. They are mostly payments by cheque, and it does not follow that, because such cheques were taken, the landlord necessarily looked upon Mr. Turnbull as being the lessee. I do not think anything of the sort follows. At the same time, inferences may be drawn, and these things might have considerable weight with the Court that eventually has to weigh the conflict of evidence that there undoubtedly would be. Another point is where does the balance of convenience lie in the present position? It would seem that the business has been brought to a standstill; there is a deadlock, because the respondent will not give up possession, and Mr. Turnbull has not got a licence to carry on the business. On the other hand, there is the lessee ready to carry on—the lessee recognised by the landlord—who has a licence to carry on the business, and it seems to me that it would be more convenient to put him into possession for the time until this matter can be decided, so that the business may be revived, and the loss may be minimised as much as it possibly can be. I should think, therefore, that the order the Court should make in the present instance is that the respondent do give up possession of this place forthwith, but that there be reserved to him the right to bring his action for damages, in which case the costs of this application may abide the result of such action, if brought, failing such action the respondent to pay the costs, this action not to be brought later than some time or other during next term. I may say I am influenced in this decision by the fact that I think the respondent, if left in possession, might possibly not be able to pay damages to the landlord for keeping him out of this place, whereas there is no doubt that the landlord in the present instance will be able to pay any damages that Mr. Turnbull may be able to prove in his action as having been incurred by him by having been unjustly ejected if he can prove such a thing when the action is brought.

*Ex parte* THE SOUTH AFRICAN  
BREWRIES.

Mr. Payne moved, as a matter of urgency, for an order authorising petitioners to enforce their landlord's hypothec over certain premises in Plein-street, known as the Excelsior Bottle Store, of which Max Kussell was sub-tenant.

Order granted, restraining Kussell and all parties acting with him from removing any of the movables in the said premises, providing, however, that the manager in charge may carry on the business thereof, placing the receipts to a special account, pending result of an action for rent to be forthwith brought.

Hopley, J., requested the Registrar to make a note so that the attorney in the matter should not be allowed costs for attendance. He added that if the attorney knew this application was to be made as an urgent matter he might have had the courtesy to wait and give any information to counsel that might be required.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

### REHABILITATION.

*In re* PEREL. ( 1906.  
( Sept. 14th.

Insolvency—Insolvent Ordinance,  
Sec. 117 — Creditors "in  
value."

*A secured creditor, when a question of voting for the discharge of an insolvent under Sec. 117 of the Insolvent Ordinance arises, may only vote "in value" in respect of such portion of the debt due to him as is unsecured by lien or other security.*

*In re Findon (2 Searle 301) followed.*

Mr. J. E. R. de Villiers mentioned the application of Isaac Perel for discharge from insolvency. The matter was standing over from Wednesday for

a written statement from the Master of his objection to grant the certificate under section 117 of the Insolvency Ordinance.

The Master now reported that he declined to grant the certificate, on the ground that the insolvent had not obtained the consent of three-fifths in value of the creditors entitled to consent. In the reckoning, he had omitted the secured creditors, Lochner and Van der Hoff, who gave their consent to the rehabilitation. They proved for £150, being balance of purchase price of landed property, transfer of which had not yet been passed to the insolvent, and their claim was paid in full. Unsecured creditors received a dividend of about 1s. 4d. in the £. The practice in his office had been invariably to exclude, in reckoning votes, secured creditors and those creditors who had been paid in full, and there was no precedent where the Court had departed from this practice, which was based upon the decision that a secured creditor was entitled to be reckoned only on the value of his unsecured balance in regard to his consent in granting the certificate under section 117 of the Ordinance. (*In re Findon* 2, S. 301.)

Mr. De Villiers submitted that Lochner and Van der Hoff were not secured creditors. In Findon's case the secured creditor was secured by a mortgage bond, and it was clear that he had a preferable security. Here the trustee had an option, and he need not have paid at all. He paid voluntarily to get possession of the land. Counsel relied strongly on section 30 of the Ordinance. The words "preferable security or lien" should be used in strict legal meaning. Security meant a *jus in re aliena* and Lochner and Van der Hoff had no security over any part of the estate. The *dominium* of the land was still vested in the creditors. Section 103 expressly gave the trustee a right to obtain sales.

Buchanan, J.: Under the 117th section of the Ordinance an insolvent, if he obtain the consent of three-fifths of the creditors in number and value, may apply for his discharge. In this case the insolvent has not obtained, according to the Master's report, three-fifths in number and value of the creditors, unless among these creditors is included the claim of Lochner and Van der Hoff. The Supreme Court has held *In re Findon* that a secured creditor is entitled to be reckoned only for the unsecured balance, and the question is therefore, were Lochner and Van der Hoff secured creditors? The section says "any person who has any claim or lien." In this case Lochner and Van der Hoff had the best possible security for their claim, which security resulted in their being paid in full. They had sold certain property, but had not yet



given transfer, and for the portion of the purchase price unpaid they were amply secured in not being bound to pass transfer unless this amount were paid. The trustee took possession of the property, and paid them in full. The Master is quite right in saying that the applicant has not obtained the consent of the required number of creditors. I think, on the decision referred to, the Master is quite right in refusing his certificate, and this application must be refused.

#### ENGELBRECHT V. RUSSOUW.

This was an application upon notice calling upon respondent to show cause why he should not be directed to restore to the applicant quiet and peaceable possession of his property right up to the boundary laid down by Government surveyor A. Frieslich in 1875, to which applicant and his family had had undisputed right for the last 28 years, and also for an order restraining respondent from using violence or trespassing upon the land of applicant, and compelling him to institute an action in this court to establish his right, if any, to the said ground.

From the affidavits, it appeared that the parties are respectively owners of portions of the farm Ezelsfontein, division of Namaqualand. A partition was agreed upon between certain parties a good number of years ago. To that partition applicant's father and the present respondent were parties. A survey took place. Respondent said he was to receive 3,000 morgen of Ezelsfontein, and that he only received 2,641 morgen 430 square yards. Respondent at the time eventually acquiesced in the survey, though he said that he had to remonstrate with the conduct of the surveyor, who was frequently in drink, and under the influence of applicant's father. A subsequent survey was carried out by one Mr. C. L. Smuts. Respondent claimed that, on the strength of an error pointed out by Mr. Smuts, applicant moved a certain beacon, and he (respondent) took possession of the additional ground to which he was entitled. It transpired that there had been a good deal of bother between the parties, and that one of the respondent's sons had been fined at Springbokfontein for an assault upon the applicant arising out of the dispute. Furthermore, last year applicant commenced an action in the Supreme Court against respondent for a declaration of rights in respect of the farm, and summons was served on the respondent, but applicant did not proceed with his action. Applicant said he was unable to file his declaration within the time allowed by the rules of Court.

Mr. Burton (with him Mr. Watermeyer) was for applicant (Andries Francois Engelbrecht); Mr. Upington was

for respondent (Gideon Joshua Russouw).

Mr. Burton said this application was for a writ of spoliation. All that the applicant had to show was, that he was in possession of the property, and had been forcibly ousted from the possession. Here the applicant had been in possession for 28 years, and all that the respondent could rely upon was an agreement to which he was no party. Counsel quoted the case of *Rex v. Russouw* (15 C.T.R., 279).

Buchanan, J.: In this case a serious dispute exists between certain owners of the farm Ezelsfontein, division of Namaqualand, and it cannot possibly be settled on the application now before the Court. This motion before the Court is to compel the respondent to give up possession of certain land, and, further, that the respondent shall be ordered to bring an action to declare the rights of the parties. It appears that before 1875 the farm in question was held by three owners in undivided shares, together with other surrounding property. It is alleged that an agreement was then come to, that the respondent Russouw, who had a third share in the property, was to take a specific divided portion, and to have 3,000 morgen surveyed and transferred to him, and a surveyor, one Frieslich, was called in, and he made a diagram, which cut off 2,600 odd morgen, and though this did not give him the full amount, still the respondent accepted this sub-division and took transfer. Frieslich put up a beacon on this land, which beacon seems, as far as one can gather from the affidavits, to be on land claimed by the applicant. In 1904 the applicant, with a number of others, six in all, who were proprietors of undivided shares in the remaining extent of the farm, called in Mr. Surveyor Smuts to sub-divide the farm, as between themselves. Smuts made a survey for the purpose of this sub-division, and he found that, although Frieslich's diagram was in itself consistent and represented the acreage described, still the beacon put up by Frieslich cut off about 200 morgen of the land included in the diagram, and gave about 260 morgen more in the remaining extent than it ought to have contained. Smuts says he explained to the parties where the true beacon ought to be, according to Frieslich's diagram, and that the parties all agreed to the correct spot being adopted, so that the beacon was shifted to the correct spot in 1904, and respondent then came up to the new line, and has since then occupied the land up to the new line. Shortly afterwards the present applicant, who was one of the co-proprietors of the undivided, remaining extent, objected to this beacon being shifted, and in 1905 he instituted an action to have the rights of the parties declared. He did not proceed with his action, but now, in 1906, he comes to the



Court with an application which is virtually an application for a writ of spoliation, and for an order to compel the respondent to commence an action to declare rights. The objection to an action for restitution is that in 1904, according to the affidavits filed in this case, the land in question was peaceably restored to the respondent, and he is in possession at the present time, and there has been no recent disturbance of possession. This, therefore, is not a case of spoliation. The respondent being in possession, there is no sufficient reason to order him to restore the land which he had obtained possession of two years ago, nor is there sufficient reason for ordering him to commence an action to declare any rights of the parties who own the undivided shares. He has his diagram, he has his transfer, and he has the word of two surveyors against the word of one surveyor that the land of which he is now in possession is included within his true boundary. Though I cannot say that the one surveyor is necessarily right, and that the two surveyors are necessarily wrong, in this case the application is not justified and it must be refused, with costs.

Counsel having been heard on the question of costs,

Buchanan, J.: I think that the proper course in this case would be application refused, with costs, with leave reserved to applicant, should he institute an action, to make a claim for costs incurred in these proceedings.

#### NEW CAPE CENTRAL RAILWAYS V. DOIDGE.

Mr. Upington moved for removal of the trial of this case to the ensuing Circuit Court, to be held at Riversdale. Counsel stated that respondent had instituted an action against applicants for £100 damages for flooding his premises from a culvert at Riversdale, constructed by the defendant company, for an order compelling defendants to remove the furrow and an interdict. Applicants said that the witnesses were resident at Riversdale, the suit was in the village of Riversdale, and an inspection by the Judge trying the case would lead to a great saving of evidence, such as would be necessary if the case were heard in the Supreme Court.

Mr. Watermeyer (for respondent) read an affidavit to the effect that he wished the action to be tried before a jury, and that it would not be possible for him to have the case heard before a jury if it were removed to the Circuit Court. Furthermore, he could not be ready for the ensuing Circuit Court.

Mr. Upington said that pleadings had been closed, and plaintiff had now no right to demand a jury trial. The bal-

ance of convenience was altogether in favour of trying the case at Riversdale.

Mr. Watermeyer said that the application was premature. The applicant had taken advantage of the rules of Court in order to bring the present application. Respondent had the right to choose his forum, and he had a right to demand a trial by jury. He would not be able to have the case heard before a jury if it were removed to the Circuit Court (Rule 41).

Buchanan, J.: Plaintiff has instituted an action in this court, and has filed his declaration and the plea was duly filed, plaintiff was barred from further pleading, and the pleadings have been closed. Application is made for removal of the trial to the Circuit Court at Riversdale. Not only the balance of convenience, but the whole circumstances of the case show that it would be far better to try this case at Riversdale. It is alleged also that the plaintiff intends to claim a jury. If he intended to claim a jury he should have done so within 48 hours after pleadings had been closed. He has not done so, and, therefore, he has lost his right. He could apply to the Court to grant him a jury, but he has not made that application. There has been no notice given that he intends to apply for a jury. The case will be removed for trial at the ensuing Circuit Court at Riversdale. If the plaintiff is not ready to go on with the case then, it will probably stand until the next Circuit Court. Case removed to Circuit Court at Riversdale, costs to be costs in the cause.

#### MATHEW V. WATKINS AND ANOTHER.

##### Pledge of movables — *Traditio brevi manu.*

This was an application upon notice to the respondents calling upon them to show cause why the applicant should not be allowed to take possession of certain furniture pledged to him by the first respondent in a certain letter, dated the 26th August, 1904, which the respondent's wife had been allowed to remove to a house at Plumstead, and for delivery of the said furniture, or, in the alternative, why he should not be restrained from selling or dealing with the said furniture, pending further order of Court.

Applicant's case was that the furniture was pledged to him by Horwood Watkins as security for his having guaranteed an overdraft to the bank.

The affidavit of Mrs. Horwood Watkins stated that she was married by ante-nuptial contract, that she bought the furniture in England, that the furniture was her own property absolutely, that she had never authorised her husband to pledge it, and that she knew nothing of the docu-

ment of the 26th August, 1904, until recently. The respondent in his affidavit admitted that the applicant became guarantor for the overdraft, and said that he had made an offer to pay off the indebtedness at £10 a month, provided applicant would give him an account of the matters between them.

The replying affidavit of the applicant, stated that when the furniture was pledged, respondent held his wife's general power of attorney. It was only by his consent that the furniture was removed from Rondebosch to Plumstead. Dependent added that he was prepared to accept £20 a month in discharge of the liability for the overdraft, subject to certain conditions.

Mr. Benjamin was for applicant (A. H. Mathew); Mr. Burton was for respondent (Edgar Henry Horwood Watkins).

Counsel having been heard in argument,

Buchanan, J.: The respondent, Edgar Henry Horwood Watkins, obtained from the applicant, Mathew, a document guaranteeing an overdraft due by Watkins to the bank for £500, and to secure Mathew in giving him this guarantee, which seems to have been given without any consideration, he pledged to Mathew certain 23 cases of furniture by a written contract, in which he says: "I hereby hand over to him, the said Mathew, 23 cases of furniture." Watkins did not pay his overdraft to the bank, and Mathew was called upon to and has had to pay £500 to the bank, from whom he has taken cession of action. The applicant now calls upon Watkins to deliver up the furniture, which, in his good nature, he had allowed Watkins to remove from the place where it was stored at Rondebosch to his house at Plumstead. Watkins and his wife now come forward and say: "This furniture is not Watkins's, but his wife's, and we are married by ante-nuptial contract." At the time the pledge took place, Watkins either was or was not authorised to pledge the furniture. He held his wife's power of attorney. If he were not authorised to pledge her furniture, it might almost be said that he committed a fraud on Mathew. That is, however, a matter I don't want to say anything upon at present. If Mrs. Watkins wishes to establish her claim to this furniture, she must do so in the future. As the case now stands, Watkins and his wife will be ordered to deliver up the furniture in question to the applicant, pending further order of Court, the respondent (Watkins) to pay costs of this application.

why a judgment granted by the Court on the 23rd August last for £22,000, together with a writ of execution and attachment, should not, as far as concerns any rentals payable by applicant company in respect of their tenancy, be discharged or qualified, or amended.

Mr. McGregor was for applicants; Mr. Searle, K.C. (with him Mr. De Waal), was for respondents.

Mr. McGregor said that the question in this case was whether or not the respondents were entitled to attach certain rents which were due by the applicants to one Cornelius Mostert, who was the owner of certain property situate at the corner of Longmarket-street and Plein-street, Cape Town, and of which the applicants were the lessees. It would appear from the affidavits that the applicants guaranteed payment of £1,000 owing by Mostert to Ohlsson, and they were to be repaid by every month being allowed the amount of £75 rental, plus £25 to be paid by Mostert. While the agreement was still in force, and there was still a sum of £375 due to the applicants by the landlord, the Gresham Co. obtained provisional sentence against Mostert on a mortgage bond, and the rents were declared executable.

Affidavits having been read,

Mr. Searle submitted that no arrangement could have been made in January, 1906, which would deprive the mortgagee of the *fructus* of the rent. He cited a number of authorities in support of this contention, though, he said that there was no direct case touching the point now raised. If such an application as this were granted, mortgagees would be placed in a most extraordinary position.

Without calling upon Mr. McGregor,

Buchanan, J.: In this case Mostert mortgaged his property to the Gresham Life Assurance Company, for whom the South African Association are the agents. This mortgage was registered in 1904. Previous to this mortgage, Mostert had leased certain portion of his premises to the present applicants, Hepworths. The mortgage has now been called up, and provisional sentence has been granted upon it, and the property specially hypothecated has been declared executable, and also the rents of the property mortgaged. Insolvency has not yet intervened, and, consequently, the cases which have been referred to by learned counsel do not altogether apply to this case. When there is insolvency and a *concursum creditorum*, and when the debtor is deprived of the ownership of the property and it is vested in the trustee different considerations arise, especially as to the rights of preference of different creditors. Up to the present, however, the property is still vested in Mostert, the debtor, and the Association hold Mostert's power of attorney to collect the rents of his property, as well as the order attaching the rents. Until

HEPWORTH'S, LTD. V. GRESHAM LIFE ASSURANCE SOCIETY, LTD.

This was an application upon notice calling upon respondents to show cause

sequestration intervenes, only those rents can be paid under the power of attorney, which can be demandable by Mostert, and only such rents as are due to Mostert, who is the debtor in the original action, can be attached to pay his debts. In this case there are certain rents which were pledged to Mostert and have, in effect, been dealt with by him in a way equivalent to a payment in advance to Mostert of these rents. Mostert, being indebted to Ohlsson, induced the lessees, Hepworths, to guarantee Ohlsson £1,000 due to him, and agreed with them to deduct the payments to Ohlsson from the rents, which would become due by Hepworths to Mostert. This amount of rent of which Mostert had disposed himself, before the action was brought against him, can no longer be demanded by Mostert from Hepworths, and those rents are not able to be attached under a judgment of the Court as the property of Mostert. That is what the judgment of the Court comes to. It authorises the Sheriff to attach the property and the rents due thereon, which are the property of Mostert. These rents are not the property of Mostert, and cannot be demanded on his behalf. The Court will order that the order of Court attaching the rents of the property shall, so long as insolvency does not intervene, apply only to such rents as are payable by the tenants to the debtor. I think it was perhaps advisable, though I do not think absolutely necessary, for Hepworths to come into Court. They could have refused to pay any rents which are alleged to be due by them to Mostert. The respondents, if an act of insolvency has been committed by Mostert, can sequester his estate. If, however, they do not wish to sequester his estate they can test the value of their judgment by putting up the property mortgaged for sale in the way indicated by the previous judgments in this court. In this case, it would have to be put up for sale subject to the lease, which was entered into before the mortgage was passed. I quite agree with Mr Searle that a person who has once mortgaged his property cannot afterwards deal with that property in such a way as to prejudice the mortgagees, but that is not the present case; and should there be sequestration it may hereafter be a question whether or not the trustees would be entitled to claim from applicants any rents accruing after such sequestration. It is quite possible that when the property is put up for sale there may be ample not only to pay the debts due to the mortgagee, but also any other debts which have been incurred. As the matter stands at present, only the property of the debtor attachable will be affected by the order of Court. An order will be made accordingly, with costs.

ESTATE BLEIBERG AND OTHERS V. GREENBERG.

Mr. Benjamin was for applicants; Mr. P. S. T. Jones was for respondents.

Mr. Benjamin said that an arrangement had been arrived at between his learned friend and himself, whereby all disputes between the parties would be referred to arbitration, subject to the approval of Court. He moved for an order by consent in the following terms: "That Mr. J. M. P. Muirhead be appointed with all powers under the Arbitration Act as referee to settle all disputes between the parties and their representatives arising out of the partnership of Bleiberg, Greenberg and Co., and all disputes between that firm and the firm of Bleiberg and Co.; the business of Bleiberg, Greenberg and Co. to be carried on pending settlement, the referee's award or further order of Court, by Greenberg under the supervision of Mr. Muirhead; banking account to be reopened in the name of the firm Bleiberg, Greenberg and Co., and all moneys (if any are standing in the private account of Greenberg, in the Bank of Africa, as shall be decided by the referee to be the firm's money) to be transferred thereto, and cheques on the said account to be countersigned by Mr. Muirhead, costs to be costs in the arbitration."

Mr. Jones (for respondents) acquiesced.

Order granted in terms of consent.

TOWN COUNCIL OF CAPE TOWN V. COLONIAL GOVERNMENT AND TABLE BAY HARBOUR BOARD.

Mr. Searle, K.C., moved for the appointment of Mr. G. W. Steytler as referee under the order of Court of the 23rd February last, in an action brought by the Town Council against the Colonial Government, and the Harbour Board regarding the expropriation of land at Fort Wynyard.

Mr. Searle said that the referee would no doubt bear in mind the directions given by the Chief Justice in his judgment, which was subsequently upheld on appeal.

Mr. Nightingale, on behalf of the Government, consented.

Order granted, appointing Mr. G. W. Steytler referee under order of Court of February 23, 1906, subject to the directions contained in the judgment of the Chief Justice, costs of reference to be referred to referee, and award to be made rule of Court.

*Ex parte* MEADE.

Mr. Close moved for transfer of certain articles of clerkship to the surviving partner in certain firm of attorneys at

Umtata, of which the petitioner's late principal (Mr. J. C. Blakeway) was a member.

Order granted as prayed.

*Ex parte* SOUTH AFRICAN BREWERIES, LTD.

Mr. Payne applied for an amendment of an order made by Mr. Justice Hopley on Thursday, in which an interdict was granted against Max Kussel, "and all parties acting for him." It was desired that the interdict should be against all other persons.

Buchanan, J., said that the order would be amended so as to restrain Kussel "or any other person."

*Ex parte* ATTWELL.

Mr. W. Porter Buchanan moved for leave to issue execution against the insolvent estate of Jacobus Nicolaas Botha for the sum of £300, and for a temporary interdict restraining disposal of certain assets.

His Lordship declined to make an order.

*In re* REYNOLD'S VEHICLE AND HARNESS FACTORY (IN LIQUIDATION).

Mr. Burton presented the first report of the official liquidators, and applied for the usual order.

Usual order granted as to lying for inspection.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

REX V. NGAMBU.

REX V. MAFA.

REX V. LONEY.

{ 1906.  
Sept. 17th.

Act 28 of 1883, Sec. 75—Evidence.

*Evidence as to a native having been found in possession of intoxicating liquor is not sufficient to support a conviction under Sec. 75 of Act 28 of 1883.*

Buchanan, J.: Three cases have come in review from the Assistant Magis-

trate of Woodstock. In each case the accused was charged that, without a licence, he or she did sell, deal in, or dispose of or offer or expose for sale a quantity of intoxicating liquor. They all pleaded not guilty, but they were all convicted. From the records it would appear that outside the gates of the Ndabeni Location there are what the police call "smuggling dens," but what the accused call coffee-shops. There were a number of natives recently returned from German South-west Africa apparently with a considerable amount of money in their possession, who had come to town to get passes to return home, and after obtaining them they went out to the N'dabeni location. That day there was an extra amount of drinking and drunkenness going on around the gates of the location, and the police accused these three different sets of people of contravening the liquor licence Act as just set forth. In the first case all the police could say was this: "I saw the accused making for the 'smuggling dens.' He was carrying a bag over his shoulder, and I heard bottles rattling in it. I went towards the accused, and he threw down the bag and ran away. I ran after the accused, and subsequently caught him. I brought him to the spot where he threw down the bag. I found the bag contained six bottles of Cape beer (produced) and six broken beer bottles." This does not amount either to selling, dealing in, disposing of, exposing, or offering for sale intoxicating liquor. In the second and third cases the circumstances are much the same. A number of natives were seen coming out of the place wiping their mouths. The police in each instance saw a woman carrying a parcel entering the premises by the back door. On searching the house they found no other liquor than three bottles of brandy hidden in a matras. Much as I regret having to quash the convictions, there is no actual evidence of the crime charged against the prisoners. The papers have been submitted to the Attorney-General, who is not prepared to support the convictions. The convictions will be quashed.

*Ex parte* ESTATE WRIGHT.

Mr. Searle, K.C. (with him Mr. Pohl), moved for an order authorising the Master to convene a meeting of next-of-kin of the late George B. Wright, attorney, Graham's Town, to elect executors dative. Counsel said that in the early part of this year curators bonis were appointed to Mr. Wright. Some little time afterwards he died, leaving a will without, however, appointing executors. Thereupon, the curators bonis proceeded to act as executors dative, under section 41, of the Lunacy Act of 1897. One of the sons, who had been appointed a curator, had



been unable to accept office, because he could not provide security. The curators had taken steps with a view of disposing of certain of the property, and the heirs, who were not represented, were afraid that valuable family heirlooms would be dispersed. The late Mr. Wright was not declared of unsound mind, but was declared unfit to manage his own affairs, having reached a great age. The Master had presented a report in which he took up the position that the curators were entitled under the Lunacy Act to act as executors dative.

Buchanan, J.: I think the parties are entitled to come before the Court. If this were a case in which there was no possibility of an executor being appointed, then the course indicated by the Lunacy Act might be followed, although it is not expressly applicable to this case, and the *curators bonis* might have continued the administration of the estate. But here the heirs are willing to have executors appointed, and the Court will authorise the Master to call a meeting of next-of-kin and creditors to appoint an executor or executors dative of the estate under Ordinance No. 104, costs to come out of the estate. Pending such appointment, the curators to be directed to stay further sale of any assets.

#### GELDERBLOM V. GELDERBLOM.

This was an application upon notice calling upon respondent to show cause why a certain award of umpire in arbitration proceedings for the partition of certain three farms in the division of Riversdale should not be made rule of Court, with costs.

It appeared that two of the farms had been sub-divided by the arbitrators, and that they did not enter into the present matter. The umpire was called in to deal with the third farm owing to a dispute. Respondent objected to the award, on the ground that the farm in question, Rietvlei, was not divided in a fair and impartial manner, the umpire (Daniel J. van Tonder) having been unduly influenced by applicant and his arbitrator (D. C. Luyt). Respondent said that he was prepared to give £300 to the applicant if he would make an exchange of the ground. Applicant denied the allegations, and said that the umpire was not in any way influenced either by himself or his arbitrator. In support of this statement, affidavits by Mr. Luyt and Mr. Van Tonder were also read. Mr. Van Tonder said that he tried to make a fair and equitable division of the land. Replying affidavits by respondent and others were read, repeating the allegations as to undue influence having been brought to bear upon the umpire and as to the sub-division being unfair.

Mr. Benjamin was for applicant (Isak Johannes Gelderblom); Mr. Upington was for respondent (Christian Johannes Gelderblom).

Mr. Upington submitted that the award, on the face of it, could not stand. The award was wrongly dated the 4th March, instead of the 4th April. It was clear that the sub-division had been quite partial. The ground ought to have been fairly and equally divided up. That that was not the case was admitted by Van Tonder himself, who said that the applicant had made the part which he had awarded so much more valuable by his own industry. The applicant had, as a matter of fact, been given credit for industry which had been shown, not by himself, but by the old people.

Buchanan, J.: This is an application to make an award of arbitrators a Rule of Court. Applicant and respondent were owners in undivided shares of three farms in the division of Riversdale. They wished to have these shares divided, so that each share should be apportioned, and for that purpose they appointed two arbitrators (Luyt and Van Wyk) and an umpire (Van Tonder) to sub-divide the farms. The arbitrators agreed as to the division of two of the farms, but they could not agree as to the division of the third farm, Rietvlei, whereupon Van Tonder was called in, and he had made an award dividing the third farm between applicant and respondent. To this division respondent now objects. He objects to the award on three grounds. The first is an objection taken on the face of the award. By the deed of submission, which is dated the 8th March, the division had to be completed within one month. The umpire visited the place at the beginning of April, and on the 4th April he made his award between the parties within the month, but, through an inadvertence, when signing the award, he affixed the date of the 4th March, instead of the 4th April. If this clerical error was in any sense material something might be said for having it corrected, but I think it would be absurd to say that the award is altogether invalid, simply because the umpire made such an error. It is not material in any way to the division between the parties. The second objection is that the umpire went on a wrong basis. On this farm Rietvlei there were extensive cultivated lands, gardens, and fencing, and the umpire said he found that the portion which had been occupied by the applicant was much better cultivated than the portion which had been occupied by the respondent, and he gave the applicant the benefit of his previous industry and the previous improvements made by him. This, on the face of it, seems a proper course to follow, and standing alone is not a ground for setting aside the award. But the respondent says that the ground awarded to the



applicant is worth to him £300 more than the ground awarded to him (the respondent). I see that the umpire directs that the applicant should pay to the respondent the sum of £30 for their difference in value. This stands very much in the same position as if the award were a judgment in an action brought in the Court. The Court, as a rule, does not satisfy both parties by its judgment, but that is not ground for saying that the judgment is necessarily wrong. The third objection is that the umpire displayed partiality and prejudiced the case. I think this is a very serious charge, and would go to the root of the award. But on the affidavits I must find that it is not substantiated. Van Tonder was the umpire proposed by the respondent, and accepted by the applicant, and was a man in whom the respondent had full confidence before the award was made. The umpire does not seem to have been influenced by either the applicant's arbitrator or the respondent's arbitrator. He went on the ground himself, and used his own judgment, and in using his own judgment, gave a decision in which he differed from both the arbitrators. It is quite possible one party may not be satisfied with the division, but that is not a ground for setting aside the award. The award will be made a Rule of Court, and as both parties are liable for the costs of making the award a Rule of Court, no order will be made as to costs.

*Ex parte* GELDENHUYS.

Articled clerk—Breach of service  
—Matriculation.

*The Court granted two months' leave of absence to an articled clerk to enable him to prepare for the matriculation examination, on condition that he should serve an additional four months after the expiration of articles.*

Mr. Pohl moved for leave to petitioner for absence from his articles of clerkship for two months, to enable him to prosecute his studies for matriculation examination.

(Buchanan, J.: Another boy that wants to go back to school.)

Mr. Douglas Buchanan (for the Incorporated Law Society) briefly laid their views before the Court, and called attention to a circular which they had sent out, urging that clerks should not be articled unless they had passed their matriculation examination. The society asked for a ruling of the Court.

Buchanan, J.: The Court will allow a break in the articles for two months, on condition that an additional four

months be served at the expiration of the articles. It should be understood that this is only allowed as a matter of indulgence. I must say that, personally, I am strongly against persons who have not matriculated coming to the Court and asking for their articles to be broken for the purpose of going back to school, for that is what it amounts to.

Mr. Buchanan: Will your lordship give any direction in regard to future applications?

Buchanan, J.: I can only express my own opinion very strongly. If this thing is to go, the only way is to alter the Rules of Court. I do not like these constant breaks of service.

*Ex parte* BISSEKER.

Mr. Benjamin moved, on the petition of John Bisseker, as chairman of the "East London Daily News" printing and Publishing Company, Ltd., for a winding-up order under the Companies Act. Petitioner said that the company was duly registered under the Companies Act, and carried on business at East London. The nominal capital was £25,000, of which 12,000 shares had been issued. On May 30 last petitioner was elected a director of the company, and thereafter he was elected chairman. On taking office he found that the company was financially embarrassed through calls on shares not being paid, and outstanding accounts. The assets of the company far exceeded the liabilities thereof. There was now an amount due to creditors of, approximately, £5,000, and the assets of the company stood in the books at £9,000. It was decided, at a meeting of the shareholders, that debentures should be called for £5,000 in order to pay off existing liabilities, the issue of such debentures to be made conditional on the whole sum of £5,000 being subscribed. Of this sum, up to August 31, only £4,000 had been subscribed. At a general meeting on that date it was resolved that application should be made by the Board to the Court for the company to be wound up under official liquidation. At a further meeting on September 14 this resolution was confirmed. Petitioner now made application accordingly, and prayed for the appointment of Mr. J. E. P. Close, accountant, of Cape Town, who had been nominated by Messrs. Wiener and Co as official liquidator, and that there should be joined with him, as co-liquidators, Mr. Herbert J. R. Pope, in his capacity as secretary of the East London Board of Executors, and Mr. Chas. A. Odum. Petitioner said that there would be considerable litigation in collecting the various calls still unpaid, there were several accounts in dispute, and there was still a claim that the company had against the Northern

Press, Ltd., South Shields, England. The details of these matters were well known to Mr. Odum. Counsel added that the prayer was that the liquidators should be vested with the powers under the 149th and 151st sections of the Act 25, 1892.

Ordered that the company be wound up under the Companies Act, and Messrs. Close, Pope, and Odum be appointed to act as liquidators, and rule to issue calling upon all persons interested to show cause on October 18 why the persons named should not be appointed official liquidators, with powers under the 149th and 151st sections of the Act, rule to be published once in the "Government Gazette," "Cape Times," and "East London Dispatch."

*Ex parte* ESTATE JAVA.

Mr. Bailey moved for an order authorising the Registrar of Deeds to pass transfer of certain landed property at Somerset West Strand in the estate of petitioner's father, of which estate petitioner is executor.

Order granted as prayed.

*Ex parte* OOSTHUYSEN.

Mr. W. Porter Buchanan moved for the appointment of a *curator bonis* to the petitioner's daughter, who had inherited certain property in the estate of her late father.

The Assistant R.M. of Lady Grey was appointed *curator ad litem*, on whom the summons is to be served, as well as on the defendant, *curator* to report to the Court, evidence as to the condition of the alleged lunatic and the position of her estate to be embodied in affidavits, and summons returnable on the 18th October.

*Ex parte* BEREND.

Mr. Long moved, on the petition of Katrina Berend, a Griqua living at Kokstad, for leave to raise a loan on or sell certain property which she acquired subsequently to having been deserted by her husband. She desired power to execute the necessary documents without the assistance of her husband.

Order granted as prayed.

*Ex parte* ESTATE WILLS.

Mr. Douglas Buchanan moved, on the petition of the executors testamentary of estate John Richard Wills, for leave to hypothecate certain property, to enable petitioners to pay certain proceeds of life insurance policy to the surviving spouse. The proceeds had been erroneously applied to the estate owing to a settlement under the ante-nuptial contract having been overlooked.

Order granted as prayed.

*Ex parte* LIQUIDATOR, WESTERN PROVINCE BANK.

Mr. Roux moved for an order authorising petitioner to distribute the balance after paying expenses of certain sum of £208 received as dividend from an insolvent estate at Pretoria.

Order granted, as prayed.

*Ex parte* OSBURN BROS.

Dr Greer moved for an order authorising registration of certain transfer of land at Plumstead. Petitioners said that the party from whom they bought had left the Colony without having granted power of attorney to pass transfer.

Buchanan, J., said he thought it would be much better to proceed under the Derelict Lands Act. The matter should go through the chamber book. No order on the present application.

*Ex parte* PITERS AND WIFE.

Mr. Roux moved for leave to petitioners to sell certain life policy to creditors, in order to pay debts due. The policy had been passed in favour of the wife and children of the first-named applicant. The wife and the major children consented to the application.

Leave granted to sell the policy.

*Ex parte* ROOS.

Mr. Douglas Buchanan moved, as a matter of urgency, on the petition of Jan Roos, for a rule *nisi* restraining and interdicting one E. Ingle, an adjoining occupier, from trespassing on the farm Steenbras, division of Caledon, hired by petitioner. It was stated that respondent claimed to have leased the farm hired by Roos, and that he had endeavoured to, and had, exercised certain rights of occupation.

Rule *nisi* granted, to operate as a temporary interdict, restraining E. Ingle from trespassing on the farm hired to applicant by Mr. Struben, rule returnable on October 15.

*Ex parte* HART.

Mr. Roux moved, as a matter of urgency, for the appointment of Cyril Wm. Elliott, attorney, Cathcart, as provisional trustee in the insolvent estate of one Smith, against which petitioner was a creditor.

Mr. Elliott was appointed provisional trustee, with the powers prayed, leave being given to telegraph the order.

*Ex parte* MCGREGOR.

Mr. Gutsche moved for amendment of a certain order of court under the Derelict Lands Act, in which the extent of the ground was erroneously described.

Order amended accordingly.

LESTER V. LESTER.

Mr. Douglas Buchanan moved for extension of return day in a certain application for leave to sue *in forma pauperis*, and by edictal citation. It was stated that the respondent had not yet been served. He had been living in Christchurch, New Zealand.

Return day extended until February 1, 1907, service as before.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

MCCALLUM V. TAXING OFFICER, SUPREME COURT AND LIQUIDATORS, B.S.A. AS-  
PHALT CO., LTD. 1906.  
Sept. 20th.

Costs — Attorney and client —  
Taxing officer.

*C. had been engaged by A., the managing director of a certain company, as attorney to the company, then in process of liquidation on the petition of certain creditors. The Court, in granting the order for liquidation, directed that all costs of opposition thereto, together with costs of the application, should be paid out of the liquidation. C. taxed his bill as against A., who endeavoured to recover from the liquidators: but the Court held that, in view of its former order, A. had no locus standi, and that C.'s bill should be taxed as against the liquidators. Certain of C.'s*

*attorney and client fees were claimed in respect of ordinary work done in connection with the liquidation, and others as extra fees for work done at late hours, costs of typing, &c.*

*Held, on review of the Taxing Officer's award, that the ordinary fees were chargeable to the liquidators, but that A. was personally responsible for all extra fees incurred without special authority.*

This was an application upon notice to respondents to show cause why the taxation by the Taxing Officer of certain bills of costs as between attorney and client due by the B.S.A. Asphalt Co. to applicant, and payable as a concurrent claim, should not be reviewed in reference to certain items set out under three heads.

Mr. Russell was for applicant; Mr. Molteno was for respondents.

Mr. Russell said that applicant had acted as attorney to Mr. Andrew Allan, who was managing director of the B.S.A. Co. The items falling under the first head had been taxed off the original party and party bill, and they were afterwards brought up in an attorney and client bill. There were two taxations as between attorney and client. At the first the managing director of the company (Mr. Allan) was present, but the liquidators were not present. At the second taxation the liquidators were present, as well as Mr. Allan, and the items were then disallowed. The second section consisted of an item of £1 ls. fee for typist, which the applicant said was specifically authorised. The third section of items were not in the original party and party bill. These items were brought up in an attorney and client bill. With one exception, they were allowed at the first taxation, and all the items were disallowed at the second taxation.

Mr. Molteno said that originally there was an application for the sequestration of the company, and the bill of costs was taxed at the time. The costs between party and party were taxed, and nothing more was heard of the matter until, about two months ago, an application was made to the Court by Allan, who practically applied on behalf of McCallum, for these costs between attorney and client. The applicant had had two bills taxed and allowed, at £84 party and party and £108 attorney and client. The latter bill originally amounted to £127, and it was this bill which formed the subject matter of the present proceedings.

[Buchanan, J.: I suppose when the company was placed in liquidation, the

applicant's costs were ordered to be paid by the company?]

Mr. Molteno: They were. I think the order was costs to be costs in liquidation.

Buchanan, J.: The costs of the application and opposition?]

Mr. Molteno: Yes. About two months ago Allan applied for costs between attorney and client. (See 16 C.T.R. 664.)

[Buchanan, J.: That would be the costs between respondent and attorney?]

Mr. Molteno: Yes. The application came before the Chief Justice, who held that Allan had no *locus standi*, and it was then stated by counsel that Allan having guaranteed payment when he employed McCallum, was attempting to obtain from the company the costs which he had been charged by Allan. The Court indicated that the matter should go before the Taxing Officer, and he should accept the costs as between attorney and client.

Affidavits in support of counsels' statements having been read on both sides, and counsel having been heard in argument,

Buchanan, J.: As a rule, the Court will not interfere with the Taxing Officer's discretion as to items of attendance, and things of that kind which the Taxing Officer is supposed to inquire into judicially, and is supposed to have proved before him. As a rule, in reviewing the Taxing Officer's taxation, the Court endeavours to keep to general principles which should guide the Taxing Officer. The applicant, Mr. McCallum, was originally engaged by the managing director of the B.S.A. Asphalt Company to act on behalf of the company. Certain creditors and others took up an antagonistic position, and applied for the liquidation of the company. The company, as represented by the managing director, opposed the application, and though the application was granted, the Court ordered that all costs of opposition to the company being placed under liquidation should with costs of the application be paid out of the liquidation. Mr Allan, as being liable to the attorney, endeavoured to recover the costs from the liquidators, but the Court intimated that Allan had no *locus standi*, that the attorney should have his bill taxed as against the liquidators, and that whatever he taxed against them should be costs in liquidation. The Taxing Master, on going through the account, which was taxed as against Allan, allowed a certain number of items, amounting in all to £12 2s. These items, however, when he came to tax the account between the attorney and the liquidator, he taxed off. These items, amounting to £12 2s., the attorney now brings in review. A general principle may be applied to each of the two classes into which these items may be divided, which, I think, will decide whe-

ther they ought to be allowed or not. As to the first class of items, the test to be applied is, whether or not these costs were incurred in connection with the application for liquidation. That the attorney had done the work and was entitled to be paid for doing it is shown by the fact that the Taxing Officer did allow them to the attorney when the bill of costs was first placed before him, when taxing the bill of costs as between the attorney and Allan. The only question is, are these items to be charged against Allan personally, or against the liquidation? Now, looking at the items objected to here, I think that all these items are items connected with the liquidation, and, therefore, ought to be allowed against the liquidation. The second class of items are charged as extra fees, and special fees. There is an extra fee paid to the typist, an extra fee paid to the attorney on account of petition being drawn after office hours, and then special fee for work done at late hours, and the Taxing Officer in the first taxation made these depend on the certificate of the managing director. The Taxing Officer said that the attorney may be entitled to these items, but it is a matter which would require to be certified by the managing director before he could allow them as against him. As a general rule, if a client allows an attorney excess fees, those items are not chargeable as against the other party, and I think the Taxing Officer was correct in refusing to allow these items against the liquidation. These special fees together with an item of 6s. 8d. taxed off the full bill of costs amount to a sum of £8 1s. 8d. Taking that off £12 2s., it leaves a sum of only £4 0s. 4d. It is a pity that this small matter should have engaged the time of the Court. But a person is entitled to have what is due to him, and, though the amount is small, the only way of obtaining it was by way of review of the taxation court. The Court will allow the sum of £4 0s. 4d., with costs, but will limit the costs to the hearing, the notice of motion, and the first affidavit only. Subsequent affidavits need not have been filed.

*Ex parte McCALLUM.*

Mr. Douglas Buchanan moved, as a matter of urgency, for a winding-up order against the Cape Minerals, Ltd., under the Companies Act of 1892. Petitioner said that the company was registered for the purpose of prospecting for precious stones and minerals throughout the Colony, with a nominal capital of £1,000. It had only been in existence since March last. Petitioner acted for the company, and had obtained judgment in this Court for £25 odd for professional services. All the directors of the company had resigned. Execu-

tion had been taken out under the judgment, and a return of *nulla bona* had been made.

The Court ordered that the company be placed in liquidation, and that Mr. McCallum be appointed to act as liquidator, and rule *nisi* to issue, returnable on the 18th October, calling upon all persons interested to show cause why the applicant should not be appointed official liquidator, with powers under the 149th section of the Companies Act, rule to be published once in the "Government Gazette" and "Capo Times."

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

*Ex parte* VILJOEN. { 1906.  
Sept. 24th.

Mr. Douglas Buchanan moved, on the petition of Willem Viljoen, of the Orange River Colony, in his capacity as sole trustee of the insolvent estate of one Van der Walt, for an order confirming and recognising his appointment so as to enable him to administer certain assets in the estate situate in the Cape Colony. Petitioner said he had discovered that the insolvent was owner of certain movable and immovable property at Jamestown, Cape Colony, of the value of £20 and £80. By virtue of his appointment petitioner was vested with the title to the assets in the Cape Colony, and entitled to administer the same. Counsel relied upon *In re Motam* (22 Supreme Court Reports) as authority for the application.

[Buchanan, J.: It would have been as well to have had a request from the High Court of the O.R.C.; it would have made the thing much more simple.]

Mr. Buchanan: It would still have been necessary for the trustee to apply to this Court.

Buchanan, J.: If you have a request, then you act under statute. During the last session of Parliament they tried to provide for cases of this kind. It would be better if there is a request in future, because there is the Imperial Statute which would govern the application, and you would have something to go on. An order will be granted similar to that in the case of *Motam*, returnable on November 1.

*Ex parte* SECCOMBE.

Mr. Alexander moved, on the petition of William Thomas Thorne Seccombe, of Cape Town, for a winding-up order under the Companies Act, against the Assets Realisation Association, Limited. Petitioner stated that he was the registered holder of one fully-paid-up share of the face value of £1 in the Assets Realisation Association, Limited, a company duly registered on March 1, 1906, in terms of the Companies Act, No. 25, 1892, with a nominal capital of £5,000, divided into 5,000 shares of £1 each. The names of the subscribers to the memorandum and articles of association were: (1) H. H. Drummond, (2) Charles W. McDowell, (3) J. H. Martyn, (4) John Perry, (5) G. Williams, (6) W. T. Seccombe (petitioner), (7) C. A. Mackintosh, and (8) Mrs. E. H. Drummond. No. 1 was incarcerated; No. 2 was not a fit and proper person to be allowed to continue the business of the company; Nos. 3 and 4 had left Cape Town, and their whereabouts were unknown; No. 5 stated that he had no knowledge of the company's affairs; No. 7 was the former office boy in the company's employ, and was aged about 11 years, and No. 8 was the reputed wife of the said Drummond. No other shares had been issued or allotted, neither had any meeting of subscribers been called or held, nor had any officers been appointed to act for the company. One Hilyard Home Drummond, the promoter of the company, in his assumed capacity as general manager or managing director, had carried on business in the name of the company on his own account, taking securities, obtaining credit, and incurring liabilities in the name of the company to a very considerable extent, and had exploited a banking account also for such association in the name of the company, upon which he had drawn for his personal expenditure, including his hotel bills. On Tuesday last, the 18th inst., the said Drummond was arrested on a charge of theft by conversion of the sum of £210 from one Webster, this person being introduced to the association by the aforesaid McDowell, who had assisted the said Drummond in the management of the business from the commencement. The said Drummond was now incarcerated in Roeland-street Prison. There was, therefore, no fit and proper person to continue or conduct the business of the company. In or about the end of August last the Atlas Printing Company obtained a judgment against the said company for £16 odd and costs. Execution was subsequently issued, and was held over for about a week, until on or about the 10th September, when the movable property of the company was removed by the messenger of the Court. The association was indebted



(amongst others) to a large number of persons, in respect of accounts collected for them, and such debts were being paid in many instances by way of instalments. There were assets belonging to the company which required to be protected for the benefit of the creditors and subscribers, as the business, as it now stood, was fast being reduced to a state of ruin. The association was practically a bogus company, and such business had been carried on by the said Drummond fraudulently and for his own benefit, and it was urgently necessary for their lordships to appoint liquidators to wind up the affairs of the company. Petitioner urged that it was just and equitable in the interests of the subscribers and creditors that the affairs of the company should be wound up by order of the Court. He prayed that the Court would appoint Messrs. Wyndham Bishop and Theodore Alfred Lougher, accountants, Cape Town, as joint liquidators. Counsel added that the application was brought under section 135 of the Companies Act.

[Buchanan, J.: This bogus company has been in court, and acting in the way it did, it was disgraceful.]

Mr. Alexander said that all the shareholders were away, and the managing director was in prison. Accounts were due in instalments payable at the office, and nobody was there to receive the money.

Buchanan, J.: Can we treat this seriously as a company.]

Mr. Alexander: I submit that we must; it is a legally registered company.

[Buchanan, J.: Petitioner is not a creditor?]

Mr. Alexander: He is one of the shareholders.

[Buchanan, J.: Party to a bogus company.]

Mr. Alexander: Apparently the managing director has been using the company for his own ends. Petitioner does not say that it was started with that idea. It is to protect him and the other creditors that we have come into court.

[Buihanan, J.: It is a bogus thing all the way through. Only the other day an action was before me in which this company was concerned; it is perfectly disgraceful.]

An order was granted placing the company under liquidation, and appointing Messrs. Bishop and Lougher to act as official liquidators, with powers under the 149th section of the Act, and rule nisi to issue, returnable on the 18th October, calling upon all persons interested to show cause why the persons named should not be appointed official liquidators, with power to wind up the company, rule to be published once in the "Government Gazette" and "Cape Times."

#### MATHEW V. WATKINS AND ANOTHER.

This was an application *ex parte* calling upon the respondents to show cause why the order granted by the Court on the 14th September should not, in terms of section 26 of Act 35, 1896, be carried into execution upon such terms as the Court may deem proper, and why respondents should not pay costs.

Mr. Benjamin (for Alfred H. Mathew, the applicant) read an affidavit by Mr. Buissinne, attorney, who said that an order had been granted by the Court requiring respondents to deliver up possession of certain furniture pledged to him. Compliance with the order not having been made, application had been made to the Registrar for a writ, but he declined to sign the same, saying that an appeal had been noted. No written notice of such appeal had been served upon applicant.

Execution granted on the order of Court, notwithstanding appeal being noted, with costs against both respondents.

#### REX V. DU PLESSIS.

Mr. Upington moved for an extension of time within which to prosecute a criminal appeal. Counsel said that the application was rendered necessary by the fact that the period of 41 days would have elapsed before the first day on which the appeal could be set down, viz., the 15th October. The Attorney-General raised no objection to the appeal being set down for the 22nd October.

Leave granted as prayed.

#### GLYNN V. THERON.

Dr. Greer moved, on the petition of James A. Glynn, shipping agent, Cape Town, for an order for the attachment of a certain inheritance falling due to respondent. Petitioner said that he had a claim against respondent, Pieter Nicholas Theron, for £19 17s., for rent of a stable and goods supplied, and he had obtained judgment in the Magistrate's Court, Woodstock. Theron had made no efforts to satisfy the said judgment. Under the will of his mother respondent would be entitled to certain funds, and petitioner prayed for an order for the attachment of his inheritance, and an interdict against the executors restraining them from paying over to respondent any moneys whatsoever until petitioner's claim for £19 17s. with taxed costs shall have been paid. Counsel added that the matter had previously been before Mr. Justice Hopley, but at that time there was no judgment, and now judgment had been taken and an execution issued.

Buchanan, J.: An idea seems to have sprung up that you can always go and

attach property as soon as you have a debt against a man. Here you have a judgment and an execution. An attachment will be ordered as prayed, with costs, with leave reserved to defendant, if so advised, to move to set aside the order.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

(IN CHAMBERS.)

REX V. CLAASSEN AND OTHERS. { 1906.  
Sept. 27th.

Vagrancy—Ejectment.

*Certain natives who had for some time resided on a Mission Station had misconducted themselves, and at the instigation of the missionary were charged and convicted under the Vagrancy Act.*

*Held, that the Act did not apply and that the missionary should sue for ejectment. Conviction quashed.*

Buchanan, J.: A case has come from the Magistrate's Court at Ladismith, in which four persons, coloured labourers, were charged with contravening the Vagrancy Act in being wrongfully and unlawfully found, without permission of the owner, upon the Amalienstein Mission Station. Prisoners pleaded guilty, but when we look at the evidence we find that these four persons were residents at Amalienstein before the present missionary came. The missionary had some difficulty with the men, and he threatened to summon them, but, upon their promising amendment, he withdrew the charge. He again had difficulty, and complains that these persons make his life absolutely a burden to him by their conduct, and that their example is injurious to the other members of the community. They were tried and convicted and sentenced to imprisonment under the Vagrancy Act. Now, the charge brought against them is evidently intended to be one of ejectment, to remove them from the mission station. A vagrant is generally described as one who wanders abroad having no

visible means of support. Now this is applying the Vagrancy Act to a purpose for which it was never intended. These parties are not vagrants; they reside at the mission station. If the missionary wishes to eject them he must take proper steps. The conviction will be quashed.

REX V. SWAARTBOOI.

Stock theft—Failure to pay fine  
—Additional term of imprisonment—Hard labour.

*Act 7 of 1905, Sec. 4, authorizes an additional term of imprisonment in the case of a person who has been convicted of stock-theft, but does not sanction the imposition of hard labour during such additional term.*

Buchanan, J.: This is a case from the Magistrate's Court at Beaufort West. The charge against the prisoner is that of stock theft. The Magistrate sentenced him to 12 months' imprisonment, with hard labour, and to pay £3 10s., or undergo additional imprisonment, with hard labour, for three months. This additional imprisonment is authorised by the Act of last year. In that Act authority was given to the Magistrates to sentence prisoners who did not pay their fine to an additional term of imprisonment, but they were not authorised to add hard labour. An Act was introduced into Parliament this year for the purpose of enabling hard labour to be imposed in such cases, but that Act did not become law, and until it does become law the Magistrates cannot act upon it. The words "with hard labour" after "additional imprisonment" must be omitted from the record, and, so amended, the sentence will be confirmed.

### ADMISSION.

Mr. Gutsche moved for the admission of John Richard Black as an attorney and notary.

Application granted, and oath administered.

*Ex parte* THE SOUTH AFRICAN WIDOWS' FUND SOCIETY.

Mr. Molteno said that in the rule nisi which had been published in connection with this matter it was omitted to state that Mr. J. E. P. Close had been appointed, subject to approval, to distri-

bute the funds. Application was now made for an amendment of the order.

Buchanan, J.: The rule nisi was made absolute, but in the Master's report he recommended that the liquidation and distribution be authorised as requested, and that Mr. Close be appointed liquidator, and that additional power was not asked for. The Court will now order that Mr. J. E. P. Close be appointed liquidator to carry out the order of the Court.

## SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

(IN CHAMBERS.)

*Ex parte FRASER.* { 1906.  
Sept. 28th.

Mr. Benjamin moved, on the petition of J. C. Fraser, in his capacity as liquidator of Wood and Williams, Ltd., for the appointment of a commission to take the evidence of certain persons in reference to the business.

Petitioner said that, by a special resolution passed on the 20th August last, and confirmed on the 18th September, the shareholders resolved that the company be wound up voluntarily, and that petitioner be appointed liquidator. One James Edwin Williams, chairman of directors, had charge of the financial affairs of the company. Since the passing of the resolution aforesaid petitioner had appointed Alfred T. Hennessy, accountant, Cape Town, to make up a statement of the company's affairs. The said Hennessy had stated that it was necessary in order to prepare such statement that the said Williams should attend at the company's offices and give him information on matters of detail connected with the transactions of the company. There was also missing from the offices a certain stock-book required for the purposes aforesaid, and which there was reason to believe was in the possession of the said Williams. Deponent went on to describe the efforts which had been made by the accountant to obtain an interview with the chairman of directors. It appeared that certain of the company's officers had been examined by the accountant, and that Mr. Williams had objected to this, and refused to give any information until the return of the petitioner, who, how-

ever, pointed out that he had left his power of attorney with the accountant. Mr. Fraser added that it was desired that the liquidation of the company should be completed as early as possible, and the action of the said Williams was vexatiously delaying the same. There were many transactions of the company which required further information, as the evidence given by various officers and servants of the company was contradictory on a number of important points, and a large and, at present, unaccountable, deficiency had occurred in the trading of the company for the past year. Petitioner stated that the business was so interwoven with the business of two other companies, viz., Wood, Williams and Co., Ltd., and A. J. Coleman and Co., Ltd., that it was necessary to refer to the books in the possession of the other companies. He prayed for the appointment of a commission to examine James Edwin Williams, Wm. Francis Wood, and Wm. Seals Wood, directors of the company; George Kerr Sloan, the secretary; David Stephen, auditor; Gustav Hermann Rubinstein (representing the principal creditor); Wm. S. Brown, accountant (manager of the accountancy business of A. T. Hennessy) and the Cape Town agent of Mr. J. B. Robinson; and certain other persons whom it may be desired to call. Counsel added that the application was made under the 186th section of the Companies Act, 1892. It was desired that Mr. E. R. Syfret should be appointed Commissioner. He understood that the work would involve the examination of very complicated accounts.

[Buchanan, J.: You ought to state the name of Mr. Robinson's agent.]

Mr. Benjamin: I am informed that his name is Mr. Colvin. Will your lordship order a general commission?

[Buchanan, J.: No. I think you will have to come to the Court again if you want to examine other persons. I cannot give you a roving commission.]

Order granted as prayed in the last portion of the petition. Mr. E. R. Syfret to be commissioner to examine the persons named, costs to be costs in the liquidation.

*Ex parte WOLFE.*

Mr. Benjamin moved, on the petition of A. W. Wolfe, in his capacity as curator bonis of the estate of James Hy. McKillop, for his release from office. McKillop, it appeared, had been personally discharged from curatorship, but his estate was left under curatorship, being in an embarrassed condition at the time.

Petitioner, who had been acting in the interests of Mrs. McKillop, said that he had kept the estate out of the

Bankruptcy Court, and he had filed his account, supported by proper vouchers.

Mr. W. Porter Buchanan (for McKillop) said that he consented to the application, subject to his client being re-vested with the administration of his estate.

[Buchanan, J.: That will follow.]

Mr. Buchanan: The applicant does not ask for it in the petition, and we want to make it secure.

Order granted in terms of prayer of petitioner, Mr. McKillop to be re-vested with the administration of his estate, costs to come out of the estate.

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*Ex parte* TRUSTEES, INSOLVENT ESTATE  
SHUTTE.

Mr. Long moved, on the petition of Hy. de Luke Vis and Jacobus P. Viljoen, in their capacity as trustees in the insolvent estate of Walter Percy Shutte, lately an hotel proprietor, of Prieska, for the appointment of a commission to examine certain persons with

respect to a sum of £1,150, proceeds of a bond, which had come into the possession of insolvent. Insolvent, petitioners stated, had absconded, and they had been informed that he was at present in South America. They had made inquiries, but were unable to obtain any information in regard to this amount of £1,150. Petitioners prayed for the appointment of the Resident Magistrate of Prieska and J. B. Schultz, attorney, Prieska, to examine the following persons: D. G. Aspeling (manager of the Prieska branch of the Standard Bank), T. B. Davies, Leopold Rose, Daniel C. S. Naude, H. de L. Vos, and J. Marcuse, all of Prieska.

[Buchanan, J.: Why should the attorney be appointed commissioner? It is altogether unusual.]

Mr. Long: I don't know what the circumstances are.

Order granted, directing a commission to issue for the examination of the persons named in the petition, the Resident Magistrate of Prieska, or person acting all such, to be commissioner, costs out of the estate.



# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

HIRSCHHORN V. SCHROEDER } 1906.  
AND VAN COPPENHAGEN. } Oct. 12th.

Mr. Searle, K.C. (with him Dr. Greer), moved for the appointment of a commission to take the evidence of Jan Willem van Copenhagen (one of the defendants in the action). The ground of the application was that Mr. Van Copenhagen, a member of a firm of solicitors at Upington, was secretary of the Municipality and of the Waterworks, and that he had to act as deputy sheriff, and it was therefore impossible for him to come to Cape Town to give evidence. It appeared that Mr. Schroeder, the other defendant, intended to come to Cape Town to instruct counsel, although Mr. Van Copenhagen was a material witness.

It was stated that the action was for damages on account of defendants having taken certain cattle which plaintiff alleged were his property. Defendants acted as agents of the German Government, and they set up the case that the cattle they took belonged to the German Government, and that the person who sold the cattle had no right to sell them to Hirschhorn, and that Hirschhorn knew when he bought that he was buying cattle, and had no right to buy.

Mr. Burton (with his Mr. Van Zyl) read affidavits in opposition to the application, on the ground that Mr. Schroeder was the deputy sheriff, and Mr. Van Copenhagen held offices to which he might appoint any competent person to act on his behalf, and that the respondent was about 100 miles from Upington, in the Prieska division, and to secure his attendance at Upington would mean great inconvenience and expense.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: There is always an advantage to a person to appear in court personally to give his evidence and it seems rather an advantage to the other side that the opponent should not be there to give his evidence in person, but on commission, seeing that the evidence given before the Court must have more effect than evidence given on commission. In the present case there appear to be circumstances to justify the Court in making the order asked for. The distance from Upington is very great, the defendants are both partners, and one can well understand the great inconvenience for both to be away from their place of business at the same time. Moreover, Mr. Van Copenhagen holds some important offices in the place, and on the whole I think a good case has been made out for granting this commission. The Court will, therefore, grant an order as prayed, and appoint the Resident Magistrate of Upington as the commissioner, costs of this application to be costs in the cause.

OFFICIAL LIQUIDATOR, { 1906.  
GRAND JUNCTION RAIL- } Oct. 12th.  
WAYS, LTD. V. RECEIVERS, }  
GRAND JUNCTION RAIL- } " 15th.  
WAYS. }

#### Company—Debentures.

*The members of a partnership gave the following undertaking to the G. Company "in consideration of your having ceded your concessions from the Cape Government to the T. Company, we hereby agree to pay all debts, including 1,700 debentures, and to undertake all the liabilities and engagements of*



*the Company, on condition that no debentures or shares are issued after this date without our sanction in writing." After the date of this undertaking, 1,000 additional of £100 each were issued by the Company with the sanction, in writing, of the members of the partnership, but only £700 worth of these debentures were lawfully issued.*

*Held, that the plaintiff, as the official liquidator of the Company, was entitled to claim payment concurrently with the other creditors from the receivers of the partnership the amount of the 1,700 debentures, but not more than £700 of the face value of the remaining 1,000 debentures.*

This was an action brought by Edward Ridge Syfret, in his capacity as official liquidator of the Grand Junction Railways, Ltd., against the said E. R. Syfret and John Edwin Paul Close, in their capacity as receivers of the Grand Junction Railways, for an order declaring plaintiff to be entitled to prove and claim concurrently upon the partnership for 2,700 debentures of £100 each.

The object of the action was to have the right of the liquidator to prove as a concurrent creditor upon the Grand Junction Railways partnership, certain debentures issued by the company at different times, 2,700 in all. The receivers admitted in their plea that they were willing to allow proof in respect of 1,700 of those debentures, and consequently that reduced the number as to which there was any dispute to 1,000, and with regard to that number it was alleged that 500 of them had been given up and surrendered under some arrangement made by Mr. Hills, who had paid some of them, so that those 500 would be out of the question also.

Mr. Searle, K.C. (with him Mr. Benjamin), was for plaintiff; Mr. Close (with him Mr. Upington) was for defendants.

[De Villiers, C.J.: What do you say about the 500?]

Mr. Searle said that 500 were surrendered to the receivers of the partnership by arrangement with Mr. Hills, who had paid them. The receivers took up the position that they would give a dividend on those claims made by people who had debentures, on an understanding that they would refund if it were shown that their proofs were not good in connection with their debentures. When these persons came, they said that they would not give the

guarantee, and they would accept a dividend out and out, without making any further claim in respect of some of their debentures. They were intimate friends of Mr. Hills, and he (counsel) understood that Mr. Hills had made some arrangement to pay those people their claims, not their debentures, and he had actually paid some of their claims already. Counsel went on to say that 2,200 debentures, 1,700, and 500 had been proved upon the liquidator of the company, who had admitted all those debentures to proof. Of the 1,700, 785 were held by the African Banking Corporation, and of the 1,000, 500 were held by the A.B.C. It was admitted now on an admission paper which had been put in that the partnership, that was, the Grand Junction Railways and the Thames Company, consented to the issue of the debentures, that was, the second 1,000 debentures, of which 500 formed part, and that the partnership took the benefit of and made use of the debentures. It was admitted, he took it, that the proper consent of the partnership was given to the issue of those debentures, and they were quite *bona fide* debentures. The present case, as he had said, ranged round 500 debentures of £100 each. He might briefly indicate the chief events leading up to this case. In July, 1898, the limited company was in existence, and was then constructing the four lines of railway under the Act of 1895. The limited company had entered into an agreement with John Walker and Sons, of date April, 1896, under which John Walker and Sons were the contractors, who actually constructed the lines, and under that agreement a cash subsidy of £1,500 per mile was paid to John Walker and Sons on certain conditions set forth in the agreement—that certain debentures were to be issued when certain formation works had proceeded, and certain shares had to be issued when certain other work had to be done. That arrangement had been going on from April, 1896, to July, 1898, and at that date 1,700 of these debentures had been issued, under contract, from time to time, as shown by the minutes of the company. They had upon certain certificates given by the secretary of the company that certain work had been done from time to time issued debentures. In July, 1898, a change was made. There was difficulty between the limited company and the Government, and after that date the Government stepped in and said another arrangement must be made, and an Act was passed in August, 1898, under which one of the lines became a Government line, and the other three lines were carried on as subsidy lines. Then the Thames Company came into the matter through Mr. Hills, who commenced to finance the undertaking, and entered into a partnership with John

Walker and Sons under an agreement dated the 18th August, which stated that this partnership should date as from the 1st January, 1898. As a result of that agreement, the limited company made over all its rights to the joint venture, and the members of the joint venture and the Thames Company all signed an undertaking that they would be responsible for all the liabilities of the company, provided that no further debentures were issued beyond the 1,700, except with their consent in writing. That was the position in July, 1898. There was also a cession from John Walker and Sons, as contractor, to the joint venture, of all their rights under the contract; consequently, the joint venture took over all the liabilities and the assets of the company as from that date. About that time an account was opened with the African Banking Corporation in London, and they commenced to advance money upon the debentures. These proceedings went on, the A.B.C. advancing money from time to time against debentures. In February, 1899, there was a meeting of the limited company, at which Hills and Walker, members of the joint venture, were represented, and also other parties, who were directors, and a certificate was then produced by the secretary of the limited company, showing that under the contract of 1896 work had been done which entitled the contractors to a certain amount in debentures, beyond the £170,000 already issued. This included work done from July up to January, 1899, whereupon it was decided to issue a certain number of debentures, 2,170 altogether, but to issue 1,000 immediately. It was to that particular 1,000 that exception was now taken. Those debentures were not issued until six months after the meeting. They were issued at the request, in writing, of the joint venture, and the joint venture then deposited them with the A.B.C., and, upon instructions given in London, and upon that information given in London to the A.B.C., they made advances then amounting to about £25,000 or £26,000 against those particular 500 debentures, which were deposited here in Cape Town at the time. There were also debentures of the old issue as well. In 1903, £59,000 odd had been advanced, and they held 785 debentures. The liquidator did not claim any preference now. He claimed to be entitled to prove concurrently on account of the undertaking of July 20, 1898.

[De Villiers, C.J.: I understand that the limited company received £70 in respect of each £100 debenture?]

Mr. Searle: The limited company did not receive anything; the partnership that had taken over the limited company was the one that was dealt with. The A.B.C. did not deal with the limited company at all.

[De Villiers, C.J.: But it is their liability. The partnership received only £70 in respect of each £100 debenture?]

That was the arrangement made, though it seems that the amount fluctuated, sometimes rather more than £70, and sometimes rather less. The proportion was more or less on that basis. A letter will be put in showing that that was what they were prepared to do. Proceeding, counsel said that the A.B.C.'s claim was £59,000, as against 785 debentures. The position the plaintiff took up was this: These claims had been filed upon the liquidator for these 1,700 and 500 debentures. He had admitted them, and he was satisfied that the A.B.C. was perfectly *bona fide* in the matter, and he said, "Well, then, let me claim concurrently upon the receivers for that amount, viz, £220,000." Supposing a dividend of 10s. in the £ were paid, then the liquidator would get half the amount proved, £110,000. Then he distributed up to the amount of the claims. It would be shown indisputably from the figures that under no circumstances could the bank get the full amount of its claim, but it would get more, of course, if it were allowed to prove in this way, than it would get if it merely got a dividend of 10s. in the £.

[De Villiers, C.J.: I do not quite see why the bank should receive on their debentures more than they advanced?]

Because they agreed with the bank that the debentures would be paid

Defendants, in their plea, said that the 1,700 debentures issued by the Grand Junction Company between the 31st October, 1896, and the 20th July, 1898, were issued to the firm of John Walker and Sons, the company purporting thereby to pay the firm for work done. At the time of the cession from the company to the Thames Ironworks Co., and of Mr. Hills, and the undertaking to pay the debts of the company on the 20th July, 1898, the company, owing to financial difficulties, had ceased business, and was unable to proceed with its railway contracts or to pay the debenture holders or other creditors. As to the subsequent issue of 1,000 debentures, defendants denied that the debentures were issued duly or for value. They denied that the partnership became subject to the liabilities of the company in respect of the said debentures, save as to the 1,700 debentures. Defendants contended that by virtue of the various agreements entered into between the company and the partnership, the joint venture had never undertaken to discharge any liabilities of the company, save such as existed on the 20th July 1898. The partnership was not a party as such to the agreement of that date and the remaining signatory thereto, the Thames Co., was not a party to this action. The parties to the said agree-

ment were jointly, not severally, liable. As to the 1,000 debentures, the company purported to issue these debentures as further payment, in addition to the 1,700 debentures, to the firm of John Walker and Sons, while defendants said that the first issue was an ample and complete discharge of all liability which the company had ever had to issue debentures to the said firm in the agreements between the company and the firm. The firm did no further work under the agreements for the company after the cession of the 20th July, 1898. Should the Court find that for work done prior thereto the firm had any claim against the company not paid for or satisfied by debentures, then such claim had been extinguished in law by set-off, and in any case such claim, if any, was far below the value of the 1,000 debentures. Of the said 1,000 debentures 500 had been surrendered to defendants by the holders thereof, and in no case could plaintiff claim the amount of these as against the partnership. The concluding paragraphs of the plea were:

16. As to the remaining 500 debentures, the defendants say that these are held in pledge by the African Banking Corporation as part security (the corporation also holding other 285 debentures of the 1,700 issue) for advances to the partnership amounting in all with interest to £59,853 12s. 4d.

17. The said corporation when it made the said advances on the security *inter alia* of the said debentures had notice and was fully cognizant of the existence and terms of the agreements in annexures A and B hereto, and knew that the said debentures would not be paid by or be the debts of the company. The corporation believed that by the said pledge it was getting a preferent security as against the partnership assets including the company's former assets, which as it knew had been transferred and ceded to the partnership.

18. The defendants contend that the plaintiff cannot in any case in respect of the said 500 debentures prove and claim against the partnership more than so much of the amount of the joint venture's indebtedness to the said corporation as was advanced upon the security of the said 500 debentures and for which the 500 debentures are held as security as aforesaid.

19. The defendants tender to accept proof of and to rank as a concurrent debt of the partnership the 1,700 debentures with all due interest; and to pay plaintiff's costs to date.

Wherefore, subject to the above, defendants pray that plaintiff's claim may be dismissed with costs.

Mr. Close applied for leave to amend the plea by setting out that the defendants denied the right of the present plaintiff to claim, the position being

that the proper procedure was for the A.B.C. to prove direct on the receivers.

Mr. Searle consented and the amendment was allowed.

Gerald D. Orpen (of the firm of Syfret and Co.), and Benjamin T. Tonkin, accountant and broker (formerly secretary of the Grand Junction Railways, Limited), gave evidence on behalf of the plaintiff.

Mr. Searle also put in a considerable body of commission evidence taken in London.

Arthur M. Tippet, an engineer of the C.G.R., was the only witness called for the defendants. Mr. Tippet was one of the referees appointed by the Court in the case of *Hills v. Colonial Government* to go into the question of "actual cost" of the work done on the lines (13 C.T.R., 136).

Counsel having been heard in argument on the facts.

*Cur. Adv. Vult.*

*Postea* (October 15th).

De Villiers, C.J.: The plaintiff, as the official liquidator of the company, known as Grand Junction Railways (Limited), seeks to have it declared that he is entitled to prove and claim concurrently from the receivers of a partnership known as the Grand Junction Railways, the sum of £270,000, being the face value of 2,700 debentures issued by the company. The claim is mainly based upon an undertaking given by the members of the partnership and by one Urquhart, as agent of the Thames Ironworks and Shipbuilding Company, on the 20th of July, 1898, to the company in the following terms: "In consideration of your having ceded your concessions from the Cape Government, dated 19th May, and 13th October, 1896, to the Thames Ironworks and Shipbuilding Company, we hereby agree to pay all debts, including the 1,700 debentures issued, and to undertake all the liabilities and engagements of the company on condition that no debentures or shares are issued after this date without our sanction in writing." After the date of this undertaking, the company issued 1,000 debentures in addition to those previously issued, and in regard to this new issue, the declaration alleges that "the Thames Company and the partnership consented to the issue, and the partnership thereafter took the benefit of and received value for the debentures, and made use of the same and pledged the same to *bona fide* holders in return for advances for the purpose of carrying on their business." This allegation was denied by the plea, but was subsequently admitted by the defendants in a consent paper signed by their attorneys. In making this admission the defendants did not withdraw their denial of the allegation in the declaration that the

debentures had been duly issued and their plea that the debentures actually issued were in excess of the number that could be lawfully claimed by John Walker and Sons, and that the partnership in fact received far less than the face value of the debentures still stand on record. It was difficult to ascertain from the pleadings what the real defences were, and it was only as the case progressed that the Court was enlightened on the subject. The defendants by their plea tender to accept proof of the 1,700 debentures issued before the 20th of July, 1898, with interest, but they dispute the right of the plaintiffs to prove for the full amount of the remaining 1,000 debentures. The plaintiff, for reasons not necessary now to state, has foregone the claim to prove 500 out of the 1,000 debentures, and the question now to be decided is whether the plaintiffs are entitled to prove as against the receivers of the partnership for the full amount of the remaining 500 debentures.

One of the defences raised by the plea is that these 500 debentures are held in pledge by the African Banking Corporation as security for advances made to the partnership, that the Corporation, when it made the advances, had notice of the undertaking already mentioned, whereby the debts of the company had become the debts of the partnership, that, consequently, the plaintiffs are not entitled to prove in respect of these debentures, and that any claim the Corporation might have should not exceed the amount actually advanced by it to the partnership. If this action is to be regarded as an action brought on behalf of the Corporation, as pledgee of the debentures, the defence would appear to be a valid one. It is clear that the written undertaking of July 20 was in the possession of the Corporation in London shortly after it was executed, and that a copy of it was, on August 12, 1898, sent by the London office to the Cape Town office of the Corporation. If the Corporation knew, when it advanced moneys to the partnership on security of the 500 debentures, that these debentures were really payable by the partnership, it is difficult to understand on what principle it can prove against the partnership for more than the amount actually advanced. But quite independently of such knowledge, I am of opinion that the Corporation must be confined in its proof to the amount actually advanced in security of the 500 shares. The plaintiff's counsel has relied upon the 30th section of the insolvent ordinance as entitling the plaintiffs to prove for more, but that section only applies to cases of actual insolvency. In the present case the estate of the partnership has never been sequestrated, and this Court has in a previous case (*London and Westminster*

*Bank v. Receivers Grand Junction Railway*, 21, S.C.C., 418), commented upon the anomaly of being asked to declare a preference against an estate which has never yet been sequestrated. The Court is not now asked in so many words to declare such a preference, but the effect of allowing the Corporation to prove for more than the amount actually advanced by it would be to give the Corporation a decided advantage over the creditors of the partnership. It is said, however, that as this action is brought not by the Corporation, but by the liquidators of the company, the Court should give full effect to the undertaking of July 20, 1898, and allow the liquidators to prove for the amount of the indebtedness of the partnership in respect of the 500 debentures. That undertaking, as I have said, was signed not only by the members of the partnership, but also by one Urquhart, on behalf of the Thames Company. The liability undertaken by the signatories was a joint one. At a subsequent date, namely, on August 18, 1898, a formal agreement was executed between Hills and John Walker and Sons for the constitution of the partnership. In that agreement the following clause appears: "The joint venture undertakes all liabilities as far as still subsisting under the said concessions and contracts, and also all liabilities under the said agreement of August 2, 1898, and will redeem or purchase all outstanding shares and debentures, and pay all the liabilities of the Grand Junction Railways, Ltd. The joint venture will also indemnify the Thames Company against any liability under the said agreement of August 2, 1898." It should be observed, however, that the company was no party to the agreement of August 18, 1898, and that if the members of the partnership agreed as between themselves to be solely responsible for the liabilities of the company, the liquidator of the company is not entitled to the benefit of such an agreement. He is, of course, entitled to the benefit of the undertaking of 20th July, 1898, which was given to the company itself, but that undertaking, under our law, binds each of the parties thereto only to the extent of his proportionate share of the liability incurred. If Hills and Walker and Sons are regarded as having then already entered into partnership, they would together constitute one of the parties, and would as partners be jointly and severally liable for one-half of the debts taken over. In respect therefore of the 2,700 debentures their joint indebtedness would be only £135,000. If Hills and John Walker and Sons were not yet in partnership, then each would undertake a third share of the liability, the remaining third being undertaken by the Thames Company, and the utmost they could



prove for would be two-thirds of the face value of the 500 debentures. I take it, seeing that the defendants are ready to admit proof of the whole of the 1,700 first issued, that they do not wish to take advantage of this technical point. Their more substantial objection is that the plaintiffs are not entitled to prove. In the latter case the liquidators could not claim for more than two-thirds of the face value of the 2,700 debentures, viz., for £180,000. By the 11th paragraph of their plea the defendants raise the objection that the parties to the agreement are jointly and not severally liable, but they do not say whether they are liable for half or two-thirds of the debentures. They do claim, however, that under the agreement of partnership of 18th August, 1898, the plaintiffs' right to sue the partnership is subject to the limitations contained in that agreement. At that date there seems to have been no formal deed of partnership between Hills and John Walker and Sons, and I did not understand the defendants' counsel to press the point that the partnership was liable for only half of the debenture debt. The point mainly relied upon by the defendants' counsel was that, whatever proportion of the debenture debt the partnership was liable for, it could only be for so much, as the debentures had been lawfully issued for. It may well be that the company could not set up the illegality of the issue as a defence to an action on the debentures, but the liquidator can only claim that the partnership shall, under its undertaking, take over such liabilities of the company as have been legally incurred. I am satisfied from the report and evidence of Mr. Tippet, that the number of debentures issued to the firm of John Walker and Sons was far in excess of what that firm was entitled to receive under their contract with the company. The fact that John Walker and Sons were also members of the partnership cannot affect the question whether the receivers of that partnership should now be held liable for more than the liability actually incurred by it under its undertaking of July 20, 1898. The state of the accounts is such that as between the company and the partnership there is not legally claimable in respect of debentures lawfully issued more than the sum of £700 in addition to the 1,700 debentures, to the proof of which the defendants consent. After carefully considering the accounts, and giving the plaintiff the benefit of the doubt on all doubtful points, I am of opinion that he is not entitled to prove for more than £170,700. The Court will, therefore, declare that the plaintiff is entitled to prove and claim concurrently against the partnership as a debt owing by it the sum of £170,700, with interest as provided by the debentures. As this amount is in excess of the amount ten-

dered by the defendants, the costs will be paid by the defendants.

[Plaintiff's Attorneys: Findlay and Tait. Defendants' Attorneys: Moore and Son.]

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## SUPREME COURT

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[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

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ADMISSIONS. { 1906.  
Oct. 15th.

Mr. W. Porter Buchanan moved for the admission of Alfred Leslie Turvey, as an attorney and notary.

Application granted, oath to be taken before the Registrar of the Eastern Districts Court.

Mr. Benjamin moved for the admission of John Louis George Bell as an attorney and notary.

Application granted and oath administered.

Mr. D. Buchanan moved for the admission of Frederick Hy. Legg as an attorney and notary.

Application granted and oath administered.

Mr. Sutton moved for the admission of Ronald Bell McIntyre as an attorney and notary.

Application granted, oath to be taken before the R.M. of King William's Town.

Mr. Watermeyer moved for the admission of Arthur James Hazell as an attorney and notary.

Application granted, oath to be taken before the R.M. of Port Elizabeth.

Mr. D. Buchanan moved for the admission of Clifford Evelyn Rochford Button as an attorney and notary.

Application granted and oath administered.

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## PROVISIONAL ROLL.

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MABAIS V. ADAMSTEIN. { 1906.  
Oct. 15th.

Dr. Rainsford moved for the final adjudication of the defendant's estate as insolvent.

Order granted.



**SEARIGHT AND CO. AND ANOTHER V. ARIFF.**

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

**VAN RYN WINE AND SPIRIT CO. V. SIFF.**

Mr. D. Buchanan moved for the discharge of a provisional order of sequestration.

Provisional order discharged.

**STEER V. ABRAHAMS.**

Dr. Greer moved for the discharge of a provisional order of sequestration.

Provisional order discharged.

**MARAIS V. O'CONNOR.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £1,700, with interest, bond due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**HOURLWITZ V. ATTWELL.**

Mr. M. Bisset moved for provisional sentence on a promissory note for £25, with interest and costs.

Order granted.

**SNASHALL V. RANDALL AND ANOTHER.**

Mr. M. Bisset moved for provisional sentence for £90, less £20 3s. 10d. paid on account, being interest on a mortgage bond.

Order granted.

**HAZELL V. KAMP.**

Mr. M. Bisset moved for a provisional order of sequestration to be made final.

Order granted.

**ARDERNE V. MILLER.**

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Defendant opposed the application, and handed in a statement in writing, in which he said that he had always paid the interest on the bond.

Mr. Buchanan said that the summons stated that no interest had been paid since the 1st January, and, furthermore,

it appeared that he was hopelessly insolvent. The application, he added, was under the Act No. 38 of 1884.

Defendant said that he had paid the interest to Mr. Steytler, and he had been given receipts, but he had not brought them to the Court. He, however, offered to go and fetch the receipts.

The case was ordered to stand over to enable defendant to produce the receipts.

Defendant appeared later in and handed in a receipt.

De Villiers, C.J., said that he did not see what the plaintiff was going to gain by these proceedings.

Defendant (in answer to the Court) said that he was willing to pay Mr. Arderne his interest, but he could not do so at present.

De Villiers, C.J., advised defendant to go and see Mr. Arderne with a view of making a settlement. He directed the case in the meantime to stand over until Thursday next.

**S.A. BREWERIES V. KUSSEL.**

Mr. Payne moved for provisional sentence on a lease for £127 5s., arrears of rent.

The matter was ordered to stand over pending production of the lease.

Mr. Payne, later on, informed his lordship that he found that a provisional order had been made against defendant's estate, and he had now to ask that the matter might be allowed to stand over until Thursday next. He, however, desired to mention the question of costs of the interim interdict obtained against respondent to enforce the landlord's hypothec.

De Villiers, C.J., said that the whole matter must stand over until Thursday next.

*Postea* (October 18th).

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.

De Villiers, C.J., pointed out that there had been short service of the summons.

Mr. Payne (on being asked for further information) said that his attorney was not in court.

De Villiers, C.J.: The attorney will not be allowed costs for attendance to-day. As far as I can see at present, there is short service of summons. There will be no order on the application, but, as the plaintiff has been called, the case may be mentioned again.

**S.A. BREWERIES V. KUSSEL.**

Mr. Payne said that this was an application for provisional sentence for

rent and judgment, under Rule 329d, but, in view of what had happened in the previous case, he should have to apply for a postponement.

Ordered to stand over.

*Postea* (October 19th).

Mr. Payne mentioned this matter, which was an application for the final adjudication of the defendant's estate as insolvent. He said that it appeared yesterday that there had not been due service of summons. The explanation was that the provisional order was only obtained on the 11th, and it was made returnable for the 18th, which made it quite impossible to allow the full seven days for the service on defendant at Oudtshoorn. Among the assets was a bottle store in Cape Town.

Hopley, J., said that his attention ought to have been called to the fact that due service could not be effected at the time when he made the order. There was nothing in the petition, as far as he remembered, to show that defendant lived at Oudtshoorn. A final order would be granted, respondent to be allowed to move within 10 days of this date to have the order set aside.

Mr. Payne afterwards mentioned the question of costs of the interdict obtained by applicants on the 13th September last in connection with the bottle store in Cape Town, pending result of an action for rent to be brought forthwith.

Hopley, J., said that there would be no further order in this matter.

#### POOLE V. FORSYTH.

This was an application for a decree of civil imprisonment, but, inasmuch as defendant's estate had been provisionally sequestrated, Mr. Burton (for plaintiff) now asked that the matter should stand over.

Ordered to stand over until the final adjudication had been decided.

#### LINDENBERG AND DE VILLIERS V. PALMER.

Mr. Watermeyer moved for provisional sentence on a promissory note for £61 16s., with interest and for judgment under Rule 329d for £3 1s. 9d., commission for collection.

Order granted.

#### MASTER, SUPREME COURT V. EXECUTOR ESTATE SHEAN.

Mr. Howel Jones moved for the usual order upon defendant to file an account in the estate.

Usual order granted.

#### LIBERMAN AND ANOTHER V. MOSKOWITZ.

Mr. Benjamin moved for the final adjudication of defendant's estate.

Order granted.

#### GROENEWALD V. TAYLOR AND MYLES.

Mr. Van der Byl moved for provisional sentence on a bill of exchange for £41 4s. 3d.

Order granted.

#### TENNANT V. BOTHA.

Mr. Lewis moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for £17 13s. 10d. and £9 4s. 1d. costs.

Order granted.

#### FOLEY V. JOHNSON.

Mr. Lewis moved for a decree of civil imprisonment on an unsatisfied judgment of this Court.

Defendant said that he could not pay the debt, and that the only offer he could make was one of 10s. a month. He had been an applicant in a matter against the R.M. of Woodstock for admission as a law agent, and he had been unable to pay the costs. He was a law agent practising at Wynberg and Simon's Town. The only fee he had paid in the recent application was a guinea.

Mr. Lewis (in answer to the Court) said that the total amount of the debt was £28 5s., plus £1 10s. 4d., costs of the application.

Defendant said that he was approached by another law agent to be applicant in the Woodstock case, and now he had been left to pay the costs.

Decree granted, to be suspended on payment of 10s. a month, first payment on the 1st November, with leave reserved to plaintiff to apply for increase of monthly payments on proof of means.

#### BOMBAL V. VAN COLLER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,600, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

#### DEMPERS AND VAN RYNEVELD V. LYONS.

Mr. Pohl moved for provisional sentence on a mortgage bond for £300, with interest, and for the property

especially hypothecated to be declared executable.

Order granted.

PURCELL V. VAN DER SCHYFF.

Mr. De Waal moved for provisional sentence on two mortgage bonds for £550, with interest, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

THOMSON V. BERGHYS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £600, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ESTATE JURGENS V. PETERS.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,540, with interest, and for judgment for £15 ls. 3d., premiums of insurance, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and the rents attached.

Order granted.

VERSTER V. DE MARILLAC.

Mr. Swift moved for provisional sentence on a mortgage bond for £2,500, and £21, premiums of insurance and stamps, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Mr. D. Buchanan (for defendant) applied for a stay of execution for two months, on the ground that defendant was expecting to receive certain funds from the trustee of an estate in England to which he was heir.

The matter was ordered to stand over for production of an affidavit by defendant.

*Postea*

Mr. Buchanan read an affidavit by defendant in support of his application for stay of execution.

Mr. Swift, in opposing, said that the defendant had already been shown a great deal of indulgence by the plaintiff.

De Villiers, C.J.: If there had been a statement that there was an expectation on the part of the defendant

within a reasonable time of receiving a sufficient sum to pay this amount, I should certainly have stayed execution, but the whole of this affidavit is exceedingly vague—there is nothing that one can lay hold of as something definite; he is interested in the estate, but he does not say he is to receive any money out of that estate. I am not satisfied that in two months he will not be in the same position. Provisional sentence will, therefore, be given as prayed, and the property declared executable. At the same time, I would suggest to the plaintiff, in his own interests, to inquire into this matter, and if he sees there is a probability of the defendant getting funds within reasonable time, to allow a certain delay.

WESSELS V. LYONS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £600, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

COLTON V. LYONS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £850, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

S.A. ASSOCIATION V. BOOSE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £5,500, with interest, less £5 14s., paid on account, and for judgment for £44, premiums of insurance; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

INSOLVENT ESTATE DU } 1906.  
PLESSIS V. DU PLESSIS. } Oct. 15th.

Mr. Gutsche moved for judgment, under Rule 319, in default of plea, for a certain transfer to be set aside, an order on defendant to deliver up or restore a certain bond, and defendant declared to have forfeited any claim he may have on the estate.

Order granted.

**DOLD AND VAN BREDA V. MACKINTOSH AND STEWART.**

Mr. Sutton moved for judgment, under Rule 329d, for £25 15s., charges for professional services, with interest *a tempore morae* and costs.

Order granted.

**UNITED PROVIDENT ASSOCIATION V. DE JEAN.**

Dr. Greer moved for judgment, under Rule 329d, for £257 5s. 7d., moneys collected by defendant for and on behalf of plaintiffs, with interest *a tempore morae* and costs.

Order granted.

**INSOLVENT ESTATE BASSON V. LOUW.**

Mr. De Waal moved for an order for payment of the purchase price of certain land at Roodebloom, Woodstock, the trustee in insolvency tendering transfer.

Order granted.

**SCHIERHOUT V. BRITTAIN.**

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for £26, balance of moneys lent, and £40, for goods sold and delivered.

Order granted.

**STEENKAMP V. VLOK.**

Mr. De Waal moved for judgment, under Rule 329d, for payment of £27 18s., share of interest due upon a mortgage bond.

Order granted.

**DE WET V. THOMAS.**

Mr. D. Buchanan moved for leave to sign judgment against plaintiff (Thomas) for not proceeding with his action within the time specified by Rules of Court.

Order granted.

**PETER AND OTHERS V. D'ARBREU.**

Mr. P. S. T. Jones moved for leave to sign judgment against plaintiff (D'Arbreu) for not proceeding with his action within the time specified by the Rules of Court.

Order granted.

**ROOS V. RADEMEYER.**

Mr. Roux moved for leave to sign judgment against plaintiff (Rademeyer)

for not proceeding with his action within the time specified by Rules of Court.

Order granted, with costs.

**MACCALLUM V. PARRY.**

Mr. Lewis moved for judgment under Rule 319, in default of plea, for £14 6s. 6d., with interest *a tempore morae* and costs.

Order granted.

**MONARCH COLLIERIES V. ISAACS.**

Mr. Bailey moved for judgment under Rule 329, for £96, balance due upon certain shares allotted to the defendant, with interest *a tempore morae* and costs.

Order granted.

**MONARCH COLLIERIES V. COHEN AND GARN.**

Mr. Bailey moved for judgment under Rule 329d for £264, balance due in respect of certain shares allotted to the defendants, with interest *a tempore morae* and costs.

Order granted.

**COLONIAL HOTEL CO. V. COLLINS.**

Mr. Van der Byl moved for judgment under Rule 329d for £50, less £10 paid on account, due in respect of a third call on certain shares.

Order granted.

**COLONIAL HOTEL CO V. WALTER.**

Mr. De Waal moved for judgment under Rule 329d for £10, due in respect of a third call on certain shares.

Order granted.

**GOSLETT V. THERON.**

Mr. P. S. T. Jones moved for judgment under Rule 329d for £30, goods sold and delivered, and an order declaring a certain inheritance to be executable.

Order granted.

**JOHNSTON V. PONTER.**

Mr. Van Zyl moved for judgment under Rule 329d for £100 balance of purchase price of certain shares and £15 9s., certain taxed costs incurred by plaintiff in his suit against defendant, which defendant had undertaken to pay.

Order granted.

BEHABILITATIONS. { 1906.  
Oct. 15th.

Mr. De Waal applied for the rehabilitation of William Alexander Kuhn.  
Granted.

Mr. Pohl applied for the discharge of Jury Johannes Ekstein from sequestration.  
Granted.

Mr. D. Buchanan applied for the discharge of Hendrik Louwrens van der Westhuizen from insolvency.  
Granted.

Mr. De Waal applied for the rehabilitation of Elias Sacks.  
Granted.

Mr. Louwrens applied for the rehabilitation of Meyer Lewin Israels.  
Granted.

Dr. Greer applied for the rehabilitation of Leon Lurie.  
Granted.

#### GENERAL MOTIONS.

*Ex parte* LOTZ.

Mr. De Waal moved for a rule *nisi*, under the Derelict Lands Act, to be made absolute.  
Rule absolute.

#### CLOETE AND ANOTHER V. INSOLVENT ESTATE NAUDE.

Mr. W. Porter Buchanan (with him Mr. Close) was for applicants; Mr. Burton was for respondent.

Mr. Buchanan said that there was such a divergence on the affidavits that he thought the matter could not be disposed of on motion. He submitted that an action should be brought by the trustee of the insolvent estate.

Mr. Burton said that the applicants had got an order temporarily stopping the sale of certain leasehold erven in dispute at Lady Grey, Aliwal North. The trustee in the insolvency claimed that the property belonged to the estate. The applicants said that they had bought the erven from insolvent, although they clearly were leased by the Dutch Reformed Church, and, respondents said that they were purchased on certain conditions which made these transfers illegal. The respondents' position was that if the applicants desired to claim from the insolvent estate they must bring their action.

Mr. Buchanan said that but for the respondents' proposing to sell leases there would have been no necessity to come to the Court. It seemed to be a case of respondent challenging the applicants' right, and therefore the

respondent should bring the action. Applicants were in possession, and they had got transfer.

Mr. Burton (in answer to the Court) said that he quite agreed that this was probably a matter which could not be decided on affidavit.

[De Villiers, C.J. (to Mr. Buchanan): I see no reason for ordering the respondent to bring the action. If you wish to go on you are at liberty to do so. If you think the case will not ultimately be decided on motion, then it would be better to consent to an order that the applicant bring an action.]

Mr. Buchanan said that under all the circumstances he thought it would be better to go into the provisional case.

De Villiers, C.J.: There will be no order on the motion, except that the applicants proceed by action, notice of motion to stand in lieu of summons, and that the interdict against the respondent be continued, pending such action, with leave to include a claim for a declaration of rights in the action, and if so advised to make the Dutch Reformed Church of Lady Grey co-defendants in the suit, costs of this application to be costs in the cause.

E. K. GREEN AND CO. V. { 1906.  
FROMING. } Oct. 15th.

Insolvent estate—Preferable security—Guarantee of third person—30th Section of Insolvent Ordinance.

*In an action for the compulsory sequestration of the defendant's estate, it appeared that the plaintiff held a guarantee from a third person for the payment of the defendant's debt to the plaintiff.*

*Held, that such guarantee did not constitute a preferable security or lien upon any part of the defendant's estate, and that consequently the plaintiff was not bound, under the 30th section of the Insolvent Ordinance, to put a value on the security in the affidavit accompanying his petition.*

Dr. Greer moved for a certain provisional order of sequestration of defendant's estate to be made final.

Mr. Upton said that in this case affidavits had only been served after ten o'clock that morning, and it would be necessary to apply for a postponement. However, objection was taken



by the defendant to the proceedings as being irregular, in that the petitioning creditors held security which they had not mentioned in the petition on which the provisional order had been granted.

Dr. Greer said that, in order to answer this objection, the whole of the facts should be before the Court, because it would be necessary to explain how certain security came to be omitted. Even, however, if that security were taken at its face value, there would still be a considerable deficiency in the estate.

[De Villiers, C.J.: Has not the Court decided that where a petitioning creditor fails to value a security, the provisional order must be set aside?]

The Court has always expressly reserved the power, and said that it would not lay down a hard-and-fast rule, and has pointed out that each case must be considered on its own merits. The cases which have been decided all differ from this, in that in those cases the security taken at its face value would be sufficient to satisfy the claims, whereas in the present case, if the security be taken at its face value, there would still be a deficiency. Counsel quoted *Standard Bank v. Winterbach* (4 Juta, 329), *Roberts v. Cape of Good Hope Bank* (5 Juta, 134), and *Standard Bank v. Van Buuren* (11 Juta, 316). Proceeding, counsel said that the respondent had been in plaintiff's employ, and there were deficiencies in his books amounting to £362. There was a security bond of £100 given by a third party. The surety was, as a matter of fact, joining with the plaintiffs in the application for compulsory sequestration. Dr. Greer also took the point that the security was not of such a nature as was contemplated by the 30th section of the Ordinance (No. 6 of 1843).

Mr. Upington said that in the case of Van Buuren the Court had held that the order must be discharged if the securities were of any appreciable value. It was admitted in the present case that there was a guarantee, at any rate, for £100, which was not mentioned in the petition or supporting affidavit. In addition to that, there was also the fact admitted on the affidavits that this man personally gave a power to transfer to the petitioning creditors certain land at Woodstock. However, he (counsel) relied mainly on the guarantee.

Dr. Greer (in answer to the Court) said that the security was a personal guarantee by a third party for any defalcations up to £100. If the present order were discharged, it would only lead to further proceedings and increased expense.

De Villiers, C.J.: An objection is raised in this case to the plaintiffs' title to claim compulsory sequestration of the defendant's estate, on the ground

that the plaintiff holds "a preferable security or lien upon any part of the insolvent estate," on which he has failed to put a value in the affidavit accompanying his petition. In my opinion, a security given by a third person as a guarantor for the payment of a debt owing by the defendant does not constitute a preferable security or lien on any part of the insolvent estate. It is a guarantee given by a third party practically to the plaintiff, and has no connection whatever with the estate of the defendant. In every one of the cases cited there was a preferable security upon a part of the insolvent estate. In the case of *Standard Bank v. Van Buuren* (11 Juta, 316) there was a promissory note in favour of Van Buuren (the defendant), which had been pledged by Van Buuren to the bank. This promissory note belonged to Van Buuren, it had been delivered to him, it had been endorsed to him, and, therefore, it formed part of his estate, and when Van Buuren handed over this promissory note to the bank to hold as a pledge against Van Buuren, such pledge constituted a preferable security as against his estate, and the Court decided that this security ought to be valued. In the present case the terms of the 30th section of the Ordinance do not, in my opinion, require that the plaintiff shall put a value upon this security, inasmuch as it is not "a preferable security or lien upon any part of the insolvent estate." The objection, therefore, in my opinion, falls to the ground.

At a later stage the case was gone into on the merits.

Dr. Greer read the petition upon which the provisional order was made. It was alleged that towards the end of August last it was found that there were discrepancies and deficiencies in connection with applicants' branch store at Woodstock, where respondent was employed as manager, to the amount of £362 4s. 8d., for which Froming was responsible. Respondent was suspended and called upon for an explanation, but he was unable to account satisfactorily for the deficiencies. Subsequently he applied to be reinstated on his furnishing security for the payment of the deficiencies. Petitioners added that the assets in respondent's estate fairly valued were wholly insufficient to meet his liabilities.

Mr. Upington read an answering affidavit by respondent, who said that since he took over the management of plaintiffs' branch store at Woodstock it had been the custom to take stock four times a year. A surplus had always been found in his stock up to about April last. This surplus was not paid to him, but debited to his stock account. After the April stocktaking he was given £10 10s. by

plaintiffs as bonus. In August this year the stock was taken, and he was informed by Mr. E. K. Green that there was a deficiency of £362, but he had never been furnished with any statement showing how such deficiency was made up. He denied that he was indebted to applicants in this amount or any portion thereof. Deponent went into the position of certain property, of which he was the proprietor, and the guarantee given by Mr. Hamilton Hodgson. He also stated that he had received no salary from applicants since the 31st July last. No opportunity had been given to him to satisfactorily account for the alleged deficiency, as this would entail a thorough examination of the applicants' books at the head office, and a complete investigation of the whole of the transactions connected with the Woodstock store since April last. He denied that he had made any unconditional admission of liability, his offer to pay the sum of £362 being simply a premium for his reinstatement in applicants' service.

Dr. Greer read a replying affidavit by C. C. Liebrandt, secretary of the applicant company, who denied an allegation by respondent that the rough sheets of his transactions were ever brought to the head offices. He said that respondent had had every opportunity afforded to him of investigating the books. Deponent repeated that respondent's assets were insufficient to meet his liabilities. He annexed to his affidavit certain correspondence between the respondent and the applicants.

De Villiers, C.J., put it to Mr. Upington whether in view of the admissions in the correspondence he could resist the application?

Mr. Upington said he thought any statements that respondent had made for the purpose of securing his reinstatement should not be pressed too strongly against him.

De Villiers, C.J., said that the respondent had said that he did not possess "a blue bean in the world."

Mr. Upington said that that was not strictly correct. If there were any admission of liability on the part of respondent, it was made in his endeavour to meet them in an amicable way. Counsel submitted that the Court should not grant an order on the present motion, seeing that the amount of the deficiencies was in dispute and that it had been in dispute all along.

De Villiers, C.J.: If I had thought there was any possibility of the respondent being successful in any action that might be brought against him for the payment of the debt, I should certainly not grant an order of sequestration. But the correspondence satisfies me that if the plaintiffs were compelled to bring their action, the defendant could have no possible defence to an action for the

amount. These letters are conclusive upon the point. There is no hesitation on the part of the defendant in admitting this amount. The only thing that could possibly be said in favour of the defendant is that Mr. Hodgson had stated at a particular interview that the only question was the amount. But that question was settled subsequently when the correspondence took place, and that in that correspondence there is a decided admission of the liability for the sum of £362. Then the only other question is whether the defendant is really insolvent. His admissions show that he is. Here are the valuations of his property and his debts. It is quite clear that his liabilities far exceed his assets, and, at all events, the plaintiffs, as one of the creditors, are entitled to have his estate sequestrated. The Court will, therefore, make the order as prayed.

#### INCORPORATED LAW SOCIETY V. VAN DER POEL.

##### Attorney—Malpractice.

This was an application upon notice calling upon one Van der Poel, an attorney, of George, to show cause why he should not be removed from the roll of attorneys and notaries, or why such other order should not be granted as the Court may deem fit.

From the affidavits it appeared that the respondent had acted as attorney for one Wells, described as a bywoner. Wells had had in his lawful possession in July, 1904, certain two heifers, the property of his mother-in-law. These heifers were stolen by one Du Preez. Before Du Preez was arrested on a charge of theft an interview took place between him and Van der Poel and Wells. What took place at this interview was a matter of dispute. The upshot, however, was that Du Preez handed over to Wells a horse, saddle, and bridle, and an ox, and this property was afterwards sold by auction by the present respondent, realising, after deducting the auctioneer's charges and commission, £13 1s. 6d., Du Preez was prosecuted on the criminal charge and sentenced to twelve months' imprisonment. Then on his release in October, 1905, he instituted an action against Van der Poel and Wells for £13 1s. 6d., the net proceeds of the property he had handed over, and the Magistrate gave judgment against defendants jointly and severally, but allowed Wells £1 for his expenses in searching for the stolen cattle. Du Preez set up the case that he had handed over the property to stay and prevent the criminal prosecution, on condition that no charge should be brought against him. From the Magistrate's judgment, Van der Poel and Wells brought an appeal at the Circuit Court,

before Mr. Justice Laurence, who delivered a considered judgment in the Supreme Court in April last, the result being that the Magistrate's decision was varied by limiting Van der Poel's liability to £3 10s., portion of the sum of £12 1s. 6d., for which the Court below had found for Du Preez, but that, with this exception, the appeal was dismissed with costs. In the course of his judgment, Mr. Justice Laurence called attention to certain comments made by the Magistrate as to Van der Poel's conduct, thus:

The Magistrate in his reasons used some very severe expressions as to his conduct. "There can be no doubt," he says, "that he co-operated in the deceit and fraud practised upon the plaintiff, and he cannot shelter himself under theegis of his profession. His conduct of this case as a practitioner of my Court was sordid, mercenary, and unbecoming, and is deserving of the highest censure." As to this aspect of the case, I do not think it would be advisable for me to say more than that, when the record is returned, it would be quite competent for the Magistrate, if he thinks fit, to send a copy to the secretary of the Incorporated Law Society for the consideration of that body.

The affidavit of R. B. Sanderson, secretary of the Incorporated Law Society, to whom the documents had been forwarded by the Resident Magistrate of George was read.

The affidavit of the respondent submitted that the Magistrate's remarks were not justified, and denied that he had derived any pecuniary benefit from the transaction. Deponent had been in practice as an attorney of this Court for 25 years, and this matter had done, and was doing, him a considerable amount of damage.

Mr. P. S. T. Jones was for the applicant society; Mr. Howes was for respondent.

Mr. Jones said that Du Preez stole two heifers in July, 1904, and sold them to one Truter. Wells appeared to have made a search from July 29 to August 2, and then, finding the cattle in the possession of Truter, who informed Wells that he had bought them from Du Preez, he (Wells) returned to George—where Du Preez was—and saw Van der Poel. According to Van der Poel's statement, not being dressed, he told Wells that he would see him later. Wells then proceeded to the Chief Constable, and was about to lay, or in the course of laying, information with the police, when Van der Poel came and left the matter standing at that stage. For some reason or other, Wells, acting apparently on the advice of his attorney, went and saw Du Preez, apparently to squeeze out of him, prior to the arrest, what they could in the way of property, which they subsequently sold. They put their damages to him

as an amount of £30, but strangely enough, when Du Preez showed no signs of landing over any property, the damages dropped immediately to £13, which appeared to be the value of the only property that Du Preez had. This claim for damages seemed to have been a strange claim altogether. It was stated by the respondent and Wells that it was for compensation for searching for the cattle. That was, however, disposed of by the fact that the Magistrate put the compensation at £1, being 5s. per day for four days. This £1 represented compensation for what Wells originally claimed £30, and for what Van der Poel and he said they subsequently sold the horse and ox, which realised about £14 10s. The Law Society's case was that, before completing the affidavit, which was subsequently laid before the police, these two, Wells, acting on the advice of Van der Poel—proceeded to squeeze out of Du Preez whatever they could, the probability being that they wanted to avoid an execution against Du Preez by another party who had obtained judgment against him. Counsel submitted that all the circumstances showed that Du Preez had had a deceit practised upon him. He was led to believe that there would be no criminal prosecution if he handed over all the property that he had. It was curious that at the examination of Du Preez before the Assistant Magistrate no mention was made of this transaction. As a lawyer, the respondent must have known that under the Stock Thefts Act he could have obtained compensation for his client.

[De Villiers, C.J.: The extraordinary part is that immediately after the alleged agreement was made the criminal proceedings took place.]

That is so.

[De Villiers, C.J.: Doesn't that tend to show that Du Preez may have misunderstood what took place?]

The affidavit was actually drawn prior to the interview, and it was not sworn, and, as the Magistrate finds—and, in his finding Mr. Justice Laurence concurs—the object seems to have been not to lay information, and have the man arrested before they could get some property out of him, knowing as they must have known that there was a judgment out against Du Preez.

[De Villiers, C.J.: What did Van der Poel get out of the business?]

Mr. Jones said that Van der Poel and his firm, for their services as attorneys and auctioneers, got £5 1s. 6d. out of a total sum of about £13 10s. The Law Society, he added, asked that respondent be struck off the rolls. That, however, was going too far, but he submitted that, under the circumstances, the respondent should be suspended from practice for at least a year.

Mr. Howes said that he wished to

deal with a few points in his learned friend's statement. It was said that Van der Poel had sufficient information to arrest Du Preez before he saw him. He submitted that that was not borne out by the evidence, because there were many people of the name of Du Preez in the George district, and it was necessary to act with due caution before causing the man's arrest. Then, as to the drop from £30 to £13, as the amount of the claim, Wells claimed the sum of £30, and he was the one who reduced the amount. Then, it was said that nothing was mentioned to the Magistrate who tried the criminal case about this property having been given for compensation or damages. It was, as a matter of fact, in evidence that Du Preez endeavoured to bring the matter under the notice of the Magistrate at that time, and the Acting Magistrate refused to hear it on the ground that it was irrelevant. If Du Preez was not heard then why should Van der Poel have been heard on the subject? It was curious to note the action of the Law Society in this matter. The first complaint was made in April, 1905. The Law Society asked for a report from Van der Poel. That was sent, and the Law Society, in view of the conflict of evidence, decided to take no further proceedings. No further action was taken by the Law Society until the decision was given in the appeal by Mr. Justice Laurence. He would submit that the appeal had a very slight bearing on this case, as far as Van der Poel was concerned. Proceeding, counsel referred to the argument in the appeal, and said that he recollected at the hearing at the Circuit Court his lordship informed him (counsel) that Van der Poel had gone out of the matter altogether. Mr. Howes went on to put before the Court what he described as the alternative version of this transaction.

De Villiers, C.J.: The applicants were quite justified in bringing the matter to the notice of the Court. In ordinary parlance, the conduct of the respondent might be called somewhat shady, but it was not such conduct as would justify the Court in striking him off the rolls. He appears to have been acting more out of excess of zeal in his client's interests than from any mercenary motive. Furthermore, it is not clear that such an agreement has been made with Du Preez as was suggested, because, if it had been made, it would have been extraordinary that respondent and Wells should afterwards have prosecuted Du Preez. Although there does not appear to have been sufficient misconduct to strike the respondent off the rolls, there was certainly sufficient ground for the Law Society to bring the matter before the Court, and the costs of this application must, therefore, be paid by the respondent.

*Ex parte* HUGO AND } 1906.  
ANOTHER. } Oct. 15th.

Lunatic—Foreign asylum.

*In the absence of clear proof that it would be for the benefit of a domiciled lunatic to remove him to a foreign asylum, the Court will not authorize or direct his curator so to remove him.*

Mr. P. S. T. Jones moved, on the petition of the curators of M. C. Olivier, of the Victoria West district, for leave to send their ward to a State lunatic asylum at Gheel, in Belgium. Applicants said that the institution was a very old one, and the charges were within the means of the estate. The petitioners could not find a suitable institution in this colony where they could place their ward. The charges of an institution in this Peninsula to which petitioner could be sent were more than the estate could afford.

[De Villiers, C.J.: I am not satisfied that the Government of Belgium would allow lunatics from another country to enter. You might send this poor lunatic to Belgium, and once she arrives there she may be sent back as undesirable.]

Mr. Jones said that he was not aware that that would occur.

[De Villiers, C.J.: Well, if she were sent here from another country she would be sent back as undesirable.]

Mr. Jones pointed out that this particular institution was a State asylum, and that it appeared to be one to which lunatics were sent from other countries. The difficulty might be got over if the Court granted an order subject to the Government of Belgium raising no objection to the lunatic being landed.

[De Villiers, C.J.: Why shouldn't you apply again?]

Mr. Jones said that certain expenses had already been incurred by previous applicants in this matter, and those expenses were all going against the lunatic's estate.

De Villiers, C.J.: I do not see any sufficient ground for an order that this lunatic shall be taken away from this country—the country of her birth, the country of her domicile, and the country where her friends live—to a country like Belgium, many thousands of miles away, merely because it is thought very desirable. There are asylums in this country, and the difference in expense will not be so great as to justify the Court making the order. Any difference in the expense of maintenance would be counterbalanced by the expense of sending the lunatic to another country. If she



should very soon regain her mental powers she would have to be sent back to this country. Nor do I like the idea of the relatives of this lunatic washing their hands of her completely by sending her as far as possible from her home and from her surroundings. I am not satisfied also that the Government of Belgium would allow her to land. Upon this point there ought to be information. In the absence of information on this and other points, clearly showing that it would be in the interest of the lunatic herself to remove her to a foreign asylum. There will be no order upon this application.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DIXON V. DIXON. { 1906.  
{ Oct. 16th.

Dr. Greer was for the plaintiff, and the defendant, who had been duly barred, was in default. The action was brought by Mary Kate Dixon, at present residing at Glencairn, for a decree of divorce against her husband, by reason of his adultery. The defendant's whereabouts were unknown, and the substituted service, as ordered by the Court, had been effected. The parties were married in community of property on the 24th December, 1884, at St. Stephen's Church, Lower Paarl. There was issue of the marriage one child, a boy of the age of 20 years. The boy had since the institution of the action become a major. The plaintiff claimed a decree of divorce, the defendant to forfeit all the benefits under the marriage in community, and costs of suit.

The plaintiff, in the course of her evidence, said that on the 30th November last the defendant left his home at Glencairn, and told her he was going to the St. Andrew's Night dinner at the British Hotel, Simon's Town. Witness knew a Mrs. Turner, who had caused her a deal of annoyance.

[De Villiers. C.J.: When did you last see your husband?]-On the 4th April last.

What did he say?—He said he was going to manage another business.

What was he?—An hotel proprietor.

Chas. J. Thompson, of Simon's Town, who had been in the police force, stated that on the 25th October, there was an advertisement in the "Cape Times" for a single furnished room in Muizenberg, Fishhoek, or Simon's Town. Witness replied to it, and a lady, not the last witness, gave the name of "Mrs. Dixon," and engaged the room. She stated her husband was employed in the dining-car on the railway, and seldom came home, and the single room would suit. Mr. Dixon called at the house daily. On November 30 last year witness went to bed about ten o'clock, and Dixon went in and out of the house about three times within an hour. Witness did not usually lock the door, because there was a big Irish terrier which he kept in the passage. After the door had been closed the third time, he got up and locked it, and about an hour afterwards he heard someone trying the handle. Witness asked who was there, and Dixon replied, adding that he had left his card for the dinner on the table. Shortly afterwards he heard someone going into "Mrs. Dixon's" room. Witness saw Dixon leave the same room the following morning about eight o'clock. His suspicions became aroused, and he tried to find out who this Mr. Dixon was. Witness went by train to Glencairn, and saw Mr. Dixon coming from the direction of Simon's Town towards the hotel. Witness then went in the direction of Fishhoek, in order to allay any suspicion, and subsequently called at the hotel, where Dixon supplied him with refreshment. He found out Dixon was the proprietor, and that he was a married man. Witness then gave the defendant notice to leave the house. He told Dixon that he wished to ask him a question, and then said: "Is that woman in the house your wife?" Dixon replied: "You have asked me a question I cannot answer." Witness then said: "You had better get out of the house: what do you mean bringing disgrace upon my house?"

Decree of divorce granted, with costs, the defendant to forfeit the benefits under the marriage in community.

### BRINCK V. BRINCK.

This was an action brought by the wife against the husband for restitution of conjugal rights, failing which a decree of divorce, on the ground of the defendant's malicious desertion. Mr. Lewis was for the plaintiff, and the defendant was in default.

The parties were married on the 1st December, 1902, at St. Andrew's Church, Newlands. After the marriage they resided for five weeks at Plumstead, when



the defendant deserted the plaintiff. He said he was going to town to pay a bill, and never returned. She had never seen him since.

Decree of restitution of conjugal rights granted, the defendant ordered to return to or receive the plaintiff on or before 30th November, failing which a rule to issue calling on the defendant to show cause on the 12th December why a decree of divorce should not be granted, with costs, the rule to be served in the same manner as directed in regard to the citation.

#### KUPKE V. KUPKE.

Dr. Greer was for the plaintiff, and the defendant was barred, and in default. The action was for restitution of conjugal rights, failing which a decree of divorce by reason of the defendant's malicious desertion. The plaintiff, the declaration set out, was a German farmer on the Claremont Flats. The parties were married on or about the 31st December, 1904, in the German Lutheran Church, Wynberg Flats. About August, 1904, the defendant maliciously deserted the plaintiff, and refused to return or cohabit with him.

Carl Wilhelm A. Kupke, plaintiff, stated that at the time of the marriage his wife was a widow. After marriage they lived together for about six or nine months. Their life was not very happy. The defendant said she would not work, and that the plaintiff was too poor. Witness owned a farm on the Claremont Flats, but the defendant had nothing. Witness asked his wife to return to him, and the reply was that the place was too lonely, and witness was too poor. He was still willing to receive his wife if she returned. At present the defendant was in Cradock.

[De Villiers, C.J.: She says you insulted her. Did you ever insult her?—No, my lord.

[Did you treat her kindly?—Yes.

[Had you not been married before?—No.

What son does she speak of in this letter?—A son by Mrs. Kennedy with whom I had formerly lived.

Decree of restitution of conjugal rights granted, the defendant to return to the plaintiff by the 30th November, failing which to show cause on the 12th December why a decree of divorce will not be granted, and the defendant declared to have forfeited the benefits in community.

#### FLETCHER V. FLETCHER.

Divorce—Adultery—Evidence—*Prima facie* case.

*The Court granted a divorce on prima facie evidence of*

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*adultery committed by the defendant, who was in default, notwithstanding that an important witness for the plaintiff had not been called.*

This was an action brought by the plaintiff against the defendant for a decree of divorce by reason of his adultery. Mr. Swift was for the plaintiff, and the defendant was in default. The parties were married in Oldham, England, on the 25th April, 1901, and there was issue of the marriage, one child, a girl of four years of age. In November, 1902, the plaintiff came to South Africa with the defendant, and resided here since then. About May, 1905, the defendant committed adultery with some person or persons unknown, while the plaintiff was lying ill in Woodstock Hospital.

Mrs. Fletcher, the plaintiff, stated that her husband was a motorman on the Tramway Company. In the month of May, 1905, witness was in Woodstock Hospital, and when she came out she noticed that the defendant was not pleased to see her. He would hardly speak to her, and subsequently she discovered that he had committed adultery. The defendant finally admitted in the presence of her aunt that he had committed adultery.

[De Villiers, C.J.: Is the aunt here now?]

Mr. Swift: No, my lord.

De Villiers, C.J.: It is a pity the aunt was not called. This is very vague evidence. The only thing to be said is that the man does not appear after personal service. It would be more satisfactory if the aunt had been called to support the statement as to the admission made by the defendant, but, still, there is a *prima facie* case against the defendant to justify the Court in holding that he was guilty of adultery. There is also the fact that he does not appear to defend this case. Under the circumstances, the Court will grant the decree of divorce, with costs, the plaintiff to have custody of the child of the marriage.

#### DELPORT V. DELPORT.

Mr. Sutton, for the plaintiff, said apparently there had been some mistake in regard to the name of the parties in this case. The name was really Leport, and not Delport, and the defendant had been summoned as Delport.

[De Villiers, C.J.: Then there has been no service.]

Mr. Sutton: The facts are set out in the summons.

[De Villiers, C.J.: How is Mr. Leport to know that he has been cited?]

Mr. Sutton: Would your lordship take the evidence of the plaintiff *de bene esse*. She has come all the way from Oudtshoorn.

[De Villiers, C.J.: Yes.]

Kathrina Sophia Leport, plaintiff, stated that she was married to the defendant on the 20th August 1888. Since the marriage her life had been an unhappy one, as the defendant was constantly quarrelling with her. Occasionally he jumped upon her, and dragged her by the neck. She left him for a time, and returned to see if there could not be an improvement, but she could only stand the treatment for a period of three days. It was ten years ago since she heard of him last. She thought he would return, and delayed taking proceedings with a view to obtaining a divorce, as she had not the money to proceed with the action.

De Villiers, C.J.: I do not think there will be any necessity for a fresh citation. The Court will order that the *intendit* be amended by inserting the correct name of the defendant, one publication in the Dutch language in the "Oudtshoorn Courant," with leave to serve the amended *intendit*, and notice of trial in a short form to be approved by the Registrar.

#### WILKE V. WILKE AND ANOTHER.

This was an action brought by Fritz Wilke, a butcher, of Wynberg, against his wife Paula Wilke (born Otto), for a decree of divorce, on the ground of her adultery with the second defendant (Herman Vienup), and for £250 damages against the second defendant, with costs. Dr. Greer was for the plaintiff, and the defendants appeared in person.

The parties were married in London on the 11th February, 1898, and there was no issue of the marriage. The plaintiff had acquired a domicile in the Cape Colony, and carried on business as a butcher at Wynberg. In June, 1906, the first defendant committed adultery with the second defendant at Claremont.

The plaintiff said he was at present carrying on a butcher's business at Wynberg, and the second defendant had been working as an assistant in witness's shop for about nine months. On the 4th May his wife left him without any cause. He then missed a big chopper, some clothes, and the cash-box. The defendant went to live at Claremont, and started a shop under the name of Herman Vienup. Subsequently the defendants came to Wynberg, and started in opposition and in close proximity to witness, under the name of Mrs. Wilke. Through the fact of his being upset, he had lost in his business £250. His wife had previously assisted him in the shop.

The first defendant then proceeded to cross-examine the witness in German. She said she did not quite understand all he had said in English, but, in any case, the greater part of it she was satisfied was not correct. The plaintiff denied having treated his wife badly, or that he usually came home about two o'clock in the morning intoxicated.

[De Villiers, C.J.: She says you come home drunk, is that so?—I have never been drunk so long as I have been married. I drink my glass of beer just like a man.

Proceeding, the defendant stated that a girl named Anna Brinck was the plaintiff's sweetheart.

[De Villiers, C.J.: What is Miss Brinck?]

Witness: A dressmaker.

[De Villiers, C.J.: She cannot do anything at the shop?]

She looks after my interests.

[De Villiers, C.J.: What does she do?]

She sells something and chops a bit.

[Would she not be better at cutting her dresses than chopping meat?]

I do not know.

[Where is your shop?]

On the Main-road, Wynberg.

[The defendant has a shop, too?]

She opened a shop about 50 yards from me.

The defendant then stated that she was offered £50 by the plaintiff to go to Australia and get a divorce, in order that he could get married.

Dr. Greer pointed out that an instalment of £5 had been paid to the defendant's attorney in order to permit of her defending the action, but the money was returned to plaintiff's attorneys.

Mrs. Hanau, a friend of both the plaintiff and the defendant, stated that when the defendant left her husband, she told witness that he had been very kind to her, and she could not help herself. A ball was about to take place, and the defendant said: "If I am not at the ball, do not judge me harshly."

[De Villiers, C.J.: What did you gather from the conversation?]

That the defendant was going to run away with a man.

The husband of the last witness stated that Mrs. Wilke said she could not live with her husband, as she wanted to have a child, and she would not have a child to him.

At this stage the second defendant entered the Court.

William O'Connor gave evidence as to the defendants living together as man and wife at Claremont.

Thor Osberg, a private detective, gave further evidence on this point.

This closed the evidence for the plaintiff.

The first defendant called Otto Meyer, who stated that the second defendant had lived with him at Loop-

street, when he received a paper to come and take his things away from Wynberg. He could not swear that the second defendant slept every night in the house.

Charles Starck stated that the plaintiff, in an off-hand manner, had told witness that his wife had run away, and that he would probably marry Anna Brinck.

A coloured boy named Mike Williams was then called, and said he came to the house at seven o'clock in the morning, and left at six o'clock in the evening.

Decree of divorce granted, the defendant to forfeit all benefits under the marriage in community and the second defendant to pay the costs of the action. His Lordship added that he saw no good grounds for giving damages against the second defendant.

#### VAN ZYL V. PRITCHARD.

Mr. Van Zyl, for the plaintiff, moved for judgment in terms of a consent paper as follows: (1) The defendant to pay the plaintiff the sums £38 7s. 7d., £18 18s. (together with £57 5s. 7d.), with interest at the rate of 6 per cent. from the date of the summons, to return to plaintiff the sum mentioned in the declaration in lieu of the sum of £16 10s. therein claimed, plus taxed costs to the date of settlement by the defendant of the judgment, plaintiff to stay execution for two months from date of judgment; (2) defendant's claim in reconvention is withdrawn; (3) on settlement of the capital, interest, and costs and return of the gun, plaintiff to hand over the 160 shares and promissory note tendered in his replication, the same to be retained by him until such settlement.

Order in terms of the consent paper

#### SECOND DIVISION.

[Before the Hon Mr. Justice HOPLEY.]

MOFFAT, HUTCHINS AND CO. ( 1906.  
V. ADAMS. ( Oct. 16th.

This was an argument on an exception taken by plaintiffs to the rejoinder filed by defendant on the ground that it was at variance with the plea, and embarrassing.

Mr. Searle, K.C., was for excipients; Mr. Burton was for respondent.

Mr. Searle said that the plaintiffs sued the defendant on a declaration for £2,703 19s. 2d., arising out of a contract, whereunder the plaintiffs agreed to supply the defendant with certain wood-work, timber, and fittings, for a build-

ing in Cape Town for the South African Mutual, of which Adams was the builder. The original contract price was £3,323, and certain extras were afterwards supplied, amounting, plaintiffs said, to nearly £1,400, the whole amounting to £4,717. The defendant made payments amounting to £2,013, and the plaintiffs claimed the balance of £2,703 odd. The defendant, in his plea, admitted the contract, and admitted that certain extras were supplied, but he said that the extras amounted to £840, and that he had a counter-claim of £1,734 6s. 5d., because certain of the timber was not supplied in the particular shape and form in which it ought to have been supplied, and because he had to do certain work which the plaintiffs ought to have done. He tendered the sum of £422. The replication traversed most of the allegations in the plea, and did not admit the counter-claim, except with regard to certain insignificant items, in respect of which they tendered. Defendant had, however, filed a rejoinder in the following terms: "On or about the 4th September, 1906, after the plaintiffs' replication, and plea to the defendant's claim in reconvention herein had been filed, the defendant, in order to cover all possible differences between himself and the plaintiffs in the matter now in suit, duly tendered to the plaintiffs in full settlement of their claims against him the sum of £1,100, together with taxed costs to date of tender (in lieu of the tender contained in his plea), but the plaintiffs refused the said increased tender, which the defendant now hereby repeats. (2) Subject to the above tender, the defendant joins issue with the plaintiffs both upon their replication and also upon their plea to the claim in reconvention, and again prays for judgment, with costs."

To this plaintiffs excepted as follows:

1. Before pleading to defendant's rejoinder, and replication in reconvention, the plaintiffs except thereto on the ground that there is a material variance between the plea and the rejoinder, inasmuch as the plea tenders a sum of £422 11s. 5d., after making allowance for a claim in reconvention, and the rejoinder tenders a sum of £1,100, in lieu of the tender of £422 11s. 5d., and the said tender is inconsistent with the terms of the said plea and claim. Further, the said rejoinder is embarrassing to the plaintiffs, inasmuch as it is not stated how or on what basis the said sum of £1,100 is arrived at, and whether the claim in reconvention is withdrawn or is amended or is persisted in.

2. The plaintiffs are unable to prepare their case, or to plead to the claim in reconvention by reason of the above.

Wherefore they pray that the said rejoinder be set aside, with costs.

Mr. Searle went on to say that the difficulty arising on the pleadings was

that the rejoinder was a complete variance from the plea. The defendant gave particulars in reference to his tender in the plea, but now in his rejoinder he had practically wiped out the plea, and had given no particulars which enabled the plaintiffs to know how the tender of £1,100 was made up. Counsel submitted that the rejoinder was not a fair answer, as contemplated by the Rules of Court. The plaintiffs might, it was true, have made an application for an order requiring defendant to give particulars of the tender in his rejoinder. The defendant had in paragraph 7 of the plea set down a specific reply to the claim of the plaintiff, but the rejoinder wiped out the plea, and nothing had been substituted but a bare tender. Counsel said that the point had not, as far as he could find, previously arisen. *Van der Spuy v. Colonial Government* (14 Supreme Court Cases, 410) had been mentioned by the other side, but he (Mr. Searle) submitted that that case did not touch the present point. Counsel urged that it was of the utmost importance to the plaintiffs to know upon what basis the tender of £1,100 was made, so that they would know how far evidence had to be led.

Mr. Burton said that the plaintiffs might have been embarrassed by the rejoinder, but it was not an embarrassment that they could come to the Court and complain of. The increased tender had been rejected absolutely, and immediately by the plaintiffs. From their point of view, he could not see that it made any difference in the world to their evidence. They must still bring their evidence and show how their claim was made up. Counsel proceeded to take several items, on which there were differences between the parties, and said that the plea, as a plea to the specific items of the declaration, still stood. Defendant said that he owed plaintiffs £422 11s. 5d. as a legal liability. Plaintiffs had actually set down the case but had afterwards withdrawn it, and decided that they were embarrassed. Although the defendant still stood by his statement that the legal liability was £422: but to settle the whole case, and avoid coming into court, he tendered to pay the plaintiffs, on the whole dispute between the parties, a sum of £1,100, with costs to date of tender. The plea had not been wiped out. The defendant had offered, as he had a perfect right to do, an increase! sum of money, unconditionally, and he said to plaintiffs, "Take that with your costs, or leave it; if you don't take it, we will fight every item, except those specific items which are admitted." Counsel contended that *Van der Spuy v. Colonial Government* was in point.

Mr. Searle having been heard in reply,

Hopley, J.: The plaintiffs did not come into court after the plea had been filed, and say that they had been embarrassed by the plea, but they joined issue and pleaded, and so the pleadings might almost have been considered closed at that stage. Now, after the replication had been filed, the defendant rejoined, and the rejoinder seems to me to introduce something which perhaps need not have been introduced at all. It might have been left to speak for itself at the trial of the case. It seems to be unnecessary to say that after the previous tender and subsequently to the plea a further and higher tender was made. But still this rejoinder did not strike me as leaving the pleadings in an embarrassing position. All the points have been traversed, the exact ground taken by the parties has been shown by the pleadings, and all that the defendant has done is to say, "I will increase my tender." Plaintiffs say that they are embarrassed by this treatment of the case. I can only say that the only reason I can see for embarrassment is that they do not quite know upon which items they will be attacked when it comes to the case. That may be so; but the plaintiffs come into court to make good all the items that make up their claim. That claim has been met by a lot of schedules for the defence, and they know exactly where they will be attacked, and on what items as disclosed in the schedules. The only point of embarrassment, it seems to me, is that when every item has been gone into they may not be able to establish a claim beyond the increased tender of £1,100. I do not see that the plaintiffs have any right under our Rules of Court or under our rules of practice to see how the whole of the items making up the tender of £1,100 are arrived at. Plaintiffs know how they are going to be attacked, and it is for them to come here and make good their case. It appears to me that if the plaintiffs prove that they are entitled to more than £1,100 they will succeed, with costs, but, if they fail to prove more than £1,100, the defendant will succeed, and plaintiffs will probably have to pay costs after the date of tender. It is a matter of evidence. I am of opinion that the exception as taken is bad, and must be overruled, with costs.

#### COUNCIL OF THE INSTITUTE OF GOVERNMENT LAND SURVEYORS V. GREEFF.

This was an application upon notice to respondent to show cause why an order should not be granted against him, under section 38 of Act 22 of 1904, suspending him from practice as a Gov-



ernment land surveyor for a period of twelve months, by reason of his contravention of sub-station (b) of section 35 of the said Act.

Mr. W. Porter Buchanan was for applicants; there was no appearance for respondent.

The ground of the application was that respondent had signed a diagram of sub-division of the farm Uitspansberg, belonging to Mr. Maritz, of Prieska, without having visited the farm. The work was actually carried out by one Montagu Good, whose calculations, respondent said, were checked by him and found correct. Good, it was stated, was a civil and mining engineer.

Mr. Buchanan read an affidavit by the Surveyor-General, who said that the diagram was signed by respondent as having been framed by him from actual survey, and beaconed according to regulations. The deductions had been made, whereas had it been known under what circumstances the diagram had been framed, it would not have been examined. It appeared that respondent was a Government land surveyor of about thirty years' standing. Respondent was a member of the Institute. He had given an explanation of his conduct to the effect that he was led to believe Mr. Good was a mining and civil engineer, but this was considered unsatisfactory by the Council. Mr. Buchanan called the Court's attention to the principal sections of the Act, and said that the sub-section under which the case was brought was as follows: "Signing diagrams purporting to represent any work performed by himself, which work shall not have been carried out under his personal supervision and direction." Respondent, apparently, tried to shelter himself under the first sub-section, which was as follows: "Agreeing to share fees or entering into partnership in any work requiring the special qualifications of a Government land surveyor with any person not admitted to practice as a Government land surveyor: provided that nothing herein contained shall prevent a Government land surveyor from entering into partnership with a civil, mining or hydraulic engineer holding a diploma, to the satisfaction of the Council." Counsel submitted that the respondent could not be heard to set up the defence that he would be allowed to sign work done by a civil or mining engineer. Respondent should be suspended, he submitted, for three months, and be ordered to pay the costs of this application.

Hopley, J.: There is no doubt that the respondent in this case has fallen short of the high standard of honour that is required of Government land surveyors. That profession is a most honourable body, and has been for many years one that is very much es-

teemed. Their work has been accurately done, and a great deal has depended upon, not only their accuracy, but their honour, because in very many instances they are put into positions of considerable difficulty, and have to be very honest men, having frequently to decide between rival claimants to ground, who might approach them to secure their partizanship. Therefore, it is not surprising that a couple of years ago the body should have caused legislation to be brought in for the purpose of seeing that the high standard which had been set up and persisted in for many years should also be enjoined by legislative enactment, and it is very clearly laid down in this Act that a land surveyor may not sign any diagrams purporting to represent any work performed by himself, which work had not been carried out under his personal supervision and direction. In this case Mr. Greeff seems to have been asked by a person called Good, who represented himself as a mining engineer, to sign the necessary documents for the purpose of passing diagrams drawn up by Good himself, representing the result of work done by Good and not by Greeff; and Mr. Greeff did it, I suppose, for some sort of consideration. The diagrams were signed as being the work of Greeff, and passed, being accurate enough to pass the Surveyor-General's office, and nothing more would have been heard of this if the owner of the farm, Mr. Maritz, had not noticed that Greeff's name stood upon the diagrams, whereas he knew perfectly well that Greeff had never been upon his farm, and he drew the attention of the Surveyor-General to this fact, and asked whether this was in accordance with what was right and proper. Thereupon inquiries were made, resulting in the present application. As I said, Mr. Greeff has fallen far short of the standard of honour that is required of land surveyors, and has directly contravened the terms of the Act under which the Institute of Land Surveyors has been incorporated. Under these circumstances, some punishment must be meted out to him, as laid down in the 36th section of the Act. The Surveyor-General himself and the Institute of Land Surveyors, through their secretary, ask that he should be suspended for twelve months from his practice. I think that in the circumstances, seeing that he has for 33 years been a surveyor against whom apparently there have been no complaints, it would be a very severe thing, indeed, at his time of life to be told that for twelve months he must not earn a single penny in the only profession, perhaps, that he has. I think, that under such circumstances, a sentence such as has been asked for would be rather severe, but at the same time, something must be done to show Mr. Greeff that such practices as this



must be stopped, and also to set an example to other land surveyors. I must say I was not inclined to make the period of suspension so long as twelve months, but still something longer than the three months suggested by counsel for the Institute. As he himself suggests that period, I will take a very lenient view of the matter, and order, therefore, that respondent be suspended from practice for three months, and that he pay the costs of this application.

#### *Ex parte* INSOLVENT ESTATE BAUER- MEISTER.

Mr. J. E. R. de Villiers moved for the appointment of the applicant, Mr. Hofmeyr, of the Paarl African Trust Co., as sole trustee of the insolvent estate of J. N. Bauermeister, with power to liquidate.

Mr. Upington appeared for the respondent, Mr. De Villiers, of the Paarl Board of Executors, who submitted that he should be appointed with Mr. Hofmeyr as joint trustee, or, failing applicant joining him, that he (Mr. De Villiers) should be appointed sole trustee.

Hopley, J., observed that it was a pity the parties could not have settled the matter between them, instead of wasting the money of their companies or the estate in law expenses.

Counsel having been heard in argument,

Hopley, J.: "In this case the insolvent estate is a comparatively small one, and, as far as the affidavits disclose the facts, there are no circumstances of complication, nor any reason to suppose that there would be anything in the way of serious conflict between the secured and the unsecured creditors. All the assets seem to be in and about the Paarl, and, at all events, the applicant and respondent, the two candidates for the trusteeship, both live in the Paarl, so that there could be no argument, as there is sometimes in cases such as the present one, that the trustees would act together as the assets were distributed. I think myself that, though Courts do sometimes appoint provisional trustees in circumstances like this, where there is a deadlock, I cannot recall any instances in which in similar circumstances such appointments have been made. My own impression is that the Court, in such circumstances, selects one or other of the candidates, and gives that one power to liquidate the estate. At all events, if I am not right in saying that that has been the universal practice of the Court, it would be found in the large majority of cases that such a course has been pursued, and I think certainly that is the wisest course to pursue. These two gentlemen who are now applying are both good business

men, and there seems nothing to choose between them from the point of view of ability to manage this estate or for general reasons. In such circumstances, it seems to me that it would be a pity to introduce almost a new practice, and say that there should be these two gentlemen, representatives, I should say, of rival institutions, in the same town, interesting themselves in the management and winding-up of this small estate. Well, then, following what, I think, is the usual practice of the Court, I must select one or other of the two. Mr. Hofmeyr put in five claims against the estate, two of them certainly being by one creditor, so that I suppose he represents four creditors. On the other hand, Mr. De Villiers put in the claims of five gentlemen for comparatively small sums. But the claims represented by Mr. Hofmeyr were largely in excess, as regards the value of those proved by Mr. De Villiers. But that is not the only thing. If I saw any reason whatsoever to suppose that there would be any conflict between the secured creditors represented by Mr. Hofmeyr and the unsecured creditors, represented by Mr. De Villiers, and if I thought Mr. De Villiers would not be likely to do his duty as an officer of the Court, because some of his clients happened to be interested, adversely to the concurrent creditors, I should have no hesitation in either not appointing him or in appointing someone to watch him on behalf of the others. But I see nothing of the sort alleged in this case, and I do not see any reason to suppose that anything of the sort would happen. I think, under the circumstances, Mr. Hofmeyr should be appointed as sole trustee provisionally, as he prays, with power to liquidate the estate. Costs are not asked against the respondent. Applicant's costs will be paid out of the estate, but no order will be made as to the respondent's costs.

#### GENERAL MOTIONS.

ROOS V. INGLE. { 1906.  
Oct. 16th.

Mr. D. Buchanan moved for a certain rule *nisi* restraining respondent from trespassing on the farm Steenbras, in the division of Caledon, to be made absolute. There was no appearance for respondent.

Rule absolute.

#### TRANTER AND CO. V. DIBB.

This was an application to make absolute a rule *nisi* calling on respondent to show cause why he should not return and deliver to applicants the balance of goods consigned to him by the applicants

against payment of £5 14s. 6d., and furnish statement of account, supported by vouchers.

Mr. W. Porter Buchanan was for applicants; respondent appeared in person.

Mr. Buchanan said that the applicants sent out to respondent certain goods for sale to the value of £177. Respondent had rendered an account, not supported by vouchers, in which he said that he had sold about £30 worth of goods. Against that he said that he had a claim of £13 odd. Counsel suggested that the respondent should give up the goods and bring an action to recover the amount of charges in dispute.

The matter was ordered to stand over until Thursday next, his Lordship expressing a hope that it would be settled out of court.

*Postea* (October 18th).

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Affidavits having been read, and counsel and respondent having been heard,

De Villiers, C.J.: The respondent was the agent of Tranter and Co., and as such agent, he owed to them the duty of rendering accounts, and when they appointed another agent to represent their interests here, it was his (respondent's) bounden duty to render those accounts to those agents, and to treat them as if they were the principals here. It appears to me from the affidavits that the respondent has not been perfectly ingenuous towards applicants or their agents. He has not given them all the information they were entitled to, and by that means he has forced applicants to come into court to obtain a rule *nisi*. The Court cannot now go beyond that rule *nisi*, which was applied for on condition that £5 14s. 6d. be paid to the respondent. That condition remains. The Court will, therefore, make the rule absolute, with costs, on condition that if the vouchers shall show that more than £5 14s. 6d. is due to respondent, the applicants shall pay such additional sum to the respondent.

Mr. Buchanan: And that he produce vouchers forthwith?

De Villiers, C.J.: A statement of accounts, supported by vouchers, must be furnished within one week from this date.

*Ex parte* QUIN.

Mr. Toms moved for an order authorising the amendment of certain

records relating to landed property at Fort Beaufort.

Order in terms of report of Registrar of Deeds.

*Ex parte* ESTATE WIESE.

Mr. Payne moved, on the petition of the executor, who is son of the deceased, for an order authorising transfer of certain property at Victoria West to the petitioner.

Order granted as prayed.

*Ex parte* PRINGLE.

Mr. W. Porter Buchanan moved for an order authorising transfer to petitioner of certain landed property at Adelaide in the district of Bedford, in the estate of William Scott Pringle, of which petitioner is one of the executors testamentary.

Order granted as prayed.

*Ex parte* ESTATE PHILLIPS.

Mr. Sutton moved, on the petition of the executrix and executor testamentary in the estate of Phillips, for leave to raise a loan of £400 upon the security of certain landed property.

Order granted as prayed.

*Ex parte* ESTATE MARAIS.

Mr. Toms moved, on the petition of the administering executor, for an order authorising the transfer of certain estate property in the Beaufort West division to petitioner, who had purchased same at public auction.

Order granted as prayed.

*Ex parte* SNYMAN.

Mr. Benjamin moved for an order authorising the equal participation of Jan Abraham Snyman, the fifth son of the marriage, in the bequests under the joint will executed by the petitioner and his late wife. The said J. A. Snyman was born in April last, a little while before the death of the petitioner's wife, and it was desired by petitioner that he should receive equal benefits with the other four sons. The will was drawn about two years ago. Petitioner said that unless the youngest child were admitted to participation, he should repudiate his share in the will.

[Hopley, J.: Has the Court power to change a will in this way?]

Mr. Benjamin: The Court has power to convert the property of the minors from one investment to another investment. If the father repudiates his share in the mutual will, he may dispose of the whole of his property to

the fifth son, and the other four children may only share in the mother's property. The petition seems very much in the interests of the four sons. Counsel submitted that, as the application was in the interests of the minors, the Court had power to make an order such as was now asked for, for the conversion of the minors' fourth share in the mother's property to a fifth share in the joint estate.

[Hopley, J.: Read it which ever way you like, it is an attempt to change the terms of the will.]

Mr. Benjamin submitted that it was simply a conversion from one investment to another of the minors' property.

[Hopley, J.: Wrap it up in whatever language you like, you want to change "four" into "five."]

Mr. Benjamin admitted that it practically came to that. What they asked the Court to do was not so much to change the terms of the will, but to sanction the conversion of the property of the minors into something more advantageous to them. Counsel added that the terms of the petition were, perhaps, unfortunate, and he would suggest that if the language were unacceptable to the Court, the matter should stand over to enable a fresh application to be made.

Hopley, J., said that he should make no order on the present application, and the petitioner might, perhaps, present a petition in somewhat different terms.

#### *Ex parte SNEAD.*

Mr. Pyemont moved for an order authorising the amendment of the surname of petitioner's children from Muller to Snead, the name to which he had reverted.

Order granted as prayed.

#### *Ex parte ABRAHAMS.*

Dr. Greer moved for an order authorising petitioner to sue her husband, Manuel Abrahams, by edictal citation for divorce, or, in the alternative, for restitution of conjugal rights. Respondent was believed to have gone to German South-west Africa.

Leave to sue by edict granted, citation returnable on the 12th January, personal service if possible, failing which, publication in the "Government Gazette" and "Ons Land."

#### *Ex parte ESTATE KORTE.*

Mr. P. S. T. Jones moved, on the petition of the executor dative, for an order authorising the transfer of certain estate property.

Order granted as prayed.

#### *Ex parte ESTATE ESTERHUIZEN.*

Mr. Watermeyer moved, on the petition of the executrix testamentary, for an order authorising a certain agreement of sale of estate property for the sum of £4,000. Petitioner had had authority from the Court to enter into a previous agreement with other parties, but the sale appeared to have fallen through.

The matter was ordered to stand over, pending a report by the Master as to a certain proviso which it was suggested should be inserted in the conditions of sale.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### GENERAL MOTIONS.

*Ex parte LAWRENCE AND* 1906.  
CO., LTD. Oct. 17th.

Mr. Gutsche moved for leave to attach certain property *ad fundandam jurisdictionem* and to sue by edictal citation one Sam Misnum, of Johannesburg, on a mortgage bond for £350, due by reason of non-payment of interest.

Leave granted and property attached, citation returnable on the 8th November, personal service to be effected.

#### *Ex parte ESTATE STEGMANN.*

Mr. Rowson moved, on the petition of the executors testamentary, for an order authorising transfer of certain estate property, situate at Newlands, to the petitioner, Johannes A. Stegmann.

Order granted as prayed.

#### *Ex parte ESTATE IDAS.*

Mr. Roux moved for an order authorising transfer of certain estate property, situate at Malmesbury, to an executor.

De Villiers, C.J., said that the Government must not suffer by reason of the fact that the price was so low. An order would be granted as prayed, without prejudice to the right of the Government to full transfer fees.

**FOULLARD V. ESTATE JOUSSARD.**

Mr. Pohl moved for an order authorising a certain claim in an insolvent estate in the Swellendam division to be expunged. Respondent had, he said, filed a consent paper.

Order in terms of consent paper.

*Ex parte* SMITH.

Mr. Payne moved for an order authorising an amendment of certain transfer deed by the substitution of petitioner's correct name, "Andrew James Smith," in place of "James Alfred Smith."

Order granted as prayed.

*Ex parte* MARAIS.

Mr. Payne moved on behalf of petitioner, a farmer, in the Robertson division, for the appointment of a *curator ad litem* to represent his daughter in lunacy proceedings. C. P. Klopper, of Vink River, Robertson, was proposed as curator. Leave was also sought to prove insanity on affidavit.

De Villiers, C. J., asked counsel who had proposed Mr. Klopper?

Mr. Payne explained that he was holding the brief for one of his learned friends, and that the attorney was not in court.

De Villiers, C.J.: An order will be granted appointing Mr. Klopper as curator, summons returnable on the 8th November next, and the Court will grant leave to prove the insanity on affidavit. No attendance fee will be allowed to the attorney in this case. I think in future the only course will be in every case where the attorneys do not attend to make an order that no fee shall be charged.

**PICKARD V. KAROW.**

Mr. De Waal moved for leave to sue the respondent (John H. E. Karow) by edictal citation for the capital and interest due on a mortgage bond for £800. Petitioner also applied for attachment of the property *ad fundandam jurisdictionem*. Respondent was stated to have gone to Swakopmund, German South-west Africa.

Leave granted as prayed, and property attached, citation returnable on the 12th November, personal service, failing which, one publication in "Die Windhoek Nachrichten."

*Ex parte* BRUWER.

Mr. De Waal moved, on the petition of the executor dative of Estate Kraus, for leave to mortgage certain estate property.

Order in terms of Master's report.

*Ex parte* FERREIRA.

Mr. De Waal moved, on behalf of petitioner, a farmer, residing in the division of Humansdorp, for leave to mortgage certain property. The Master's report was favourable.

Order in terms of Master's report.

**RANSBY AND COVELL V. WOUDBERG.**

This was an application for a temporary interdict restraining respondent from making, using, vending, or exercising helms for eliminating fusel oil and other impurities from distilling brandy, the same as or similar to the one in respect of which letters patent were granted to the applicants on the 17th April, 1905.

From the affidavits, it appeared that the applicants carry on business at Montagu, and that the respondent is a coppersmith, of Wellington. Respondent had recently advertised a helm in "Ons Land" which applicants said was an infringement of their patent rights. Apparently there had been negotiations between the parties some time ago, not only in regard to the question of whether respondent should make the helms, of which applicants were patentees, but also as to whether he should be admitted as a partner. On the question of what actually took place, there was a divergence of testimony on the affidavits. But there was also a dispute as to whether the helms advertised by respondent were an infringement of applicants' patent. Applicants said that they were, and they produced affidavits sworn by others as to the value of the helm which they had put on the market. Respondent, who had several supporting affidavits, contended that the so-called invention of applicants was not an invention within the meaning of the letters patent of this colony. His helm was not identical in construction with that of applicants. Such helms as applicants were producing had been sold for many years before the applicants took out their patent. Respondent said that applicants simply desired to obtain a monopoly in the Colony. Applicants, in replying affidavits, denied these allegations.

De Villiers, C.J., however, said that he could not allow the replying affidavits to influence his decision, because the Court had not been furnished with them.

Mr. Upington for applicants; Mr. Benjamin for respondents.

Mr. Upington said that this had been entirely due to a misapprehension. He added that he felt, of course, that this matter could not be disposed of on motion.

Mr. Benjamin agreed.

De Villiers, C.J., said that again the applicants' attorney did not appear to be in court, and he should direct that

no fee be allowed to him for attendance. On the whole, it appeared that the matter was one which ought to be tried by action. The Court would order that the applicants proceed by action, and direct that the respondent keep an account of all helms and distillery apparatus of the kind objected to herein, constructed and sold by him, and of the prices for which they are sold, the attorneys of the applicants not to have any fees for attendance in court to-day.

#### FORFAR V. HOUSTON AND CO.

Mr. Benjamin moved for the appointment of a commission to take certain evidence in London. Counsel said that there was a consent paper, and he suggested Mr. David Thomas Oliver as commissioner. He might remind the Court that Mr. Oliver acted as commissioner in the Grand Junction Railways case, which was recently before the Court.

[De Villiers, C.J.: You mean the gentleman who admitted evidence in cross-examination and re-examination, and re-cross-examination and so on?]

Mr. Benjamin: It was rather a voluminous record.

[De Villiers, C.J.: No, it was not voluminous; it was irregular.]

Mr. Benjamin: That was the name suggested to me.

[De Villiers, C.J.: I do not think much of the manner in which the evidence was taken. Why not appoint Mr. Mackarness, who has done the work before?]

Mr. Benjamin said that he was not aware of any reason why Mr. Mackarness should not be appointed, except for the endorsement on his brief.

De Villiers, C.J.: The Court will appoint Mr. Mackarness as commissioner to take the evidence; in case he should not be available, Mr. Oliver will be appointed. Mr. Mackarness has generally been appointed, and he has done the work very well.

#### Ex parte ESTATE VAN RENSBURG.

Mr. M. Bisset moved, on the petition of the executive, for leave to mortgage certain estate property in the sum of £900. The major heirs consented.

Order granted as prayed.

#### Ex parte MCKOBOTUA AND ANOTHER.

Mr. Benjamin moved for an order authorising Rosenblat and De Beer, attorneys, to pay out to the petitioners a sum of £135 6s. 8d., paid to the said firm towards the purchase price of certain property in the district of Mafeking, the sale of which had never been completed.

[De Villiers, C.J.: Rosenblat and De Beer have the money in their hands?]

Yes.

[De Villiers, C.J.: But do they refuse to pay?]

I understand their position is that they do not feel safe in paying out unless there is an order of Court. They appear to have been acting for both parties, some error apparently having been committed in the office.

Rule granted calling upon Rosenblat and De Beer to show cause on the 8th November why they should not be ordered to pay to the applicants the sum of £135 6s. 8d., alleged by the petitioners to be in their hands, the said Rosenblat and De Beer to be in the meantime interdicted from dealing with the said money pending final order of Court.

#### Ex parte DE KLERK.

Dr. Greer moved for the appointment of a commission *de bene esse* to take the evidence of petitioner in an action instituted by her against her husband for restitution of conjugal rights. Petitioner said that she was now residing at Melmoth, Natal, and that she could not afford to come to Cape Town to give her evidence.

Order granted appointing Mr. Maritz, R.M. of Melmoth, as commissioner to take the evidence of plaintiff.

#### Ex parte ESTATE VAN DER MERWE.

Mr. Douglas Buchanan moved for an order sanctioning certain transfers proposed by the petitioners. The Master reported that the arrangement would be in the interests of the minors.

Order granted as prayed.

#### Ex parte DE JAGER.

Mr. Howes moved for an order declaring petitioner of sound mind, and releasing him and his estate from curatorship. Affidavits were annexed to the petition showing that petitioner had recovered his sanity.

Order granted as prayed.

#### MCKINNON V. MCKINNON.

This was an application brought by John H. McKinnon, a shipwright, of Woodstock, calling upon his wife to show cause why he should not be granted leave to defend a certain action *in forma pauperis*. Applicant also applied for removal of bar to enable him to enter appearance.

Mr. M. Bisset was for applicant; Dr. Greer was for respondent.

The parties, it appeared, were married in Aberdeen, Scotland. Mrs.



McKinnon had commenced an action for judicial separation on the grounds of alleged cruelty, personal violence, and threats and neglect. Recently she brought an application against her husband for alimony and means to proceed with the action. The matter came before Mr. Justice Maasdorp, who declined to make an order, holding that the then applicant had not made out a *prima facie* case.

Mr. Bisset read an affidavit by applicant, who said that he was without funds with which to defend the action, and that he had a good answer to the plaintiff's allegations.

Dr. Greer said that the respondent's position was that her husband was earning £14 a month, and that he had a certain sum of money in hand.

Mr. Bisset mentioned that there had also been proceedings in the Magistrate's Court at Woodstock, brought by Mrs. McKinnon for maintenance. The Magistrate declined to give her an order.

De Villiers, C.J., said that he did not see how he could treat the applicant as a pauper. McKinnon could appear in court and give his evidence.

Mr. Bisset said that, as to the other part of the application, the defendant had been unnecessarily barred, because it was known that he was going to make the application to defend in *forma pauperis*.

Dr. Greer read an affidavit by the respondent's attorneys, to the effect that the defendant had been duly barred, according to Rules of Court.

Applicant was refused leave to defend in *forma pauperis*, but the bar was directed to be removed, costs to be costs in the cause.

#### *Ex parte* STADELMANN AND CO.

Mr. Bailey moved, as a matter of urgency, for leave to petitioners to sue John and Gilbert G. Pitkethly, of Pretoria, and formerly of Woodstock, by edictal citation, for £204 13s. 2d., on a certain bill of exchange.

Leave granted to sue by edictal citation, returnable on the last day of term, personal service to be effected.

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

LINSCOTT V. LINSCOTT. { 1906.  
Oct. 17th.

This was an action brought by Bertha Lily Maud Linscott against her husband, Arthur B. Linscott, for restitution of conjugal rights, failing which, a decree of divorce, the plaintiff to have custody of the child, and the defendant

ordered to pay £4 per month as maintenance of the plaintiff, and £3 per month as maintenance and education of the child, until it reached the age of sixteen years.

The declaration set out that the plaintiff resided at Cape Town, and the defendant at Woodstock. The parties were married out of community of property at Paris, October, 1898. There was a child, aged two years, issue of the marriage. About the 26th August, 1906, the defendant maliciously deserted the plaintiff, and was still absent from her. The husband had previously instituted a suit for divorce against his wife, on the ground of adultery. The judgment was one of absolution from the instance, and the defendant then deserted the plaintiff.

Mr. Van Zyl was for the plaintiff, and the defendant was barred and in default.

Bertha Lily Maud Linscott (born Smith), plaintiff in the case, stated that after the marriage they lived at Paris, and then at London. Her husband got a position as a professor in the South African College, and both came out here. After the birth of the child she had a serious illness, and she went to live at Somerset West Strand, and for eighteen months her husband contributed nothing towards her support. In July last her husband instituted proceedings for divorce, and judgment was given in her favour. After the proceedings, witness said she was perfectly willing to come back to him, but his attorney said the defendant would do nothing. The child was in England with the defendant's people. Correspondence ensued between the attorneys on both sides as to a settlement between the parties. On the 1st September the defendant put an advertisement in the paper that he would not hold himself responsible for plaintiff's debts. Her husband came out here as a professor to the South African College at a salary of £350 a year, but at present he was doing nothing. He had a private income of £150 a year. Witness had private means of £75 a year, and could also take pupils at music.

An order was granted calling on the defendant to restore conjugal rights on or before the 30th October, failing which, to show cause on the 14th November why a decree of divorce should not be granted, why the plaintiff should not be declared entitled to the custody of the child of the marriage, why he should not be ordered to pay £3 a month towards the maintenance of the child from the time the child comes into the custody of the plaintiff, until it attains the age of sixteen years, and why the defendant should not pay the costs.

#### DUNCAN V. STEYN.

This was an action brought by the plaintiff, a law agent, of Wynberg, to

recover from the defendant £226 14s. 1d., balance due for professional services rendered, and disbursements made at the special instance and request of the defendant.

The declaration set out that the plaintiff, Robert Duncan, was a law agent, of Wynberg, and the defendant, D. G. Steyn, was a farmer of Swellendam. The amount the plaintiff alleged was due in connection with the defence of Tobias Louw, a brother-in-law of the defendant.

The defendant in his plea stated that about March, 1906, the plaintiff requested him to assist by monetary contribution in the defence of Louw, who was charged with murder and acquitted. The defendant agreed with the plaintiff, in case Louw should be acquitted, to contribute to the defence in a moderate sum. In June, 1906, the defendant paid £26, £20 being paid by the defendant by cheque, and the remainder from one Dreyer, of Claremont. The plea stated, even if the Court found him to be indebted to the plaintiff in a greater charge than £26, the plaintiff's bill was excessive.

Mr. Alexander was for the plaintiff, and Mr. Burton was for the defendant.

Robert Duncan, plaintiff, enrolled agent, Wynberg, stated that on the 14th February he first saw Tobias Louw in connection with his defence. That was the morning after his arrest. An agreement was entered into as to the charges he should pay for his defence. At the end of February or beginning of March he met the defendant at Mr. Dreyer's house at Claremont. Witness went to see the defendant with regard to finding funds for Louw's defence. The defendant said before he could say whether he would find funds for the defence, he would have to see his wife. Witness asked about his fees in the meantime, and the defendant said they were all right, but until he saw his wife he could not do anything with regard to the Higher Court. Witness told him that his fee was five guineas a day. From start to finish the case took about four months. The criminal trial lasted six full days. On the 14th March witness sent a telegram to the defendant asking him was he prepared to assist in defence, and the reply was that if found not guilty the defendant would stand guarantee for money, but not too much.

[Hopley, J.: What was your account then?—Between £60 and £65.

What disbursements could have been at that stage?—Cab fares.

Surely, from the five guineas you pay your cab fares?—It was understood that the five guineas was over and above any expenses.

Continuing, the witness said he subsequently went to Swellendam to see the defendant, and pointed out that he could not guarantee that Toby Louw would not be found guilty, and the de-

fendant then saw the unreasonable position he had taken up. Witness asked for a cheque for £100 for barristers' fees, and told the defendant the costs altogether would amount to about £200 or £250. The defendant promised to send a cheque for £100 the following week. The defendant then wrote that his wife (Louw's sister) objected to him sending the cheque, as it was too much. After the case witness wrote asking for the cheque, for his bill of costs. A reply was sent enclosing a cheque for £20, and authorising witness to collect £6 from Mr. Dreyer at Claremont. The defendant said the cheque was the amount promised witness at Swellendam.

Cross-examined by Mr. Burton: You would not say you erred on the side of modesty?—I do not consider it over-charged.

You put in £3 10s. for travelling expenses to see Mr. Steyn?—Yes.

You charge £5 5s. for the honour as well?—Yes.

Your own personal fees are £171?—Yes, for four months' work.

[Hopley, J.: Was that the only work you were doing?—Practically, I had to give up other work.

Mr. Burton?—You never charge less than £5 5s. for going to the Court?—There is one item of £3 3s.

Every day you walk into the court you charge £5 5s.?—Yes, every day.

Do you know what attorneys are allowed for attending the court in civil matters?—I cannot say.

You do not know it is half a guinea?—We always charge a special fee.

According as you arrange it with your client?—Yes.

I only point out these things to show you that your bill does not err on the side of modesty. Was the £5 5s. arranged in writing with Louw?—Yes.

Your consultations are arranged on counsel's basis, or even more?—I went by the amount of time.

You inspected the Arums for £3 3s.?—It is all according to time.

Having a look at Mrs. Louw, £2 2s.; attending Mrs. Louw at Salt River, £2 2s.; looking at Louw in the gaol, £3 3s.?—It is all according to time.

[Hopley, J.: Take, for instance, the consultation with Sir Henry Juta?—Yes.

[Hopley, J.: That could not have taken much time?—I have to come from Wynberg. I called at his chambers more than once.

[Hopley, J.: Why did you come in? Could you not have written him?—I was instructed by Mr. Dreyer to see Sir Henry Juta personally.

Continuing, under cross-examination, witness said he knew Louw had no money, although he got him to sign the agreement. Mr. Dreyer assured him that the family would see him paid.

Up to the time you saw Mr. Steyn, on the 28th February, on whose authority were you conducting the case?—Upon the authority of Louw.

In the hope Mr. Louw's relations would see him through?—No, I had seen Mr. Dreyer in the meantime, and he assured me that the relations would see me paid. I considered the relations of a man charged with murder would not see him hanged for the want of defence.

[Hopley, J.: Sometimes relations might like to see a man hanged.]

Proceeding, witness, in reply to Mr. Burton, said while he looked to Steyn for the payment of the bill, he thought the other members of the family would assist.

Mr. Steyn asked you if in such a case the Government did not supply counsel for the defence, and you said they might supply a schoolboy?—I said people of that sort.

[Hopley, J.: I am sure the junior bar will be pleased at this opinion of them.]

Mr. B. Shaw, agent-at-law, who went through the bill of costs, said he would only have taken off an amount of £10 10s.

Cross-examined: The amount of £5 5s. for attendance was reasonable for a whole day. The plaintiff, until recently, was his son-in-law.

John K. Lancaster, agent-at-law, said he might have charged for such a case 100 guineas, in addition to the disbursements, and five guineas for the visit to Swellendam.

Mr. Alexander closed his case.

D. G. Steyn, defendant, stated he had not met the plaintiff until he saw him at the house of Mr. Dreyer at Claremont. When he was asked if he would support the defence with money, he said Louw was his wife's brother, and he would see her about it. Nothing was said about the expenses in the Lower Court. At Swellendam the plaintiff said he did not think Louw would be found guilty. When the plaintiff stated that he wanted £100, witness said, "Do not depend on that." He never promised anything beyond that he would send a cheque, but the amount was not mentioned. Witness never undertook to pay the whole amount of the defence.

Cross-examined by Mr. Alexander: The plaintiff was to get £6 from Dreyer, which the latter owed to witness. It seemed to him that the plaintiff was more interested in the case than witness. If his wife had told him not to support the case, he would not have done anything in the matter. He did not discuss the matter much with his wife, on account of the charge hanging over her brother. The position he took up on his telegram was that he would give the plaintiff what he thought was a fair amount. He might have offered him £5.

Henry Cornelius Dreyer, said if the plaintiff had asked him for the £6 it would have been paid. Steyn said he would promise nothing until he had seen his wife. He heard nothing about

paying costs in the Magistrate's Court.

This concluded the evidence, and Mr. Alexander having been heard in argument on the facts,

Hopley, J.: In this case I wish Mr. Steyn had exhibited more generosity, and I do not think, considering the careful way in which the work was done, that any relation, who did really care for a near relation in jeopardy, ought to complain of £100, or even more, for the work in getting him acquitted. I am sorry this case came into the court, unless it came in a different shape as to the reasonableness of certain charges, and the Court, to give an opinion as to what the charge should be for the work and labour actually done. That I could understand. I am sorry that Mr. Steyn has not been a little more open-handed, in giving more towards his relative's defence. I think, as a law agent, Mr. Duncan exhibited great care and assiduity in working up this defence, and he deserves every credit, and possibly his efforts contributed largely to the eventual result. But I have to consider as to whether Mr. Duncan has made it clear if there was a contract between him and the defendant, that the latter should pay for the defence of Mr. Louw. His lordship, after reviewing the documents and the evidence, said, on the whole, his mind was not convinced that there was this absolute promise on the part of the defendant, and he thought the proper judgment would be one of absolution from the instance, with costs.

[Plaintiff's Attorney: E. J. Sydney.  
Defendant's Attorney: Herold and Gie.]

#### VAN DER MEULEN V. GREEFF AND GREEFF.

Mr. Roux moved as a matter of urgency for an interdict restraining the respondents from removing a large number of sheep, the property of the applicant.

A rule nisi was granted calling upon the respondents to show cause why they should not be interdicted from parting with, or in any way dealing with the sheep, or the goats, or their progeny, removed by them from the possession of the applicant, and why they should not restore them to the applicant, and pay the costs of the proceedings. The rule to act as an interdict meanwhile, restraining the respondents or any other persons whatsoever from further dealing with the said stock, save for their custody and safe keeping, the rule returnable on the 1st November. Leave would be granted to telegraph the order.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

### PROVISIONAL ROLL.

SMITH AND ROLLINS V. ( 1906.  
JENKINSON. ( Oct. 18th.

Mr. Palmer moved for the final adjudication of the defendant's estate.  
Order granted.

### VIRMT AND OTHERS V. HAZELL.

Mr. Lewis moved for a provisional order of sequestration to be made final.  
Order granted.

Mr. Lewis, later on, applied for the matter to stand over for a week.

The previous order was suspended, and the case ordered to stand over accordingly.

### PRICE V. WOOD.

Mr. Bailey moved for provisional sentence on a mortgage bond for £750, with interest from the 1st July, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

### DICHMONT V. BOOSE.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £1,600, with interest from 1st January, 1905, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

### FAIRBRIDGE V. SCHWALBE.

Mr. Palmer moved for provisional sentence on certain two mortgage bonds for £1,050 and £850, with interest from the 1st July, 1905, less £20 odd paid on account, bonds due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.  
Order granted.

### KERSCHHOFF V. SHELDON.

Mr. Roux moved for provisional sentence on certain two mortgage bonds for £400, with interest from the 1st April, 1905, and for £150, with interest from the 1st January, 1905, bonds due

by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### BROIDO V. WOLFAARD.

Mr. Van Zyl moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

### HEWAT V. ROWIK.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £600, with interest from the 1st February, 1906, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ILLIQUID ROLL.

VALUE SUPPLY CO. V. ( 1906.  
JOHNSTONE. ( Oct. 18th.

Mr. Lewis moved for judgment, under Rule 329d, for £80 0s. 10d., work and labour done, materials supplied, etc.  
Order granted.

### OOSTHUYSEN V. OOSTHUYSEN.

This was the return day of a summons calling upon the respondent, Miss A. E. J. Oosthuysen, to show cause why she should not be declared of unsound mind, and a curator appointed to her person and property.

Mr. W. Porter Buchanan appeared for the applicant, and read affidavits by the Assistant Resident Magistrate of Lady Grey, Aliwal North (the *curator ad litem*), and others, in proof of the respondent's demented condition. It was suggested that the respondent's mother should be appointed curator of her person and property.

Order granted declaring the respondent of unsound mind, and appointing her mother curator of her person and property, costs of this application to be paid out of the assets of the lunatic's estate.

### GENERAL MOTIONS.

#### DE SMIDT V. DE SMIDT.

Mr. Gutsche moved for a decree of divorce, in default of defendant's compliance with an order of restitution of

conjugal rights. Counsel explained that the plaintiff's affidavit of non-return of her husband had not yet come to hand from Kimberley.

Order granted, subject to affidavit of non-return of defendant being filed with the Registrar.

*Ex parte* ESTATE BAKER.

Mr. Roux moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

*Ex parte* CAPE MINERALS, LTD.

Mr. Douglas Buchanan moved for the rule *nisi* to be made absolute placing the company under winding-up order, and appointing A. J. MacCallum as official liquidator, with powers under the 149th section of the Companies' Act.

Rule absolute.

*Ex parte* EAST LONDON DAILY NEWS CO., LTD.

This was the return day of a rule *nisi* placing the East London Daily News Printing and Publishing Company, Limited, under a winding-up order, and calling upon all concerned to show cause why J. E. P. Close, of Cape Town; Herbert J. R. Pope, secretary of the Board of Executors, East London; and Charles A. Odlum, secretary of the petitioning company, should not be appointed official liquidators.

The affidavits of certain creditors of the company stated that they considered it was not in the interests of the creditors that an official of the company should be a co-liquidator, that he would be acting in a dual capacity, and that his interests in one capacity might clash with his interests in the other.

The replying affidavits of Mr. Pope and Mr. Bissek (chairman of the company), strongly supported the proposed appointment, in view of probable litigation and the importance of having Mr. Odlum's services at the disposal of the company, there being a danger that, unless he were appointed, he would take a position in Johannesburg.

Mr. Benjamin appeared for applicants; Dr. Greer appeared on behalf of the following creditors to show cause against the appointment of Mr. Odlum as a liquidator, viz., John Dickinson and Co.'s African and Australasian Branch, Limited (as agents for Caslon and Co.), Haddon and Co. (Africa, Ltd.), of London, and Ernest Alfred Moody, representing Parsons Bros., of New York and Cape Town.

Dr. Greer said that the creditors for whom he appeared represented debts

amounting to over £600, while the total debts of the company were about £4,800, of which amount over £1,000 was due to Wiener and Co., who had nominated one of the liquidators.

[De Villiers, C.J.: But they do not object to Odlum?]

Dr. Greer: No, but they have their own nominee, and I submit that for the purposes of this application he may be left out of consideration. Proceeding, counsel said that the ground on which it was asked that Mr. Odlum should be appointed one of the liquidators was that he had exceptional knowledge of the affairs of the company, and, in view of possible litigation, it would be well if his services were retained. He (counsel) was instructed that, so far as the creditors whom he represented were concerned, they were willing that Mr. Odlum's services should be retained, only not as a liquidator, but as manager. Their reason for opposing his appointment as a co-liquidator was that when the affairs of the company were gone into, it might well be that the interests of creditors might conflict with those of officials.

De Villiers, C.J.: As I understand the case, the great majority of the creditors are in favour of three liquidators being appointed, including Mr. Odlum. An objection is now raised by a minority of the creditors to Mr. Odlum on the ground of his being secretary of the company. I quite agree that as a general principle the secretary of a company should not be appointed a liquidator, but in the present case there certainly are circumstances which would justify his appointment. He is intimate with all the concerns of this company, and, if he is not so appointed, he will leave for the Transvaal, when his services will not be obtainable. It is suggested, however, that he should be appointed manager of the company at a salary, which would pay him better than being a liquidator. No doubt it would pay him better, but the question is, would it be better for the shareholders and the liquidators? If he is appointed liquidator, he would share with the other liquidators in the full amount of the fees that would be payable, and there would not be the additional expense of a manager's salary, whereas if he is appointed manager, the two liquidators would receive the full amount of the commission, and, moreover, he would be entitled to receive his salary as manager. Upon the whole, I consider that it would be in the interests of all parties concerned that Mr. Odlum should be appointed as liquidator instead of manager, and the rule will, therefore, be made absolute. I do not think that the objecting creditors should be ordered to pay their own costs. I think it was a fair objection to take, and it is only on weighing the convenience and advantages on both



sides that I have decided that Mr. Odum should be appointed a liquidator, so that the costs of this application, including the costs of the opposition, will come out of the assets of the company.

*Ex parte FOURIE.*

This was an application to make absolute a rule nisi calling upon the curator dative of the estate of petitioner's late husband to show cause why she should not obtain leave to sue him *in forma pauperis*.

It appeared that the late Ockert J. Fourie died without having made a will after his first marriage, having only left a mutual will that he had entered into with his first wife. Petitioner considered that she was entitled to something out of her late husband's estate. No account had, however, been lodged with the Master of any separate estate of the deceased, though Mrs. Fourie had been offered £50 in settlement of any claim that she might have, which offer she had refused.

Mr. Swift was for applicant; Mr. Gardiner appeared on behalf of respondent to show cause.

Mr. Gardiner submitted that the petitioner's proper remedy was to write to the Master and ask him to call upon the executor to furnish an account.

[De Villiers, C.J.: Does the tender of £50 still hold good?]

Mr. Gardiner said that it did.

[De Villiers, C.J.: Would you object to the tender being paid to her, without prejudice to her right to claim more, because, if you are willing to do that, I could not grant her leave to sue *in forma pauperis*?]

Mr. Gardiner said they were willing to do that.

De Villiers, C.J.: There will be no order upon the application for leave to sue *in forma pauperis*, on condition that within a fortnight the sum of £50 be paid to the plaintiff without prejudice to any claim she might have to more than £50, costs to be costs in the cause.

Mr. Swift said he took it that applicant would not have to pay costs out of the £50?

De Villiers, C.J.: If she loses, she will have to pay costs out of the £50.

*Ex parte ANDERSON AND ANOTHER.*

Mr. Roux moved on behalf of petitioners for leave to execute a certain lease of property at Dordrecht, upon which it is proposed to commence coal mining, and for authority to lay out a township and dispose of plots by lease. The Master's report was favourable.

Order in terms of Master's report.

GOOSEN V. INSOLVENT ESTATE JOYNER.

Mr. Van Zyl moved for an order barring the respondent estate from prosecuting an appeal from a judgment of the Magistrate's Court at Maclear. Respondent did not appear.

It was stated that the respondent estate had failed to take steps to prosecute the appeal, and that six weeks had elapsed since notice was given to the trustee without any further intimation being received from him.

Order granted as prayed.

*In re* B.S.A. ASPHALTE AND MANUFACTURING CO. (IN LIQUIDATION).

Mr. Molteno was for applicant; Mr. Burton appeared for Andrew Allen, the late managing director of the company.

Mr. Burton applied for a postponement, stating that he had only just been briefed, and that he could not argue the matter at present.

Mr. Molteno opposed a postponement. The matter, he said, was down in the list for Monday last, and was then postponed for the convenience of the respondent.

Mr. Burton (in answer to the Court) said that he was unable to supply certain information, because his attorney was not in Court.

[De Villiers, C.J.: I must order, at any rate, at this stage, that the attorney shall not be allowed the costs of attendance to-day.]

Mr. Burton: I am told that he has been in court, but he is not here just now.

[De Villiers, C.J.: Still, I cannot help that; he must be in court when the case is called.]

Mr. Burton said that if the hearing were proceeded with now, he should be compelled to return his brief.

Mr. Molteno submitted that respondent had had ample notice of the application.

De Villiers, C.J.: I think the case should be postponed, because it is impossible to do justice without hearing the respondent has to say. The case will be postponed until Thursday next, the respondent to pay costs of to-day, and respondent's attorney not to be entitled to costs of attendance to-day.

ESTATE BOTHA V. LOUBSER.

This was an application calling upon respondent to show cause why applicants should not forthwith issue out of this court a writ of execution against respondent for the amount of taxed costs of applicants, incurred in connection with a certain action brought by respondent against applicants, and decided

in favour of the latter on the 22nd August.

Mr. Upington (with him Mr. De Villiers) was for applicant; there was no appearance for respondent.

It appeared that, after the judgment given by Mr. Justice Maasdorp in the trial, an appeal was noted by respondent (plaintiff in the action), and that the executors were desirous of closing the estate. They said that they were prepared to give the necessary security.

Order granted as prayed, security to be given to the satisfaction of the Registrar of the Supreme Court.

*Ex parte* ESTATE LLOYD.

Mr. Benjamin moved, on the petition of the South African Association as executors testamentary in the Estate Lloyd, for leave to sue one Minnie Jacobs (born Evitt) by edictal citation in connection with a life policy of £1,000 in favour of the deceased. The deceased was insured with the Mutual Company of New York. During his lifetime he ceded the policy of the respondent, who was then his wife, and from whom he subsequently obtained a divorce, with forfeiture of the benefits of the marriage. The cession was still registered against the policy, hence the company declined to pay the money to the petitioners. Since the divorce, respondent had contracted a further marriage, and was now believed to be residing in England. Petitioners also applied for leave to attach the policy *ad fundandam jurisdictionem*.

The Court ordered an attachment of the insurance policy mentioned in the petition *ad fundandam jurisdictionem*, and interdicted the Insurance Company from paying out the money, pending further order of Court, and granted leave to sue Minnie Jacobs, alias Minnie Grey, by edictal citation, citation returnable on the 1st February, 1907, personal service to be effected, and the Insurance Company to be joined with Mrs. Jacobs as co-defendants, with leave to petitioners to serve intendit and notice of trial with the citation.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

WILLIAMS V. LIQUIDATOR, { 1906.  
WOOD AND WILLIAMS. } Oct. 19th.

Inquiry under Sections 173 and 177 of Companies' Act, 1892  
—Presence of legal adviser of parties interested.

*A person interested in an enquiry held under Sections 173 and 177 of Act 25 of 1892 is not entitled, as of right, to claim that his legal adviser shall be present throughout the enquiry.*

This was an application for an order calling on respondent to show cause why an order should not be granted, authorising the applicant to be represented by his legal adviser at and during the whole of the proceedings of the Commission presently inquiring into the affairs of the company of Wood and Williams, Ltd., in liquidation, and to show cause why he should not be ordered to pay costs.

The affidavit of James Edwin Williams, the applicant, set out that on the 28th September, application was made to the Supreme Court by the liquidator of Wood and Williams, Ltd., for the appointment of a commission to examine in reference to certain transactions of the company certain witnesses among whom was deponent. Deponent was the first witness. He attended before the commissioner, and was accompanied by his attorney. On the conclusion of the examination (it lasted for five days) the attorney to the liquidator raised an objection to deponent's legal adviser being present during the examination of the succeeding witnesses, with the result that the commissioner stated that he considered himself bound to uphold the objection. A reference to the petition under which the commission was appointed, would show that the main object of the commission was to examine deponent: as a matter of fact, certain charges would be found in the petition. Deponent desired to be represented during the examination of the remaining witnesses by his legal adviser, in view of the fact that several witnesses had expressed themselves in a manner hostile to deponent's interests. The commissioner gave no reason

save that he had been instructed to object.

The answering affidavit of Wm. Shaw Brown, a chartered accountant, employed by the liquidator to make investigations into the affairs of the company, stated that on the first day of the examination, the following witnesses were summoned: J. E. Williams, W. F. Wood, William Seals Wood, and Gustav H. Rubenstein. The commissioner decided to take the evidence of J. E. Williams first, thereupon the attorney of Williams requested all the other witnesses should be ordered out of the room, and should not be allowed to be present during the examination of Williams. The commissioner said he was willing to comply with the request, but that the same rule should apply all round. The liquidator was desirous for reasons which he did not wish at present to make public, that the evidence of each witness should be taken separately and privately, and deponent was of opinion that this was in the interests of the creditors and shareholders, and would tend to the elucidation of the truth of a very complicated position of the company's affairs that this mode of procedure should be adopted.

The applicant's replying affidavit set out that the reason for requesting the exclusion of the witnesses was the previously expressed hostility of several witnesses. No objection was raised to the attorney, who represented these witnesses, being present during his examination. The liquidator appointed by the company was John Cargill Fraser, who, immediately upon his appointment, delegated his power to Rubenstein, and Rubenstein had appointed Wm. Shaw Brown to investigate the accounts. Rubenstein, who was practically the liquidator, was also apparently to be called as a witness.

Dr. Greer was for the applicant, and Mr. Benjamin was for the respondent.

Dr. Greer submitted that the application was a perfectly reasonable one, and the Court had power to grant it. It was quite clear from the original petition that Mr. Williams was being attacked. There was a specific charge that he was in possession of a certain stock-book that had mysteriously disappeared. The real object of having the commission appointed was to attack the present applicant. Mr. Rubenstein, who practically occupied the position of liquidator, through a power of attorney, had yet apparently to be called as a witness to give information to the liquidator. Counsel referred to sub-section 4 of the 154th section of the Companies' Act of 1892, which provided that after the report of the official liquidator any creditor or contributor of the company may take part in the examination, either personally or through his counsel or attorney. Counsel submitted that these provisions

really applied to a case of this kind. There was a real necessity for the applicant being present at the proceedings, because the proceedings were in the hands of those who were hostile to him.

Mr. Benjamin said he did not think that the 154th section of the Act applied to this case. There was authority for saying that no one interested was entitled to be present. The Court had relaxed it to the extent where a weak witness was being examined they allowed his counsel or attorney to be present. These proceedings were really in the nature of a Star Chamber inquiry. It was not the sole object of the commission to take evidence of Williams as it would be seen from the original petition, there were several gentlemen whose evidence was required.

De Villiers, C.J., drew counsel's attention to the fact that there was no record to show under what section the commission was granted.

Mr. Benjamin said he might be allowed to state from the Bar that it was granted under the 186th section of the Act 25 of 1892. It would only be a public examination under the 154th section after the report of the liquidator, and there had been no report yet, so it could not be under that section.

Dr. Greer having been heard in reply.

De Villiers, C.J.: If the appointment of a commissioner had been made under the 154th section of our Act, I should have thought that the Commissioner would have been quite justified in allowing the legal adviser of the applicant to be present throughout the proceedings. But the Commission was not appointed under the 154th section at all. If it was appointed under any section it must have been under the 173rd and 177th sections of the Act. These sections empower the Court to make certain inquiries or to direct the making of certain inquiries concerning the dealings of the company. The inquiries thus made are for the information of the Court, and there is nothing in the Act which entitles persons interested in the Company to be present at the inquiries. It is said, however, in the present case the whole object of the inquiry is to inquire into the conduct of the present applicant. I do not find such to be the purpose of the original application. No doubt there is one statement in the original petition that there is also missing from the offices of the company a certain stock-book, which there is reason to believe is in the possession of Williams. A statement of this kind does not make it necessary that Williams should have his legal adviser present throughout the whole of the proceedings. The application must be refused, but under all the circumstances the costs will be costs in the liquidation.

[Applicant's Attorney: A. J. McCallum. Respondent's Attorney: Syfret, Godlonton, and Low.]

HODGSON V. HODGSON.

**Incompetency—Marriage—Annulment.**

*In an action by the plaintiff against the defendant for annulment of their marriage on the ground of the defendant's incompetency, it was proved, that although the parties had been married for more than three years and although the plaintiff had always been ready and willing to cohabit with him, he had never succeeded in performing his matrimonial function, so that she continued to be a virgin.*

*Held, that she was entitled to succeed in the action.*

This was an action brought by a Cape Town lady for a declaration that the marriage she had entered into with the defendant was null and void.

Mr. Benjamin was for plaintiff; defendant did not appear.

The plaintiff, in the course of her evidence, stated she had known the defendant in England previous to the marriage, which took place in Cape Town in June, 1903. Before the marriage the defendant said to her they were only going to be "pals."

Dr. Bennie Hewat gave evidence in support of plaintiff's case.

This concluded the evidence.

Mr. Benjamin, in argument, quoted the cases of *F. v. P.* (75 "Law Times Reports, 192), and *B. (otherwise H.) v. B.* (Law Reports, Probate Division, 1901, 39).

Plaintiff (recalled) said that she had asked her husband to be examined by a medical man and he had refused.

By the Court: Witness lived with her husband until the 1st August. She did not tell him the reason why she had left him. He had told her that the intellectual life was the best.

Mr. Benjamin cited Voet (24, 2, 15).

De Villiers, C.J.: There has been no proof that the defendant is suffering from a physical defect, visible on inspection, which would render him unfit to perform his matrimonial function. If proof of the existence of such a defect now, and at the time of his marriage, had been given, the lapse of time without the performance of such function would have been of no importance. The only proof of incompetency, however, in this case is the fact that, although more than three years have passed since the marriage, and although the plaintiff has been ready and willing to cohabit with

him, he has never succeeded in performing his part. Upon this point the plaintiff's evidence is supported by that of the doctor who, on inspection, found her to be a virgin. She suggested to the defendant that he should also submit to an inspection, which he refused to do, and he has not appeared to defend this action. Under these circumstances the plaintiff is entitled to have the marriage annulled. See Groeneweg (*ad Cod* 5—17—10), and Voet (24—2—15). The marriage must be declared null and void with costs.

GILDEMEISTER V. MACLACHLAN.

**Partnership—Inchoate agreement.**

This was an action to have a certain partnership between the plaintiff and the defendant dissolved, and the appointment of a Receiver to liquidate the partnership and frame a proper account, with costs.

The declaration set out that the plaintiff, Gottfried Gildemeister, and the defendant, Harry MacLachlan, were both of Vryburg. On the 12th June and the 7th February the plaintiff advanced certain sums of money to the defendant, who agreed to pay interest. On the 19th April it was agreed that the plaintiff should before the 30th June deposit a further sum of £750, and the total sum of £1,000 should be used by the defendant in the purchase of live-stock in the Vryburg district. In the partnership the plaintiff was to get one-third of the profits, and the defendant was to bring into the partnership all the live-stock owned by him. A document was drawn up, and signed by the plaintiff as follows:

"Hayslope, April 19, 1905.

"I, the undersigned, hereby agree to deposit the sum of seven hundred and fifty pounds (£750) to the credit of Harry Campbell MacLachlan, at the Standard Bank, Vryburg, on or before the 30th day of June, 1905, on the following terms and conditions: (1) That the said Harry Campbell MacLachlan allows me one-third share of the profits derived from the breeding and selling of all farm stock and agricultural produce during the time I am the partner of the said Harry Campbell MacLachlan; (2) the said profits to be derived, as stated, after all expenses, such as rents, taxes, and interest and working expenses, have been paid."

(Signed)

"GOTTFRIED GILDEMEISTER.

The document, however, did not purport to record the full arrangement. The defendant purchased a farm near

Vryburg, where he moved his stock, and the plaintiff joined him. On the 30th June the plaintiff handed the defendant a cheque for £700. The defendant failed to purchase the additional stock for which the amount was subscribed, except in the sum of £126. The defendant had also failed to keep proper books and accounts. Certain moneys of the plaintiff had been misapplied in the purchase of land in breach of the agreement, and the land was purchased in defendant's own name.

The defendant, in his plea, denied that he had failed to purchase the additional stock. The £300 was not advanced, but was deposited in the bank in defendant's name, as the plaintiff had no banking account. The parties entered into an oral agreement, which was to last three years. It was first agreed that the defendant should contribute £213 18s., together with a further sum of £750. Subsequently, in April, it was agreed that the defendant should be allowed to appropriate the sum of £300 towards the purchase price of the farm, and at the same time it was agreed that the defendant should be allowed to appropriate £600 for the same purpose out of the amount which he (the defendant) had undertaken to contribute. It was further agreed that the farm should remain the property of the defendant solely, the sum of £300 to be repaid to the plaintiff, together with one-third share of the improvements made on the farm. The £300 was applied towards the purchase of the farm in accordance with the agreement. The defendant had never at any time undertaken to pay interest. The plaintiff's right to claim a dissolution of the partnership was denied.

Mr. Searle, K.C. (with him Mr. Toms), for plaintiff; Mr. Burton (with him Mr. J. E. R. de Villiers) for defendant.

Godfrey Gildermeister (plaintiff) stated that in April, 1904, he came from Germany, and went to a farm at Stutterheim belonging to Mr. Malcomess. He received a sum of £500 from his mother, and was anxious to start farming. The defendant suggested that witness should come and live with him, and witness did this in November, 1905. Witness handed over to the defendant £250, on which interest was to be paid at the rate of 3 per cent. Witness understood that he was credited with the money, but afterwards he found out that this was not so. Witness's mother died in January, 1905, and he told the defendant he would get £750 from Germany, and the defendant then said he would put his live-stock into the partnership if witness put in the additional money into the partnership. The defendant brought about 348 sheep and 40 head of cattle. Witness was to get a third of the profits. None of witness's money was to be put into the land. Witness

would have objected to this. In June he received from Germany £750, and handed the defendant £700 for the partnership. Witness became suspicious that the money was not being invested according to the partnership agreement when the defendant asked him to write home for more money to stock the land. When witness asked for a copy of the document of the 19th April, the defendant said he would give one at his convenience. The account furnished showed a loss of over £500, with which plaintiff was not satisfied. The defendant admitted to him that part of the money had been used in land purchase. It was not possible to continue the partnership, as he was not satisfied with the way in which the money had been employed or the accounts kept.

Cross-examined by Mr. Burton: An accountant had gone into all the books of the defendant. When witness asked to look at the books, the defendant said it would be time enough to go into the accounts at the end of the year. It was not the case that the defendant was only to pay interest on the £250 if he used it. At the time when he went into partnership with the defendant, he did not know how much money the latter had.

Alfred T. Hennessy, accountant, of Cape Town, said he had gone into the accounts and books of the defendant. The amounts of £200 and £50 were put into the defendant's account, and he used the money. Witness was taken over the entries in the bank pass-book. He stated that the total outlay on the farm was £1,605. Towards this, a bond of £700 was raised. Out of plaintiff's money, £700 was paid; £54 was paid in connection with the costs, and the balance of £157 odd was paid on the 17th August. There was only one account, first at Stutterheim and afterwards at Vryburg, and it was in Mr. H. MacLachlan's name.

[De Villiers, C.J. (to witness: Would it be possible from these books to prepare an account of what is owing?)]

Not without an agreement being come to between Gildermeister and MacLachlan as to what is partnership and what is private.

Mr. Searle submitted that it was impossible to go into the matter further, and that someone should be appointed to go into the accounts.

[De Villiers, C.J.: Seeing that the partnership is to be dissolved, would it not be best to appoint a receiver?]

Yes; that is what I am going to suggest.

[De Villiers, C.J.: Of course, the defendant may object to a dissolution after all, and that this is a three years' partnership.]

I submit that, under all the circumstances, one partner is entitled to have the partnership dissolved. They cannot go on like this.



Cross-examined: The whole of the transactions passed through the bank. His idea was that it was erroneous to keep only one account, and mix the partnership and private accounts. He had seen the notes made by Mr. MacLachlan in his pocket-books, but it was impossible to follow the entries properly.

Jonathan C. Bennington, farmer, Bechuanaland, spoke to certain stock having been brought across his farm by MacLachlan.

Reginald E. de Beer, attorney, of the firm of Rosenblatt and De Beer, and that he had an interview with MacLachlan at his office in reference to what had become of plaintiff's money. Defendant produced a book, and said that the entries were there. Witness asked defendant to point out the entries, but he did not do so, and witness could not understand the entries.

Mr. Searle closed his case.

Henry Campbell MacLachlan stated that the commencement of the partnership was the document of April 19. Prior to the document he had been in negotiations for the purchase of the farm. In order to meet the first instalment in the purchase of the farm the plaintiff agreed to put the money into the partnership on June 30. The arrangement was that the £700 was to be paid as the first instalment. The understanding was that witness was to put back the £400 into the partnership. Witness's contribution to the partnership was £2,200, being the value of certain stock, implements, etc. The plaintiff started with a sum of £1,023. The £300 belonging to the plaintiff was to be returned after three years, and there was no interest to be paid. The plaintiff had a consideration allowed for the loan by way of a reduction of rent, interest, etc. When witness went to the farm with the plaintiff in June he brought with him 368 sheep and 43 head of cattle, his own property, and six head of cattle, the property of the plaintiff. There were 210 lambs, and some big cattle belonging to defendant, left behind. Witness spent about £100 recovering the stock. There was no agreement between the plaintiff and himself that only stock should be purchased. He distinctly stated to the plaintiff that he had no intention of buying stock in Bechuanaland until he had been in the country at least 12 months. When witness suggested a deed of partnership at the beginning of the year things were not working smoothly. The plaintiff objected to the valuation of the oxen, but he was satisfied with the valuation of the other cattle. Witness was annoyed, and then suggested a re-valuation of everything which the plaintiff objected to. The farming operations were now improving, and later on he hoped to show a profit.

Cross-examined: Witness made the entries in May, 1905, in his diary (produced) at the time the arrangements were entered into in the presence of the plaintiff. He read over his entries to the plaintiff, and told him that those were the final arrangements. The memos. in May did not state how much stock witness was to put in, but there was an entry on June 1, 1905, setting out how many stock were to go to Bechuanaland. Witness did not treat plaintiff as a part owner of the land. Plaintiff advanced £300. Witness considered that he had a right to bond the land as he thought fit.

By the Court: The witness contributed in the way of capital £2,244, and plaintiff was to contribute one-third. They decided to reduce the capital, witness's share by £600 and plaintiff's by £300.

[De Villiers, C.J.: But he did not get his £300 back? He left this £300 with you?]

Witness: I have to pay that back at the end of three years. The total sum of £900 went towards the purchase price of the farm.

In further answer to the Court, witness said that he regarded this sum of £300 as a personal loan to himself.

Further cross-examined: Witness had proved and improved the farm.

Mr. Searle: Yes, and you have taught Mr. Gildermeister a little about farming in Bechuanaland.

By the Court: Witness looked upon the losses up to May 15, 1906, as £566. The wells that were sunk were failures. When the account was drawn up, one of them was now giving water, and was a success.

Mr. Searle (to defendant): I put it to you that the result of the whole thing is that you have got the whole of the improvements on your farm, and Mr. Gildermeister has got the experience?

Witness: No, sir.

De Villiers, C.J., suggested that a compromise should be arrived at, and that the defendant should pay to plaintiff the amount of capital that he had put in, less one-third portion of the expenditure wasted on well sinking. This would leave an amount of £918 in favour of plaintiff.

Defendant said that he would be prepared to do that, but there was one point that he should like to mention, and that was in this action he had been accused of dishonesty, because that was what the declaration alleged.

Counsel on both sides, after consultation with their clients, intimated that they were prepared to adopt the suggestion thrown out by the Court.

Mr. Burton said that his client felt sore about the alleged misapplication of the funds, and he desired that that allegation should be withdrawn.

De Villiers, C.J., said that defendant had exposed himself to it by the manner in which he had kept his accounts, because it certainly was not the proper thing to mix up the two accounts.

Mr. Searle said that the plaintiff was quite willing to say that he had intended no imputation against defendant's honesty in this matter, and that, if any such imputation were made, he desired to withdraw it.

Counsel having been heard on the question of costs,

De Villiers, C.J.: The only written evidence of a partnership is contained in a document dated April 19, 1906, and in that document nothing is said as to the period over which the partnership was to extend. No doubt, there were subsequent negotiations, and the defendant produces a diary in which the alleged terms of the partnership are entered, and, according to that, the partnership had to last for three years. But it is quite clear that it was merely an inchoate agreement. If the parties wished to have a definite agreement of partnership they could have had it drawn up either by themselves or by proper legal advisers. The whole thing was unsettled, and I am satisfied that the condition of things was such that when the present dispute arose the relationship between the partners was such that it would be impossible for them to carry on the partnership, and that the period had arrived for a dissolution of partnership. That is really all that the plaintiff claims—a dissolution of partnership. That, in my opinion, on the evidence so far as it has gone, the plaintiff would have been entitled to. It would have been wholly impossible for them, when the relationship had become so strained, to carry on the partnership, with any benefit to either of them. Then the plaintiff would be entitled to get back the money he has paid. He has advanced £1,025, but then it is said there had been losses to the extent of £566. These losses represent £144 for wells which had been sunk and the defendant now admits that one of these wells is not a dead loss, and I think the £144 might fairly be deducted from the £566. There would remain, therefore, £422 as losses. If the plaintiff has to bear one-third of them it would be £107. Deducting £107 from £1,025 leaves £918. That gives the plaintiff no interest whatever on his money. It does not give the plaintiff interest on the £300, but still, the plaintiff is prepared to accept £918. Now, upon the question of costs, it seems to me to be fair that the costs should be apportioned in proportion to the interest which each had in the partnership and, therefore, the judgment of the Court will be for the plaintiff for £918, but the defendant is to pay two-thirds

of the total costs of this action and the plaintiff to pay one-third of the total costs of this action. I think it may be to the satisfaction of the defendant to know that, in the opinion of the Court, there is no evidence of any intention to misappropriate. There is no evidence of that kind, but, at the same time, the Court cannot lose sight of the fact that the accounts were not kept in a proper manner. Where a person goes into a partnership of this kind it is his bounden duty to keep the partnership account entirely separate from his own private account. The plaintiff left it to the defendant to keep the books and accounts, and it was clearly the duty of the defendant to have kept the books and accounts in a wholly different manner. He has mixed up in the account he renders domestic items with the items connected with the partnership.

Mr. Burton applied for a stay of execution on behalf of the defendant.

His Lordship directed that £400 be paid within one month, and that the balance be paid within three months of this date, defendant undertaking, meanwhile, not to mortgage the farm without the consent of the plaintiff.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Michau and De Villiers.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLBY.]

### GENERAL MOTIONS.

*Ex parte* SALIE. (1906.  
(Oct. 19th.)

Mr. Lewis moved as a matter of urgency on the petition of Nomenati Salie (born Berdien) for the attachment of certain funds in the Standard Bank, Cape Town, pending an action to be brought by petitioner against her son (Amanie Salie), in whose name the money is standing. Petitioner, a Malay, it appeared, had been twice married, and the respondent was her son by her first marriage. She had inherited a sum of £497 18s. 4d. from the estate of her grandfather. She bought certain movables and decided to place the balance in the bank on floating deposit, but, as she was unable to write, the money was deposited in the name of her son. He had given her a worthless credit slip and had gone to Port Elizabeth without saying "Good-bye." Although written to, he had refused to send her a cheque for the amount of £250 which, she be-

lieved, was standing in the bank in his name. She was informed that respondent intended to leave Port Elizabeth.

Hopley, J., said he thought the matter might very well be disposed of on motion, and he granted an order interdicting the Standard Bank from parting with any of the money standing in their books in the name of Amanie Salie, pending further order of Court, and also granted a rule nisi calling upon the said Amanie Salie to show cause why the sum of money standing in his name at the Standard Bank should not be paid over to petitioner or her duly-authorised attorney, and why he should not pay costs of this application, rule returnable on the last day of term, personal service, failing which, one publication in the "Government Gazette" and "Eastern Province Herald."

*In re* THE PURE MILK SUPPLY CO. (IN LIQUIDATION).

Mr. Roux presented the first report of the official liquidator of the Pure Milk Supply Company, Ltd. (Mr. Alex. R. Watson).

Mr. Roux said that he had to apply for the usual order as to the report lying for inspection, and for costs to be costs in liquidation. Counsel proceeded to read the report, and then discovered that the company belonged to East London. The report stated that the company was formed with a capital of £2,000 in 200 £10 shares, of which 147 were subscribed. The object of the company was to supply milk in East London pasteurised, and although the directors worked hard in the interests of the company without remuneration in several capacities, the company never paid its way from the start, owing to several reasons, the chief being the milk not giving satisfaction to the customers. On a good portion of the capital becoming expended, the directors thought it best to apply for the liquidation of the company. Owing to several engagements and leases having been entered into by the company which were now terminated by the liquidation, it was not probable that the creditors would be paid in full, as the directors had hoped. At the date of the order of liquidation, the assets were estimated at about £670, and the liabilities the same.

He suggested that there should be publication in an East London paper. Counsel (in answer to the Court) said that he could not say whether the creditors were in East London. His attorney was not in court.

Hopley, J., said that the attorneys or their clerks should be in court when any matters they were concerned in were coming on. At all events, one of the clerks should be there, because

(added his lordship) "it would be wholesome for the clerk and useful to the Court."

The Court ordered the report to lie at the Master's Office for a fortnight, one publication in the "East London Dispatch," no order as to costs at the present stage.

*Ex parte* VAN ECK.

Mr. Pohl moved, on the petition of Petrus Johannes van Eck, of Aberdeen, for the appointment of *curators ad litem* to represent certain minors and a lunatic in a special case which it is proposed to submit to the Court as to the interpretation of a will. Counsel (in answer to the Court) said that he thought it would be desirable to have separate curators for the minors of the first and second marriages respectively and for the lunatic. The clause in dispute was very vague, and there might be some conflict of interest.

Order granted as prayed, Messrs. Watermeyer, Sutton, and Bailey being appointed *curators ad litem* to the minors and lunatic.

MACDONNELL V. MACDONNELL.

Mr. Alexander moved, on the petition of Gladys Macdonnell, for leave to sue her husband, Charles Robert Macdonnell, by edictal citation for restitution of conjugal rights, failing which a decree of divorce. The parties were married at Cape Town. Petitioner said that her husband deserted her in November 1904, and that she had since had no tidings of his whereabouts.

Leave to sue by edict granted, citation returnable on the 1st February, personal service, failing which one publication in the "Government Gazette," "Cape Times," and "S.A. News."

*Ex parte* ESTATE CARY.

Mr. Watermeyer moved on the petition of Rayner Garlake, of Tarkastad, one of the joint trustees in the insolvent estate of Thomas Bovey Cary, for leave to pass transfer to petitioner of a certain erf at Tarkastad belonging to the estate, which he had bought at public auction for £400.

Order granted as prayed.

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TORIEN V. HORWITZ (1). { 1906.  
TORIEN V. HORWITZ (2). { Oct. 22nd.

**Partners—Non joinder—Amendment of summons.**

*The plaintiff sold certain produce to the defendant, who signed a document in his own name, acknowledging the purchase and promising to pay on delivery of the purchase. It was held in the Court below that as the plaintiff had the means of knowing that the defendant had a partner in the purchase of the produce; such partner should have been joined as co-defendant.*

*Held on appeal, that as credit was given to the defendant, the plaintiff was entitled to sue him alone.*

These matters came on appeal from the Resident Magistrate's Court at Tulbagh.

In the first case, appellant sued respondent on a cheque for £35, drawn in his favour by S. Horwitz. The second case related to an account for onions sold and delivered to defendant upon which a sum of £27 11s. was alleged to be owing. Defendant took exception in the Court below that his partner Dembo ought to have been joined in the actions. This exception was upheld.

The Magistrate, in his reasons for judgment, said that these actions were both brought in his court on the same day. Exception was taken to both summonses that the transaction was one connected with a business run by defendant in partnership with another active partner, who had not been joined in the action with him. The exception appeared to be a fatal one. After plaintiff had denied the partnership and called for proof of such, it was proved to his (the Magistrate's) satisfaction that the defendant had been openly trading in partnership for several months before the demand was issued, which could easily have been ascertained by casual inquiries on the spot. The exception was sustained in both cases, and absolution given, with costs.

Mr. Molteno was for appellant, Pieter Jacobus Torien; Mr. Alexander was for respondent, Saul Horwitz.

Mr. Molteno submitted that the Magistrate's ruling was wrong. Defendant went to the plaintiff's farm, and bought certain onions in his own name, and gave a cheque for £35 in his own name, and also signed a contract of sale in his own name. He also left with plaintiff a card bearing only his own name. The Magistrate seemed to have been guided by the decision of *Aurel's Trustee v. Pienaar* (3 Juta, 40), but he (counsel) contended that that case did not touch the point in the present case.

Mr. Alexander, in support of the Magistrate's ruling, said that it had been found as a fact, in the Court below, that it had been clearly proved that there was a partnership between these two parties, and he submitted that, as he was satisfied in regard to the evidence of partnership, the Supreme Court would not overrule the Magistrate's decision on a question of fact.

[De Villiers, C.J.: But the question in this case is, to whom was credit given? Defendant went to the plaintiff's farm alone.]

Mr. Alexander: Even so, the Magistrate goes on to say that the defendant had been openly trading there in partnership for several months before.

Mr. Molteno (in answer to the Court) said that he did not ask for judgment, but that the cases should be sent back to be tried on the merits.

Mr. Alexander said that the defendant and his partner had been openly trading at the station, and the plaintiff admitted that, by asking at the close that the defendant's partner should be joined. He submitted that, if the cases were remitted, costs should abide the result.

De Villiers, C.J.: It appears to me that the Magistrate has erred in his judgment. In his reasons he says that "at the hearing it was proved to my entire satisfaction that the defendant had been trading openly in partnership for several months before the demand was issued, which fact could easily have been ascertained by the plaintiff or his agent by the most casual inquiries on the spot." He does not say that the plaintiff knew that the defendant had a partner, but that he might have known if he had made inquiries. But there is no obligation upon a person to make inquiries of this nature. If a man comes to my place to purchase produce from me, and does not name his partner, I am justified in assuming that, although he may have partners, he comes there to buy on his own behalf, unless he in some way indicate that he came on behalf of the partnership. Now, it is true that in the defendant's own evidence something of

the kind is said—that he had said that he had a partner—but the Magistrate does not seem to rely upon that point, and in the plaintiff's own evidence, he says that defendant gave him the note marked "f," promising payment on delivery. That note was signed only by Horwitz (the defendant). He also gave him the card marked "c." That is also the card of the defendant alone. The plaintiff had not the slightest knowledge that the defendant had a partner. Defendant promised to send a man with the bags to pick out the onions. In cross-examination plaintiff said that he did not know Dembo until he came out to his farm, which was about two hours by cart from Porterville-road. Moreover, the document of the purchase of the onions is also signed by S. Horwitz alone, and there is no mention of the partner. "The undersigned has bought from P. J. Torien"—"the undersigned" is Horwitz, not q.u., nor is the partnership mentioned. Therefore, it is clear that in this case credit was given by the plaintiff to the defendant alone, and that is the test in this case—to whom was credit given? To my mind, it is perfectly clear that, whatever means of knowledge the plaintiff possessed, he intended to give credit to Horwitz, and Horwitz alone, and, therefore, he is entitled to sue him alone. But, then, it is said that the plaintiff afterwards offered to join Dembo, the partner, in the action. There is nothing inconsistent in that if Dembo comes forward and says: "I am the partner, I have no objection to being joined and sued with defendant." Plaintiff applied to join Dembo, whereupon objection is made, and the Magistrate allows that objection also. I think it is a very unreasonable course on the part of Horwitz's attorney to take the objection, and on the part of the Magistrate to disallow this reasonable request. When Dembo comes forward and says he is a partner, the plaintiff should be allowed to join him as defendant. As to the question of costs, it is an altogether unreasonable defence from beginning to end, and, therefore, the plaintiff was quite justified in appealing, I think, against this judgment. The appeal must be allowed, with costs in this court, and the case remitted back to the Magistrate to be tried on the merits, costs in the court below to be left to the discretion of the Court.

Mr. Molteno said he took it that the decision of his lordship applied to both cases.

[De Villiers, C.J.: Oh, yes; it applies to both.]

DE KOCK V. FICK.

Giving time to debtor—Payment in instalments.

*The defendant offered the plaintiff, to whom he owed the sum of £43, to liquidate the debt in instalments of £2 a month, and the plaintiff accepted the offer.*

*Held, that on failure of the defendant to pay one of the monthly instalments, the plaintiff was entitled to claim payment of the whole debt then still due to him.*

This was an appeal from a judgment of the Resident Magistrate of Bredasdorp in an action brought against appellant by respondent for £39 10s., for goods sold and delivered. The Magistrate had given judgment for plaintiff.

It appeared that attached to the summons was an endorsement in these terms: "On the 1st February, 1906, defendant signed an acknowledgment of debt in favour of plaintiff, which acknowledgment has subsequently been mislaid." The debt was contracted in respect of certain carts supplied at defendant's special instance and request. The original amount was £73 10s., reduced by payments to £39 10s. Exception was taken by defendant in the Court below that he should have been sued on a copy of the lost document and not on the open account. This was, however, overruled. Defendant said that the acknowledgment of debt stipulated that he should have the balance of £43 10s. then owing at the rate of £2 per month.

The Magistrate, in his reasons for judgment, said that, as to the exception, he was not aware at that stage of the existence of the acknowledgment of debt. The only document before him, and attached to the summons, was an open account on which he was being sued, the genuineness of which he did not dispute. He (the Magistrate) saw no reason, therefore, why he should entertain the exception. The defendant seemed to contend that the account was not yet due, and that an agreement had been entered into, whereby he was to liquidate the debt by monthly instalments of £2. He did not hesitate to believe Mr. Hofmeyr when he swore that the copy he produced was a true copy of the original which he had drawn up, and in which no mention was made of the payments. He (the Magistrate) did not believe that the original bore any such arrangement, as the defendant claimed.

Mr. Louwrens was for appellant. Pieter E. de Kock, of Bredasdorp; Mr. M.

1927 O.P.D. 34

1929 W.L.D. 106

1927 C.P.D. 129



Bisset was for respondent, Willem L. Fick, of Caledon.

Mr. Louwrens submitted that the exception should have been sustained. The acknowledgment of debt stipulated that £2 per month should be paid and the whole amount had not become due. The lost document set forth the rights of the parties and the agreement, and the plaintiff should have sued on a copy of the lost document. Counsel relied on sections 67 and 68 of the Bills of Exchange Act.

Without calling upon Mr. Bisset,

De Villiers, C.J.: It appears to me that the Magistrate was perfectly correct in his judgment. Even if the document were entered into in terms of the letter of the 3rd February, 1906, defendant had failed to perform his part of the agreement. It is clear that on the 3rd February, 1906, there must have been owing to the plaintiff the sum of £43 10s. That sum was payable at once. The plaintiff might have insisted upon £43 10s. being paid to him at once. He, however, authorised his attorney to write as follows: "I have instructions to inform you that Mr. Fick is agreeable to accept your offer to pay instalments of £2 per month in liquidation of your debt. Your other offer to pay the balance of liability by the end of March, therefore, falls to the ground. I shall be pleased if you would kindly pay in to me the sum of £4, being instalments due for the months of January and February, 1906." These two instalments were already due, and, therefore, they were put together, and £4 was demanded, and the £4 was paid. Upon failure by the defendant to pay any of the subsequent monthly instalments, the plaintiff was quite justified in claiming payment of the whole debt. It is unnecessary, therefore, to consider the further question as to this note. The Magistrate is satisfied that this document (a) is a true copy of the document which was signed, and that it is an unconditional acknowledgment—not a promise to pay, but an acknowledgment. The Magistrate finds that that was the nature of the document. The Magistrate has seen Mr. Hofmeyr and heard his evidence, and the Court could not well now, upon the suggestion of counsel, hold that is not the document. If that were the document, it was not a promissory note, whatever the parties may have called it. Quite independent of that, the plaintiff is entitled to be paid the whole amount, seeing that the defendant failed to pay one of the instalments as it fell due. The appeal must be dismissed, with costs.

#### MEYER V. KATZENELLENBOGEN

This was an appeal from a judgment of the Resident Magistrate of

Ceres in an action brought by appellant against respondent for £13, being £8 in respect of purchase price of a horse and £5 damages. The Magistrate had given absolution from the instance, with costs.

The matter arose out of a horse transaction. Plaintiff said he bought a mare from defendant for £8 on a guarantee that the animal was sound, and in good health. Plaintiff caused to be delivered to defendant a bicycle valued at £5, and a promissory note for £3, as the purchase price of the mare. He now complained that the mare was unsound and unhealthy, and said that he had tendered the return of the animal to defendant, who, however, declined to receive the same or to return the bicycle and promissory note. The defence was that no guarantee had been given. There was a wound on the animal's throat, stated to have been caused by a nail, and in other ways it was admittedly in a poor condition.

The Magistrate, in his reasons for judgment, said that the evidence was most contradictory. He looked upon the defect as a patent one, and he gave absolution from the instance.

Mr. Benjamin was for appellant, Fritz Meyer; Mr. De Villiers was for respondent, Charles Katzenellenbogen.

Mr. Benjamin submitted that the balance of the evidence was with the plaintiff, who was a watchmaker, and against the defendant, who was a horse dealer. It was only to be expected that plaintiff would ask for a warranty. The evidence of defendant and his witnesses was very inconsistent.

Without calling upon Mr. De Villiers,

De Villiers, C.J.: At the time of the sale this horse was suffering from an ailment which would be apparent to anybody. The plaintiff, before he bought the horse, saw the animal, had an opportunity of inspecting it, and could have known whether this horse was suffering from an ailment or not. The plaintiff does not rely upon any latent defect in the horse, so as to entitle him to either of the remedies mentioned, but he relies upon an express warranty, that at the time before he purchased the horse and afterwards, there was an express warranty on the part of the defendant that the horse was sound. It is a question of fact. The plaintiff swears that there was this warranty, and he is supported by the old man Wiese, who is supposed to have been in an adjoining room at the time when the warranty was given. On the other hand, the defendant and his witnesses deny that the warranty was given and the Magistrate was satisfied that the evidence given on the part of the defendant was more trustworthy than the evidence given on the part of the plaintiff. It seems to me entirely a question of credibility in this case, and I see no reason why the Court should

now disturb the decision of the Magistrate, who is satisfied from the manner in which the defendant and his witnesses gave their evidence that no express warranty as to soundness was given by the defendant. The Magistrate was therefore, right in his judgment, and the appeal must therefore be dismissed, with costs.

REX V. DU PLESSIS. { 1906.  
{ Oct. 22nd.

**Criminal summons—Amendment  
—Autrefois acquit.**

*The appellant was charged in a Magistrate's Court with having stolen a horse from some person unknown, but upon the case being called, the police informed the Court that the owner had been discovered, and applied for an amendment of the summons by substituting the name of the owner. The Magistrate refused to allow the amendment, but allowed the first summons to be withdrawn and an amended summons to be proceeded with. The appellant having been convicted.*

*Held on appeal, that the Magistrate would have been justified in allowing an amendment of the original summons, and that the fact of the original summons having been withdrawn and an amended summons proceeded upon did not entitle the appellant to raise the defence of previous acquittal.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Upington, who had convicted appellant (Nicolas Jacobus du Plessis, a sheep farmer, of Prieska district) of the crime of theft, under Act No. 35 of 1893, and had sentenced him to six months' imprisonment, with hard labour.

The grounds of appeal were (1) that appellant had previously been tried and discharged for the same offence; (2) that legal and competent evidence tendered on his behalf was rejected and (3) that the conviction was not supported by the evidence, and was contrary to law.

The charge on which appellant had been convicted was that he had stolen a horse, the property of one Uriah

Weissohn. Defendant's version was that he had bought the horse from a Kafir while he (defendant) was returning from German territory, whence he had been taking sheep. He was first charged with the theft of a horse, the property of some person or persons unknown, but that charge was withdrawn because the police were not allowed to amend the indictment by inserting the name of the owner. Accused was immediately afterwards re-arrested and charged with the theft of Weissohn's horse.

The Magistrate, in his report to the Court, said that he refused to allow the record of the first trial to be produced merely for the purpose of proving that the accused had been before the Court, because it was irrelevant in view of the fact that the circumstances sought to be proved were fully detailed in the record after accused's plea. The defence raised was so fraught with improbabilities and so impossible that accused's attorney had not raised this matter in the grounds of appeal.

Mr. Upington was for appellant; Mr. Howell Jones was for the Crown.

[De Villiers, C.J.: If accused had pleaded, and he were in jeopardy at the time, he cannot be tried again.]

Mr. Upington said he felt that the correct position for him to take up was that his case was sufficiently strong, it being admitted that there had been a previous trial with reference to this horse, when he (counsel) showed that the Magistrate improperly excluded evidence which was legally admissible to prove the plea of *autrefois acquit*.

No record of the first case was eventually produced, with the consent of Mr. Upington.

De Villiers, C.J., said he found that at the first trial accused pleaded not guilty.

Mr. Upington said that the Magistrate ought to have entered a verdict of either guilty or not guilty.

[De Villiers, C.J.: I suppose there is no doubt that it is the same horse that is mentioned in the further indictment?]

Mr. Upington said he did not think there was any question upon that point.

[De Villiers, C.J.: I think the Magistrate might have amended the summons.]

That is quite true, but as a matter of fact he did not. Counsel submitted that the accused having been arraigned and pleaded, he was in jeopardy at the first trial, and the Magistrate had acted irregularly in not finding him either guilty or not guilty. Accused was entitled to call the Clerk of the Court to produce the records of the first trial. Counsel submitted that the plea of *autrefois acquit* was good. In the case of *Rex v. Twalatunga* (20 Supreme Court Reports, 425), the accused was not in jeopardy. Counsel

added that he did not propose to go into the question of fact, in view of the finding of the Magistrate. He submitted, however, that the proceedings were irregular, that admissible evidence was excluded, and that the appeal should be allowed.

Mr. Jones submitted that the point raised in this case should have been taken by way of review, rather than appeal. His learned friend's objection to the conviction was practically a technicality. In answer to that, he contended that he was also entitled to take the technical objection that there had been no acquittal. Furthermore, he submitted that a plea of *autrefois acquit* could not be sustained, because the prisoner was never in peril at the first trial, inasmuch as, even if the Magistrate had convicted, it would have been set aside on review. The Magistrate had not convicted or acquitted the accused on the first charge, and it would have been the duty of the prisoner to take the objection at the second hearing that the first charge had not been dealt with. The second indictment was, legally speaking, distinct from the first. If a prisoner pleaded *autrefois acquit*, he must show, not merely that he was in jeopardy at the first trial, but that the second indictment on which he was convicted charged a like offence to the first. Counsel quoted Archbold (p. 155), Stephen (p. 174), *R. v. Green* (D. and B. Crown Cases, Vol. 1, p. 113, *R. v. Kock* (3 Searle, 44), and submitted that the plea of *autrefois acquit* could not hold good in this case. There was a distinct variance between the two indictments, and the accused could not have been convicted on the first indictment on the evidence which was taken to be sufficient to convict on the second indictment.

Mr. Upington, in reply, submitted that if the accused could not have pleaded *autrefois acquit*, his client, if he had been convicted on the first indictment, might also have been convicted on the second, and thus have been punished twice over.

De Villiers, C.J.: In this case it appears that the accused was charged before the Resident Magistrate with the theft of a horse, the property of some person or persons unknown. Evidence was given in support of this charge, and there was then a remand for the purpose of further evidence until the 13th August. On the 13th August the case was again called on, and it then appeared that the person from whom the horse had been stolen was well known, that the police had got the information of the name of the person, and it was accordingly pointed out to the prosecution that the charge of stealing from a person unknown could not be proceeded with, because the person was, in point of fact,

known. Thereupon the police withdrew from the prosecution, and there and then—whether the accused was arrested again is not perfectly clear—the second charge was made against accused, viz., that of stealing this horse from Weissohn. Before this was done, an application was made to the Magistrate for leave to amend the original summons by substituting the name of the prosecutor Weissohn for the words "from some person or persons unknown." The Magistrate would have been perfectly justified there and then in directing that such an amendment should be made. The Act 20 of 1856 (section 50) says that "it shall and may be lawful for such Court, before or at the hearing, to amend any plaint or summons or other record, in regard to the misdescription therein of . . . any particular or particulars." There is this important proviso: "That no such amendment be made, except in some particular, which, in the judgment of such Court, is not material to the merits of the case, and by which the opposite party cannot be prejudiced in the conduct of his action, prosecution, or defence." There is nothing here to show that it would have in any way prejudiced the accused if the amendment had been made, because he came to be charged with the theft of a particular horse, and the fact that he is charged with stealing it from Weissohn, instead of from a person unknown, could not have affected his defence, and, therefore, the Magistrate would have been quite justified, seeing that there would have been no prejudice in the conduct of the defence, in allowing this amendment to be made. The Magistrate, however, instead of allowing the amendment, allowed the previous case to be withdrawn, and the further summons to be proceeded with, and the evidence was then taken on the second summons. Substantially, that is what took place. It was the same as if the amendment had been ordered. It may be that there was this difference, that a different piece of paper was used for the purpose of the fresh summons, but if the original summons had been used and had been amended, it would have made no possible difference to the accused. To my mind, that is really the answer to this appeal, that, practically and substantially, what the Magistrate did was to allow the amendment to the summons. In substance, that is what was done. The amendment was allowed and the suit proceeded upon what must be considered an amended summons, and, if that view of the case be correct, there is really no question of *res judicata* or previous conviction or acquittal, but the proceedings were fairly in order. The defence is not raised that there is a *lis pendens*, but the defence raised is

that there is an actual acquittal. That is the sole defence that the Court can deal with now. Certainly, there is no proof that there was a previous acquittal. The original case was not proceeded with, and, therefore, it is impossible to say that there was such a *res judicata* between the parties as to prevent the prosecution from proceeding with the case against the accused of stealing from a person who was well known, viz., Weissohn. For these reasons, I am of opinion that this appeal should be dismissed, and it is unnecessary, therefore, to go into the further questions which have been raised in this case. I only wish to make this remark, that in regard to the case of *Rez v. Twalatunga* (20, Sup. Ct. Reports, 425), if there is any difference between the two cases, the difference is certainly in favour of the prosecution in the present case, because, in the case of *Twalatunga*, there had been an actual conviction, and that conviction had been set aside by the Chief Magistrate on the ground of irregularity, and, notwithstanding that there had been this conviction and discharge by the Chief Magistrate, this Court held that the plea of *autrefois acquit* was not a good one. For these reasons, I am of opinion that the appeal should be dismissed. In regard to the merits of the case, I need not say much about it, because it seems to me perfectly clear that the theft was committed in the present case. The defence was wholly inadequate to meet the strong case which was made against accused of having stolen that horse. The appeal must, therefore, be dismissed.

MADUNA V. GOETECH.

Prescription Act, 1861 — Acknowledgment of debt.

*An oral acknowledgement of a debt for goods sold and delivered does not take a cause of action out of the operation of the 3rd section of Act 6 of 1861.*

Bell and Moore v. Swart (16, S.C.R., 404) followed.

This was an appeal from a judgment of the Resident Magistrate of Idutywa in an action brought against appellant by respondent to recover £5 16s. 6d., balance of account for goods sold and delivered. The Magistrate had given judgment for the full amount.

Mr. De Villiers was for appellant, Klaas Maduna, a blacksmith; Mr.

Gutsche was for respondent, John Goetsch, a general dealer.

Mr. De Villiers said that the transactions in question went as far back as May, 1891, and that after 1892, there was a gap of about eleven years, during which there was no trading between the parties. There was a defence on the merits that no money was owing by defendant to plaintiff. The other defence taken in the Court below was that the old part of the account should have been prescribed.

Counsel having been heard in argument,

De Villiers, C.J.: In this case the defendant was sued upon an open account, which commenced on the 11th May, 1891, and ended on the 6th October, 1904. The account was not a continuous one, because from 1893 to 1903, a period of ten years, there seemed to have been no dealings on credit between the defendant and the plaintiff. In March, 1903, fresh dealings began, and the total dealings from that date up to the 6th October, 1904, were to the extent of £3 14s. 9d. During this interval, however, the defendant paid £1 15s. on account, and the first question to be decided is, whether this £1 15s. is to be deducted from the old account, or whether it is to be specially appropriated to the new account. Well, upon this point the Magistrate has definitely found that the defendant agreed to let the old account be brought forward to the new account, and that the moneys paid in 1903 and 1904 were to be placed to the credit of the old account. There is not a distinct statement by the plaintiff himself to that effect, but if the defendant did agree, as stated by the plaintiff, that he would pay the old account, then it is a fair inference that in paying the £1 15s. he intended it to be placed to that old account, and also on the general principle that the older account would be paid before the newer account I am therefore not inclined to overrule the decision of the Magistrate in regard to this £1 15s., and I think it might fairly be deducted from the old account. But then arises the further question, whether, after so appropriating the £1 15s. to the old account, the plaintiff is entitled to sue for the balance of the old account. Now, that old account was certainly upwards of eight years old at the time when the alleged promise by the defendant was made to pay the old account. In the case of *Bell and Moore v. Swart* (16 Supreme Court Reports, 404) it was decided that an acknowledgment of a debt does not take the case out of the operation of the Prescription Act, 1861, unless made in writing by the party chargeable thereby. That was a decision of the full Court, and I see no reason what-



ever for questioning its correctness. The third section of the Act provides that the period of prescription for suits and actions for money due for goods sold and delivered shall be eight years. Then comes the eighth section, which provides that "in any suit or action in this colony in which any question shall arise concerning the effect, if any, of any acknowledgment of debt or any promise to pay any debt, or any payment of interest on any debt, or any part payment of the principal of any debt made by any person whomsoever, whether the person sought to be charged in such suit or action or not, in taking any cause of action out of the operation of this Act, the question shall be judged of and determined in this colony in like manner and by the same rules and principles as at it would be judged of and determined in any of Her Majesty's Courts of Record at Westminster, in case the effect of the same acknowledgment, promise, or payment were in question at the same time in any of such last-mentioned Courts." But for the 8th section, therefore, the suit now in question would have been barred. If an acknowledgment of the debt during the interval is relied upon as taking the cause of action out of the operation of the Act, the effect of such acknowledgment must be decided upon as if the question had arisen under the law of England as it stood at the time of the passing of the Act. If by that law no effect would be given to the acknowledgment unless it were in writing, the same result would follow in this Colony. Well, that being so, it is clear that, although £1 15s. may be appropriated to the old debt, the balance of the old debt could no longer be sued upon, because it is prescribed, and the only account, therefore, which remains payable is the new one. That would be £3 14s. 9d. Therefore, the appeal must be allowed to this extent, that judgment must be entered for the sum of £3 14s. 9d. in the Magistrate's Court, with costs in the Court below, but as there has been a substantial alteration of the judgment on appeal, the respondent (that is the plaintiff) will have to pay the costs of appeal. The Magistrate's judgment is accordingly altered to judgment for plaintiff for £3 14s. 9d., with costs in the Court below, plaintiff to pay costs of appeal.

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

SWINTON V. BOARD OF EXECUTORS.

1906.  
Oct. 22nd.  
" 23rd.  
" 24th.  
" 25th.  
" 26th.

### Agency—Negligence.

This was an action brought by Mrs. Swinton, of Plumstead, against Johannes Henoch Neethling Roos, in his capacity as secretary of the Board of Executors, to recover damages for alleged negligence in dealing with certain property during plaintiff's absence.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Plumstead, in the Cape Division, and is married out of community of property to Frederick William Swinton, by whom she is herein assisted as far as need be. The defendant is sued in his capacity as secretary of the Board of Executors, Cape Town.

2. In or about the month of April, 1901, the plaintiff, having in contemplation a visit to Europe, signed a general power of attorney in customary form, in favour of defendant to act as her agent and otherwise represent her during her absence from this colony, and defendant accepted and acted on the said mandate and thereby undertook to and did manage her affairs during her said absence.

3. Plaintiff furthermore, *inter alia*, arranged with defendant for commission and reward to let, on her behalf and as her agent, certain furnished house, premises, and grounds at Plumstead, known as Talana, and a certain cottage on the said grounds, all belonging to plaintiff, and defendant thereupon and thereby undertook and arranged with plaintiff to use due care and diligence about securing fit and proper persons to be tenants of the said Talana house and premises and the said cottage before letting the same to such persons as tenants, and about fixing, receiving, and recovering the rents respectively payable by such tenants.

4. (a) In Talana house was a large quantity of furniture of considerable value, and there was, further, packed in boxes and packing cases a large quantity of valuables, consisting of silver, silver-plate, etc., and of household and other linen, stored in one of the bedrooms of Talana, save that one large packing case was left deposited in the passage upstairs; (b) plaintiff duly gave defendant notice that the contents of the said boxes and cases were valuable and of the nature of the said contents and gave in-



structions that the same were to be locked up in one room or removed from the premises for greater security; (c) defendant, notwithstanding the above notice and instructions, failed and neglected, when giving occupation of Talana as hereafter mentioned, to lock up, remove or otherwise secure or care for the said valuables and failed to carry out the instructions received from plaintiff.

5. Notwithstanding the premises the defendant, without using due care and diligence let the said Talana house and premises to one Captain Corbalis in or about July, 1902, without ascertaining that the said person was a fit and proper person to become such tenant; nor was he such fit and proper person. Corbalis thereupon was given, and entered into, occupation of the said house and premises.

6. Thereafter defendant negligently and carelessly allowed Corbalis to fall into arrears with his rent and he paid no rent after April, 1903, and defendant subsequently negligently and unlawfully failed to take prompt steps for the ejectment of Corbalis or for the recovery of the arrear rent, and unduly and negligently delayed, and gave him time for payment, till January, 1904, when he instituted legal proceedings for the recovery of the arrear rent in plaintiff's name.

7. After certain postponements defendant obtained judgment in May, 1904, for £144; the cost of the proceedings amounting to £34 18s. 8d.

8. Notwithstanding the premises defendant wrongfully and unlawfully left the said Corbalis in occupation by his family after he himself had left the Colony till June, 1904, without taking sufficient or any steps or exercising due diligence to ascertain the condition of the house, and the goods, furniture, and valuables therein, before or at the termination of the occupancy. Corbalis is no longer resident in this colony since his said departure.

9. Corbalis was not a fit and proper person as aforesaid, and while in occupation he, by himself, his family, agents, or servants, negligently, wrongfully, and unlawfully (1) damaged, removed, lost or destroyed a considerable part of the said furniture, the loss sustained herein being £218 11s. 6d., and further (2) broke open the aforesaid boxes and packing cases and extracted the contents therefrom, and the greater part thereof is now destroyed, removed, or missing, and in any event is lost to the plaintiff to the value of £1,138 13s. 10d.; the said sums together amounting to £1,357 5s. 4d. Particulars of these amounts have been supplied to defendant.

10. Alternatively to paragraph 9 plaintiff says that defendant negligently and wrongfully failed, and still fails, to return to her the furniture and the said contents of boxes and packing-cases, or

the value thereof, or any part of the aforesaid goods or value.

11. Defendant has credited plaintiff with the amount of the rent for the said Talana house and premises up to June, 1904, but has wrongfully and unlawfully debited her account with the aforesaid sum of £34 18s. 8d. for costs, and plaintiff is entitled to recover the same by reason of defendant's negligence as herein set forth, especially in paragraphs 3, 5, 6, and 8.

12. By reason of the premises plaintiff is unable to obtain compensation from the said Corbalis for the loss, removal, damage, and destruction hereinbefore complained of, or the payment of the aforesaid costs, and is entitled to claim payment thereof from the defendant as and for damages.

13. Alternatively to the above, and claiming leave to refer thereto so far as necessary, plaintiff says: (a) That defendant, as holding her general power of attorney, undertook and agreed, in consideration of so being appointed her agent, and of receiving the aforesaid commission and reward, to act in plaintiff's interest, and as her agent and on her behalf, to take such measures and exercise such care and diligence as might be necessary to protect the property and interests of the plaintiff. (b) The defendant failed to exercise due care and diligence, or duly to protect her aforesaid property and goods entrusted to him as aforesaid, or duly to carry out the terms of the said agency, or to hand over to her, as principal, the property, goods, and valuables received by him in his said capacity or entrusted to his care as aforesaid, and by reason of such neglect and failure, plaintiff has suffered the loss set out in the preceding paragraphs, to wit, of £218 11s. 6d., of £1,138 13s. 10d., and of £34 18s. 8d., and is entitled to be paid the same by defendant as and for damages.

14. (a) Plaintiff also says, for a further count, that in or about the month of October, 1904, defendant, acting as agent as aforesaid for plaintiff for reward, negligently and carelessly gave occupation of the aforesaid cottage to one Melt Stephanus van der Spuy, without carefully and diligently, and as it was his duty to do, stipulating or contracting for the payment of any rent, or fixing the amount thereof, or binding the said Van der Spuy to the payment thereof; and he negligently failed and omitted after the commencement and during the continuance of such occupation to require, or make claim for any amount as and for rent or use and occupation, and left the said Van der Spuy nine months in such occupation as aforesaid. Plaintiff being still absent in Europe during substantially the whole period referred to in this paragraph. (b) The rental value or fair payment for use and occupation of the

said cottage was £3 a month, being £27 for nine months, and the defendant received, or paid over to plaintiff no part of such sum, and by his said negligence the said sum of £27, less £1 7s. for commission to him at 5 per cent., has been lost to plaintiff, who has not recovered and is unable to recover any part thereof from the said Van der Spuy, the latter denying any liability therefor; and plaintiff is entitled, owing to defendant's negligence and default, to recover the sum of £25 13s. from him as and for damages.

15. Alternatively to the above, in paragraph 14, plaintiff says that if defendant did contract for the payment of any rent for the said cottage, he carelessly and negligently failed to recover any part of the same or to pay it over to plaintiff, who has lost the said sum of £25 13s. accordingly, and is entitled to recover the same from defendant as and for damages.

16. All things have happened, all times elapsed, and all conditions have been fulfilled, to entitle plaintiff to be paid the sums amounting in all to £1,417 17s., but defendant refuses to pay any part of the same.

Wherefore plaintiff claims from defendant in his said capacity: (a) Payment of £1,417 17s. as and for damages; (b) interest *a tempore morae*; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration.

2. As to paragraph 2 of the declaration, the defendant says that the power of attorney referred to was signed on the 13th November, 1899, and was still in force in April, 1901, when the plaintiff proceeded to Europe on a visit, which she then contemplated would be for a period of only about five months. Save as aforesaid, the defendant admits the allegations in that paragraph.

3. As to paragraph 3 of the declaration, the defendant says that it was not until the year 1902 that the plaintiff, after failing to find through a broker appointed by herself a tenant for the house, premises, and grounds mentioned in the said paragraph, specially requested him to let the house, premises, and grounds. He admits that he became bound in law to exercise due care and diligence as the plaintiff's agent for reward in and about such letting, and in and about the fixing, receiving, and recovering of rent from tenants, but he denies that any special agreement was made in regard thereto, and, save as aforesaid, he denies the allegations in that paragraph.

4. Save as to the large packing-case deposited in the passage upstairs, and box of plate, the defendant had and has no knowledge of the existence in Talana House of the valuables alleged to consist of silver, silver plate, etc., and of household and other linen. He was aware that there was a large quan-

tity of furniture of considerable value, and he caused a proper inventory of the same to be made. The silver or silver plate in the large packing case and the box of plate aforesaid he caused to be brought and kept for safe custody in the strong room of the Board of Executors; save as aforesaid, he denies all the allegations in paragraph 4 of the declaration, specially denying that the plaintiff gave him the notice and instructions mentioned in sub-paragraph (b), and that he failed and neglected in any way to perform his duty or carry out any instructions received from the plaintiff as alleged in sub-paragraph (c) of that paragraph.

5. He admits that Talana House and premises were let by him in or about July, 1902, to Captain Corballis, who was given, and entered into, occupation thereof, but he denies all other allegations in paragraph 5 of the declaration, and says that he used due care in so letting the said house.

6. As to paragraphs 6 and 7 of the declaration, he admits that Corballis fell into arrear with his rent, and made no payments after April, 1903; he admits that he did not take steps to eject Corballis, that he instituted proceedings, after many demands for payment, in January, 1904, and obtained judgment as alleged, and that the costs were £34 18s. 8d., but he denies the other allegations in paragraph 6, and says specially that he acted throughout both in not ejecting Corballis and in giving time for the payment of rent with a view to the plaintiff's interests in the matter of retaining for her, at a time when tenants for such a property were scarce, a tenant who was reasonably believed to be possessed of ample means to pay all rent, though for the time being he was not able to make prompt payments.

7. He says specially that Corballis, before he left the Colony, convened a meeting of his creditors and laid before them representations previously made to and believed by the defendant as to his having large sums of money due to him by way of inheritance, and that the creditors accepted the said representations and permitted the said Corballis to leave the Colony for the purpose of obtaining the means to pay all his debts, and he (the defendant) acting with such prudence on behalf of the plaintiff as he would have exhibited in his own affairs, agreed with the other creditors to permit Corballis to leave for such purpose; and also permitted him, by his family, to continue to occupy "Talana" after Corballis left this Colony. He admits that Corballis did not return to this Colony and is not now resident here, and that he has failed to pay the rent due under the said judgment or after the period to which such judgment refers; but, save as aforesaid, he denies all the allegations in paragraph

8 of the Declaration, specially denying that he failed before the termination of the occupancy to ascertain the condition of the said house.

8. With reference to paragraph 8 and also to paragraph 9 of the Declaration, he says that the wife, family, and servants of the said Corballis left the house in June, 1904, without notice to him, and thereafter he ascertained that certain of the furniture, according to the inventory kept by him, was no longer in the house, and other part was damaged, but he does not know how or by whom such furniture was removed or damaged, and he specially denies that he acted in the matter wrongfully, unlawfully, or negligently as alleged. He admits that the plaintiff has supplied particulars of her alleged losses referred to in paragraph 9, but wholly denies the correctness of the said particulars; and, save as aforesaid, he denies the allegations in paragraph 9 of the declaration.

9. As to paragraph 10 of the declaration, he has returned to the plaintiff the silver or silver plate and box of plate stored as aforesaid in the Board's strong room, and he denies all allegations in that paragraph.

10. He admits the allegations in paragraph 11, save that he denies that he acted wrongfully or unlawfully in debiting her account as therein alleged.

11. He denies the allegations in paragraph 12 of the declaration, and as to paragraph 13, he begs to refer to the several paragraphs of the foregoing plea, and denies the allegations in paragraph 13, specially denying that he failed to exercise due care or diligence, and that he is responsible to the plaintiff in respect of the losses which she alleges that she has sustained.

12. As to paragraph 14 of the declaration, he says that the said Van der Spuy continued for nine months from October, 1904, in occupation of the cottage therein referred to; the cottage is part of the property known as "Talana House" and premises, and he admits that during the said period Van der Spuy did not pay rent, but he permitted the said Van der Spuy to remain in occupation and did not press him for rent, in order that he might look after the plaintiff's property. He denies that he acted negligently in regard to the occupation of Van der Spuy, who had previously paid a rental of £2 per month, and he denies that he is liable to the plaintiff in the sum of £25 13s. or any part thereof. Save as aforesaid, he denies the allegations in paragraphs 14 and 15 of the declaration.

13. He admits that he refuses to pay to the plaintiff the sums claimed or any part thereof; but otherwise he denies the allegations in paragraph 16 of the Declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Mr. McGregor (with him Mr. P. S. T. Jones) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Van Zyl), for defendant.

Douglas Hoets, architect, of Cape Town, gave evidence on a plan of the house which he had made for the purposes of the case.

Edith Swinton, plaintiff in the case, stated that there were eighteen rooms in Talana House. Before she left for Europe in May, 1901, there were some thirty boarders staying at the house. In April, 1901, she saw Mr. Roos, and gave him her general power of attorney to raise a loan by mortgage to enable her to go to Europe, and also to act for witness during her absence. In November, 1899, she signed a power of attorney to the defendant. Defendant was to let the house and all the valuables were to be packed and deposited in the nurse's room. If that room was required the valuables were to be removed to a place of safety. Witness wanted £50 a month for the house and the defendant laughed and thought £25 to £30 was sufficient. The defendant accepted witness's instructions. Mr. Coulton, who had been boarding with her, said that he might get a tenant for £50 a month, and witness said if he should hear of anyone it would be necessary to see her agent, Mr. Roos. The defendant was aware that witness was packing the plate in packing cases. While she was in Europe in November, 1902, she heard from the defendant that the house had been let. She never heard anything about the arrears of rent. She received a letter dated 13th July, 1904, in which the defendant informed her that the directors were not prepared to make further advances on Talana House, that the tenant had left the house, without paying rent, in a disgraceful state, the furniture being damaged and portion of the goods removed. In May, 1905, she returned to Cape Town and the defendant informed her that the house and cottage were let. Mr. Roos said she would find the house in a disgraceful state and some goods missing. The defendant gave witness an inventory of the house, as Captain Corballis entered it and asked witness to make a note of what was missing, and they would make good the loss.

Cross-examined by Mr. Schreiner: She signed a power in November, 1899, in favour of the Board. She was certainly not mistaken in stating that she signed another power to Mr. Roos in April, 1901. The inventory she made of the things was locked up in the box. It was not after the Board of Executors failed to advance her more money she decided to take action against them for the loss. She had not written to a certain lady asking for an explanation as to how some of the furniture of witness was sold at an auction of that of the former. The German linen she valued at £200, although she had it in her

possession for ten years. She claimed £250 for a stamp album which her daughter subsequently claimed from witness. The defendant was told upon several occasions if he let the house to remove the cases and store them for safe keeping. The defendant never asked for an inventory of the articles. In 1900 the personal property of witness was insured for £548 by the defendant. Captain Corballis should have been sued sooner; the defendant would have secured him in gaol. Witness's grievance was that Corballis should have been allowed to go away, while his wife remained in the house.

J. E. van der Byl, of Wynberg, who had frequently visited patients at Talana House, gave evidence as to the superior quality of the furniture and plate.

Mr. F. W. Swinton, husband of the plaintiff, stated that he was present at the interview with the defendant when the general power of attorney was signed. Mr. Roos was distinctly informed of the valuables having been packed in boxes, and he was asked to see that the room was locked or the boxes removed to a place of safety according to circumstances.

Cross-examined by Mr. Schreiner: A general power of attorney was signed in April, 1901, and witnessed by two of the clerks of the Board of Executors. The defendant was not given any information in writing of the contents of the boxes, but as receiver he knew well what the plaintiff was in possession of. Mr. Coulton merely spoke in a friendly manner as to a tenant, and witness told him if he did find one to go to Mr. Roos. The defendant could not have taken the slightest interest in the place Corballis might have been a captain, but he was not a captain "proper." Mr. Roos must certainly have been charmed with the presence of Captain Corballis.

Wm. le Sueur, law agent, living at Mowbray, stated that he checked the inventory with the goods in September last, and took a note of what was missing.

I. E. Coulton, broker, of Cape Town, who had been a boarder at Talana House before the plaintiff left for Europe, stated that Mrs. Swinton told him that she had seen Mr. Roos about the letting of the house, and that he did not think she would get more than £25 a month for it. Witness incidentally remarked that he thought he could get more than that for it. The matter was never put into his hands, but the plaintiff said if he could find a tenant he must see Mr. Roos. Witness gave evidence as to the high class of the furniture and plate, and to the state of the house on Mrs. Swinton's return.

Cross-examined by Mr. Schreiner: It was not so difficult to let a house at that time.

James Joseph Donner, tailor, of Wynberg, stated that he was living in the cottage on the property when Mrs. Swinton left for Europe. After the plaintiff and the maid, Miss Henley, left, witness told Mr. Roos that the house was locked up, and the servant had gone. One of the clerks in the office then said that the keys of the house had been sent to him. Mr. Roos and the clerk who had the key looked over the house before it was let. Captain Corballis asked witness to carry the boxes from the room above the kitchen to one near the stable. Captain Corballis told witness that he had opened the boxes, and there was nothing in them but rubbish, and he wanted them out of the house. Witness then went into the office of the Board of Executors and told Mr. Blake about the boxes being removed. Mr. Blake said that Captain Corballis was the boss of the house, and he could move the boxes if he liked. Witness did not tell Blake that the boxes had been opened.

Caroline Donner, wife of the last witness, stated she had been a servant to Mrs. Swinton for seven years. She saw her husband carry the boxes down to the coachman's room at the instructions of Captain Corballis. She saw Captain Corballis's housekeeper take the linen.

Hermanus, a coloured labourer, gave evidence as to rendering assistance in the removal of the boxes at the request of Captain Corballis.

Annie Fredericks, a coloured washerwoman, stated that there was a good deal of linen sent out from Captain Corballis's house. The initials on the linen was "E. M." Captain Corballis paid her £5 a month for the washing. Witness was paid extra for the curtains. When witness called for the washing she saw the boxes in the nurse's room, and the case was on the landing. Later on she saw the case lying empty at the back of the house.

Cross-examined by Mr. Schreiner: The first week she washed for Mrs. Corballis a lot of good linen was handed to witness. Mrs. Corballis always told her to be careful with the linen, as it belonged to the house.

Dora Matz, of Plumstead, stated that Mrs. Corballis, called on her, and offered for sale a sofa and two chairs. Witness called at Talana House by appointment, and after viewing the furniture Mrs. Corballis said it had been sold.

Cross-examined by Mr. Schreiner: When witness heard the original price she believed that Mrs. Corballis was not disposing of her own property.

John Chas. Mitchell, of Messrs. Garlicks, stated that to re-upholster the three arm-chairs would cost £26 5s. The class of the furniture was decidedly good. The Chesterfield could not be purchased under £30. The witness gave evidence as to the price of other articles of furniture.



Cross-examined by Mr. Schreiner: He was not allowing for wear and tear, and was quoting merchants' prices along with profits.

Mr. Nicholls, manager of the crockery department of Messrs. Cartwright and Co., stated that champagne glasses, produced, would cost £1 5s. per dozen.

Annie van der Spuy, who hired the cottage from Mrs. Corballis, stated that when she was a fortnight in occupation, Mrs. Corballis asked as a favour for a month's rent in advance, which witness gave her. Immediately after that Mrs. Corballis went away. Witness continued to live in the cottage, and took care of Talana House. When Mr. Jackson came to live in the house witness called at the Board of Executors to know what her position was, and one of the clerks said she was to stay in the cottage, as Jackson would only be in the house four months, and she need not pay rent. The clerk was to inform Mr. Roos, but Mr. Roos never wrote to witness. Subsequently the Board of Executors demanded from witness nine months' rent, and when witness drew the clerk's attention to what he had previously said, he said he did not remember anything about it.

Mr. McGregor closed his case.

Johannes N. Roos, secretary of the Board of Executors, stated the Board was largely connected in collecting rents and letting property. The first time he met the plaintiff was in 1899, when he was appointed as receiver in the division of the estate. He visited the house in September, 1899, and took an inventory of the furniture in the place. The tenor of the plaintiff's correspondence to the Board then was one of thankfulness. There was a division of the property, and the plaintiff got Talana House, and about three morgen of ground. In November, 1899, a general power of attorney was handed in to the Board through Mr. C. H. van Zyl. That was the only power he ever received. There was not the slightest truth in the statement that a general power of attorney was signed in witness's favour in April, 1901. If he had received a general power he would have submitted it to his Board. Witness had no knowledge whatever of the cases referred to by the plaintiff. As far as he was aware the matter had been withdrawn from him, and another party was to let the house. When plaintiff went away she failed to leave an inventory or keys with defendant. Before the plaintiff left she gave no special instructions as to the letting of the house.

Upon receipt of a letter from Miss Henley, witness sent Blake out to Talana House and instructed him to secure any valuables. Blake brought back certain parcels of valuables, which were locked up in the Board's strong room. In the several letters he received from the plaintiff there was no

mention of the locked-up cases. Captain Corballis was apparently a gentleman in all respects, although he was temporarily embarrassed for ready money. A large number of business men gave Corballis considerable credit. On the 5th January, 1904, Corballis was summoned in the Supreme Court for £144 for rent. Captain Corballis put in a counter claim for £160 4s. 8d., for improvements to the house and cottage. The Board repudiated the accounts, as Corballis had done the work without any authority. Corballis produced documentary evidence that he had a valuable estate in Ireland, and the creditors, whom Corballis mentioned, signed permission to his going to England to get his affairs settled. Subsequently Corballis went insolvent, and other creditors than those he mentioned in the first instance proved in the estate. The only assets discovered were a pony and trap. When Corballis left he gave witness to understand that he was coming back to take his sons to England to complete their studies. Corballis wrote from the boat asking witness to look out for a farm for him upon his return. In the course of one of his letters Corballis stated "that after the way he had been done in South Africa he would be very careful about investing any more money." Witness called upon Mrs. Corballis, and she gave him the impression she was waiting for her husband's return to South Africa. When witness was at the house what he saw of it was in good condition. Letters were received from both Captain Corballis and Mrs. Corballis repudiating any responsibility for the state of the house, which they said was in excellent condition when they vacated it. He did the best he could to protect the plaintiff's interest. Witness did not say to the plaintiff that he would bear the loss of what was missing. Witness had great sympathy for Mrs. Swinton's loss, and engaged, at the expense of the Board, Mr. Osberg to assist her in the inquiry. Never for a moment did he think that the plaintiff was going to sue the Board for heavy damages. Donner did not tell witness that Corballis had removed the boxes.

Cross-examined by Mr. McGregor: Under the general power, the Board could have let the house, and the reason it was not let to Taylor was that he wanted a lease for eighteen months, and Mrs. Swinton was expected back from Europe before the expiration of that time. The first inventory ought to have been signed by the incoming tenant, and it was an omission not to have had this done. A copy of it should also have been given to Captain Corballis. There was no difference in the case taken of a furnished house and an unfurnished house. The original power of attorney showed that the power of attorney to



pass the bond was signed by Edith Swinton and F. W. Swinton. The power might have been signed in his presence, but he did not remember if it was. He could not recollect the plaintiff telling him that certain goods were locked up. It was not necessary to inspect the house before Captain Corballis left the house. The plaintiff was credited with the rent due by Corballis by a special resolution of the Board. He did not know of his own knowledge that Captain Corballis had ceded his estate in Ireland to his sister.

Re-examined by Mr. Schreiner: Corballis did complain that Donner had cut down the trees. All the time witness was the general agent of the plaintiff.

Chas. A. W. Blake, clerk in the office of the Board of Executors, stated that before the plaintiff went to England, he had no knowledge of any specific instructions about the locking up of certain cases. The maid, Miss Henley, wrote after the plaintiff left and requested the Board to pay some small accounts she had incurred. Witness went out to the house, and had instructions from Mr. Roos to remove anything of value. Miss Henley showed him some valuables in the lower portion of the house, and a case on the landing, which she said contained valuables. The lid of the case was unfastened. Witness cleared the case, which contained no German linen. There were silver or plated articles wrapped up in paper in the case, and witness took anything he thought of value. Miss Henley said there were other boxes in a room, of which the plaintiff had the key, containing personal effects of the plaintiff. The inventory was made at the time Captain Corballis got possession. When the witness took the inventory, there were no cases in No. 10 room. The inventory was a correct one of what was in the house. A fruit-stand, similar to the one produced, witness saw in the house, although the plaintiff had said it was packed away. Other articles similar to those produced were inventoried by witness, although the plaintiff said she had them packed away. Corballis, to witness's knowledge, was put to considerable expense in connection with the house. Donner never told witness that cases had been removed from the room over the kitchen. He found no packing-cases where they were alleged to be. In his opinion, £100 would amply cover the whole of the articles, as stated by the plaintiff to be actually missing.

Cross-examined by Mr. McGregor: Unfortunately for the creditors, Captain Corballis entertained on a lavish scale. It was reported to him that the maid Miss Henley, after she vacated the house in June or July, 1901, left the keys at the office of the Board. When witness went out to the house in June, it was on general instructions to

see the maid with reference to the accounts, to see whether the things on the place were in order, and to remove anything of value.

P. de Wet, a clerk at the Board of Executors, said he saw no cases packed away in a room, or they would have been placed in the inventory. Upon information from the police that the house was vacant, he went down again and found the place in a very disordered state. Subsequently he visited the house on another occasion, on receiving information from the police that the place had been broken into, but did not notice that anything had been taken away.

Cross-examined by Mr. McGregor: He did not remember telling Mrs. Van der Spuy to remain at the cottage, as Jackson would only be staying on at the house for a short time. On the second occasion upon which he went down, he found a pane of glass broken, with bloodmarks around the breakage. The aperture was big enough for a man to get through.

George Wm. Dillman, chief clerk of the Board of Executors, recollected a general power passed by the plaintiff in favour of the Board in 1899. There was also a special power to pass a bond passed by the plaintiff before her departure. He knew of no other general power. About a couple of months before the occupancy of Captain Corballis, Mr. Roos and witness, having business in the vicinity, looked through the house. Neither witness nor Mr. Roos said anything to Donner about the silver. On a second occasion, when Captain Corballis was in the house, Mr. Roos and witness called at the house, and noticed some of the trees cut down. Near Donner's place, there was a quantity of cut wood.

Cross-examined by Mr. McGregor: Mr. Roos and witness simply went out to see if the place was all right.

Mr. Zoutendyk, who conducted the sale at Mrs. Bourne's, said the auction was well attended. Good prices were realised, and £8 10s. was fair price for the sofa.

Reginald Simpson, an attorney, in the firm of Messrs. Syfret, Godlonton and Low, stated he was there when Captain Corballis made certain arrangements with his creditors in 1904. Business men as creditors attended the meeting. Corballis said that he had a considerable estate in Ireland, and he was allowed to proceed to Ireland to get his affairs settled. Witness was given a general power of attorney by Corballis.

A. N. Foote, of the firm of E. R. Syfret and Co., sole trustee in the estate of James Corballis, stated that at the second meeting the Board did not prove any claim.

G. B. van Zyl, of Van Zyl and Buissinne, stated that he knew Captain Corballis personally. Witness had no hesitation in recommending him to the

Board. Corballis was introduced to him by reliable people.

Constable Petersen, of the Wynberg Police, gave evidence as to the condition in which he found the house after Captain Corballis left.

Mr. Schreiner closed his case.

The plaintiff, recalled by his lordship, stated that the linen was taken into account in the £600 valuation in the division of the estate. It had all been lost except the couple of pieces produced.

Mr. McGregor said the fundamental and crucial question was whether loss had been sustained. If there had been a conspiracy and the claim was a bogus one, then away went the plaintiff's case, and she would deserve not one penny nor a particle of sympathy. But the inventories clearly showed that there had been a loss. Where had the valuable German linen, glass ware and plate vanished to? They could not believe it had disappeared at the wave of a magician's wand. Counsel laid stress on the fact that the evidence of the plaintiff as to the packing of the valuables in boxes, which were placed in an upstairs room, was fully corroborated by the witness Donner. The plaintiff had left this valuable property in the hands of the Board of Executors, who were her agents under a general power of attorney and whose duty it was to protect her interests in her absence. His submission was that the defendant Board had a special duty towards his client who was away in Europe, and that there was a failure of diligence. Instead of a full payment of rent as arranged by Capt. Corballis, they only found a succession of arrears. Mr. Roos's memory must have been at fault when he said Mrs. Swinton had never mentioned to him that there were valuables packed away in boxes. Which was the more likely that Mrs. Swinton had forgotten to mention this to Mr. Roos or that Mr. Roos, a busy man, had forgotten that the matter was mentioned? There was no imputation of corrupt motives or improper conduct on the part of the defendant, but there had been a failure to protect the plaintiff's interests.

Mr. Schreiner, for the defendant, said no one was disposed to say that Mrs. Swinton had not sustained a substantial loss. No one had denied it; but that was not the first question; it was whether the defendant was responsible, and if so, what was the amount of the substantial loss. The real issues were: first of all, did the plaintiff, before leaving, give notice to the Board that she had packed up valuables, and notify to the Board what they contained, and give further instructions that if the house was let the valuables should be removed and placed in a locked-up room; then, secondly, did the defendant let the house to a fit and proper person? These were the two main issues. With regard to the latter,

it was admitted that this should have been done, but the point was had the defendant used every reasonable precaution. In regard to the rent, the plaintiff had lost nothing. As to the first issue, all the probabilities were, as shown by the evidence, that there had been no communication by Mrs. Swinton to Mr. Roos that she had packed the cases, and what their contents were. If, as Mrs. Swinton said, she had seen Mr. Roos some fifteen or twenty times on the subject of the house and the valuables, he could not possibly have forgotten it. No doubt, the instructions were given to Mr. Coulton, but never to the Board of Executors. No doubt the cases were packed, but the question was whether through negligence the Board was responsible. The Board was sorry for the loss, but the point was had these valuables ever been placed in their custody. As to letting the house to Captain Corballis, there was every reason to believe that he was a fit and proper person, and he was introduced to the Board by Mr. Van Zyl. He submitted that *initio* there was no negligence on the part of the Board. Counsel proceeded to deal with the questions of the costs incurred by the Board in connection with his rent and the non-recovery of rent from Van der Spuy for occupancy of the cottage. He urged that on the four points judgment should be given for the defendant, and that the jury should find that no instructions with regard to the valuables had been given to the Board; that Captain Corballis was a fit and proper person; that the costs were incurred in plaintiff's interest, and that there was no proof of damage having been sustained in consequence of proceedings not having been taken against Van der Spuy.

Mr. McGregor having replied,

Hopley, J., said the case rested upon an allegation of negligence in the discharge of certain duties by a general agent, whom the plaintiff left here upon her departure for Europe. The whole case was based upon negligence and that, after all, was the crucial point in the whole thing. The plaintiff alleged that in April, 1901, she signed a general power of attorney and upon that point the first difference in the evidence arose. There was nothing very important in that save as a matter of accuracy in recollection as between the plaintiff and defendant. No such power was produced, but it had not been suggested by the plaintiff that it had been made away with by the defendant for any sinister purpose. The only suggestion was that it had been mislaid. It would be for the jury to say whether the plaintiff was wrong in saying that a general power of attorney had been signed in 1901. Since 1899 they had it that this property had been her own upon the division of the estate. They

had it that she said she then put the whole of her affairs into the hands of Mr. Roos as secretary to the defendant Board. The departure of the plaintiff for Europe seemed to have been a little bit hurried and that was confirmed by the fact that at that time the affairs at the boarding house had not entirely been wound up. Her absence at that time was contemplated to be something like six months, and she states a man named Donner was to be caretaker of the place at a reduced rent, a nominal rent, or no rent at all. The plaintiff and the husband swore positively that they were very explicit about the instructions given to the defendant about the boxes. The instructions were denied, and that seemed to his Lordship to be the one point upon which they would have to decide the case. If explicit instructions were given to the agent to do a certain thing and he failed to carry out these instructions, and a loss occurred, then they might fairly say that the agent was negligent and the agent would have to bear the brunt of the loss. Therefore they must carefully consider this portion of the evidence and see who, in their opinion, was the most likely to be right. They would have to say whether the plaintiff, who was making out a case of negligence against the defendant, had proved her case. They must remember at the time these conversations were going on probably there was no idea that there would be any loss. Now they were considering it when the loss had occurred and a serious loss in all probability. It was suggested that in all probability the instructions were given to another person in Mr Coulton, the broker and house agent, and that the plaintiff was confusing him with Mr. Roos. The first point was that she undoubtedly talked to Mr. Roos at one period about the letting of the house, and that there was a difference of opinion between them as to what the house might fetch, and when the plaintiff mentioned £50 a month Mr. Roos laughed and said £25 or £30 would be much more likely. Then the plaintiff suggested that Mr. Coulton would be able to get £50, and it would be for the jury to say whether at that time she was looking more to Mr Coulton or more to Mr. Roos for the purpose of getting the rent that she hoped to obtain. It was almost impossible to think that a business man like Mr. Roos would have forgotten the injunctions alleged to have been given him in the course of the many interviews. Then it would be for the jury, on the question of a suitable tenant, to say whether or not Captain Corballis, who had formerly held a commission in the army and was subsequently agent for several large firms, was a fit and proper person at that time. It would be remembered that he was introduced to the Board by Mr. Van Zyl, and with the

house vacant for such a long time it would be for the jury to say whether the defendant had been negligent in letting him the house. All the inquiries that could have been made with regard to Captain Corballis would have been with regard to his ability to pay the rent. The Board could hardly be expected to inquire into the man's honesty or whether he was a person likely to steal furniture. As a matter of fact no claim was made for the rent, as it had been paid, and how that was done need not trouble the jury. If the plaintiff did not tell the Board about the boxes, how could the defendant tell that Captain Corballis was unwarrantably using the goods. It was a maxim of law that everyone was supposed to be innocent until proved guilty. The other points were the costs incurred by the Board in trying to recover rent from Corballis and the question of the rent of the cottage, which was occupied by Mr. and Mrs. Van der Spuy. It would be for the jury to find as a matter of common-sense whether there had been negligence on the part of the defendant, and if so what damage had the plaintiff suffered.

After an absence of fully an hour the jury, by a majority of 7 to 2, found for the plaintiff for £300 damages.

Mr. McGregor moved for judgment in that amount with costs, including costs of the plan of the house.

Judgment was entered for the plaintiff in the sum of £300 with costs and costs of the plan.

In reply to his lordship, the Foreman of the jury said the matter of the stamp album had not been considered in the sum mentioned, and his lordship remarked that the album remained free and unadjudicated upon.

[Plaintiff's Attorneys: Buchanan and Boyes. Defendant's Attorneys: Van Zyl and Buissinné.]

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## SUPREME COURT

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### FIRST DIVISION.

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[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

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PINTO V. PINTO. { 1906.  
Oct. 23rd.

This was an action brought by Joseph William Jacobus Pinto, of the Mowbray district, against his wife, Letitia

Elizabeth Frances Pinto, for restitution of conjugal rights, failing which a decree of divorce, with custody of the two children, and a declaration that defendant had forfeited any benefits of the marriage in community.

Mr. Watermeyer was for plaintiff; there was no appearance for defendant.

Mr. Watermeyer said that defendant was sued by edictal citation. Efforts had been made to serve the citation upon her at Delagoa Bay, but these had failed, and publication had been given in "O Futuro" as directed.

The declaration set out that the parties were married on the 14th April, 1895, at St. Alban's, De Beers district of Kimberley. Defendant deserted plaintiff in June, 1899, and had not returned to him.

Wm Thomas Birch, clerk in charge of the Marriage Register, Colonial Office, produced formal proof of the marriage.

The plaintiff gave evidence. He stated that one day in June, 1899, he had a little quarrel with his wife about his food, and on the following day she left him. He did not know of any good reason why she should not have continued to live with him.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 30th November, failing which rule to issue calling upon defendant to show cause on the 12th January, 1907, why a decree of divorce should not be granted as prayed, same order as to service as directed in regard to the citation.

#### BROMAN V. BILLINGHAM.

This was an action brought by Carl Broman, a farmer, Burghersdorp division, against Walter Burns Billingham, trading as Billingham and Co., at East London, to recover £325, with interest on a certain promissory note.

Plaintiff, in his declaration, said that defendant was indebted to him in the sum of £325, upon a promissory note for that amount, bearing interest at 6 per cent. from the 13th April, 1904, and payable on the 13th April, 1906, at the African Banking Corporation, East London. The note was made, and signed by defendant q.q., as agent of one Albert Parker, in favour of plaintiff, and defendant delivered the said note to Dreyfus and Co., of East London. Plaintiff became and was the owner in due course. Alternatively, plaintiff referred to an agreement of the 21st March, 1904, confirmed by a subsequent agreement of the 30th March, for the sale to Albert Parker of a certain hotel and other property at Odendaalstroom, the purchase price being paid by £1,000 in cash, and four promissory notes for the balance. The notes were endorsed by de-

fendant. The last note for the balance of £325 was not yet paid. Parker was outside the jurisdiction of the Court. Plaintiff had given transfer of the hotel and erven, and he was ready and willing to give transfer to defendant of the remaining erven when he got transfer from the vendor.

Defendant pleaded that he was justified in refusing to pay the balance of £325 on the last note, inasmuch as plaintiff's delay in not giving transfer of the erven was wholly unreasonable, plaintiff having had nearly 2½ years in which to give transfer. Defendant further set up an agreement, which he said was entered into shortly before the note of the 13th October, 1905, became due, that he would not be called upon to pay the last note unless transfer of the remaining erven had been given. Defendant, relying on this promise, paid the note of October 13, 1905.

Plaintiff, in his replication, denied that there had been any delay for which he was responsible, and he also repudiated the alleged agreement of October, 1905.

Mr. Gardiner (with him Dr. Greer) was for plaintiff; Mr. Burton (with him Mr. Russell) was for defendant.

Plaintiff said that in 1904 he was an hotelkeeper at Odendaalstroom. In March of that year he met Billingham and Parker, and he had certain negotiations which resulted in the agreement of the 21st March being signed. Arrangements had to be made with his creditors in regard to taking over the stock. Witness, Billingham, and Parker saw his principal creditors, Dreyfus and Co., in East London, and the agreement of the 30th March was entered into. Witness handed over his hotel and erven and stock-in-trade. He denied that on or about the 13th October, 1905, he agreed that should the note then due be paid he would not press for payment of the note now sued upon until transfer had been given. Witness was not in East London on that date, and he did not see defendant at Burghersdorp. He produced an hotel bill, certain cheques, and his cash-book, to show that he was not in East London until the latter part of 1905. He had not been able to give transfer of certain of the erven owing to surveying difficulties. He had not received transfer of these erven from Odendaal, from whom he had bought the ground in 1903 for £105. That amount was more than the erven were worth to-day.

Cross-examined: The erven in question were next to the hotel erven. Witness had done all that he could to get transfer of the remaining erven passed. Witness owed Odendaal £52 10s. in respect of the purchase price of the ground, but he had a contra account for £10 against Odendaal. Witness was sure that he did not go down to East Lon-



don before the 26th or 27th October, 1905.

Edward R. Briggs, accountant, employed by Dreyfus and Co., said that plaintiff called at their office in East London towards the end of October, 1905. He did not call early in October. A few days before the last promissory note fell due defendant said that it did not matter to him who held the note, he was going to pay it.

George Welsh, of Schweitzer and Co., attorneys, Burghersdorp, said his firm were acting for Odendaal in the matter of the transfers of erven in Odendaalstroom township, which was situated on the farm Groot Vley. Witness described the difficulties which had been raised by the Registry Surveyor and the steps which had been taken to obtain amended title, which they hoped would now go through. There were nine erven in question in this case. The average price at which such erven sold was about £10. There was nothing more that plaintiff could have done to facilitate transfer.

Charles Matthews, clerk, Surveyor-General's Office, said that a protest had been lodged by one of the erfholders, and it might be some time yet before amended title was issued.

Mr. Gardiner closed his case.

Defendant said that when he took over the liability on the notes he understood there would be no difficulty in the way of transfers. Shortly before the note of the 13th October, 1905, became due, Broman called at his office in East London, and it was then agreed, after some discussion, that witness should not pay the last note until the transfer of the other erven had gone through. Witness remembered that plaintiff had been down to the wharf and then he said the river Buffalo was still coming down. A freshet occurred on the 10th October. A deed of sale from Parker to another man had been entered into, and witness had undertaken to let him have transfer within six months, and he had been threatened with an action for failing to do so.

Cross-examined: Witness was confident that plaintiff called at his office about three days before the note of October 13, 1905, fell due.

Mr. Gardiner: Why didn't you say anything about the alleged agreement in your affidavit on the provisional case?

Witness: I gave my attorneys a full statement of my case. Mr. Giddy told me that they were only suing me provisionally, and they would not go into the merits of the case.

By the Court: It was possible that the conversation with Broman may have taken place after the 13th October, 1905. Witness had been thinking the matter over, and he naturally concluded that the agreement was made before the note fell due. Mr. Briggs was mistaken when he said that he (witness) said he would

pay the bill. He said distinctly that he would not pay the bill. He valued the erven in question at about £450. He had lost about £800 on the transaction.

Richard D. Gately, attorney, East London, and Algernon Geo. Parker, clerk, East London (defendant's stepson) also gave evidence as to the alleged promise of plaintiff not to press for payment of the last note until transfer had gone through.

Mr. Gardiner having argued on the facts,

Mr. Burton said that transfer in this case was unreasonably delayed and so the defendant was entitled to refuse payment of the promissory note. He cited Dig. (18, 1, 78 and *Eagle v. Boshof* (C.L.J., vol. ix., p. 56). The second defence was a *pactum de non petendo*, which was clearly proved. Consideration was not necessary to support a *pactum de non petendo*. He quoted *Malan v. Secretan, Booth and Co.* (Foord, 94).

De Villiers, C.J.: In this case the plaintiff sues for the amount of a promissory note, which is dated April 13, 1904, and is as follows: "On April 13, 1906, I promise to pay to Carl Broman (the plaintiff) the sum of £325, with interest at 6 per cent. per annum." The promissory note was given as one of several promissory notes under a contract of sale entered into between the plaintiff and defendant. There are two documents which constitute the contract of sale, and they are substantially the same. It comes to this, that certain erven at Odendaalstroom, in addition to certain other property there, were sold for the total sum of £2,300. As to these erven at Odendaalstroom, the condition is as follows: "The seller agrees to transfer the hotel erven to the purchaser on payment of the sum of £1,000. The seller further undertakes to transfer the remaining erven to the purchaser as soon as he (the seller) obtains transfer thereof." Here, therefore, there was a clear distinction drawn between the hotel erven, of which the plaintiff already had the transfer, and the remaining erven, of which he had not yet had transfer. This contract was not quite completed, but subsequently it was completed under a further arrangement, which was as follows: "I, Carl Broman, hereby confirm the arrangement come to in connection with agreement for purchase of my business at Odendaalstroom by Mr. A. B. Parker, as follows: £1,000 cash and promissory notes for the balance of the purchase price and the value of the furniture and stock-in-trade at 6, 12, 18, and 24 months, said promissory notes to be endorsed by Billingham and Co., and, further, we, Billingham and Co., do hereby undertake to hand to Messrs. Dreyfus and Co., East London, our cheque for £1,000 and the promissory notes afore-



said, upon receipt of title deeds of the two hotel erven, power to transfer, and power to cancel bond." Here, again, there is a special reference to the two hotel erven as to which there is to be the transfer upon payment of the £1,000, but as to the remaining erven, they are left in the original arrangement that transfer is to be given as soon as he (the seller) obtains transfer thereof. I quite agree with the learned counsel for the defendant that this would not give an unlimited time to the plaintiff to obtain transfer. He must use all reasonable despatch for the purpose of obtaining transfer, and if in the present case the plaintiff had not satisfied me that he had done everything that he could to obtain transfer, I should have said that an unreasonable time had already elapsed. But the circumstances of this case are very peculiar. The Surveyor-General, whether rightly or wrongly, has intervened; he has refused to allow Odendaal's transfers to pass; he has required amended titles to be issued; and the plaintiff himself, although he has not actually gone to law against Odendaal, which would, perhaps, have been throwing good money after bad, has urged upon his attorney (Schweitzer) whom he employed, to do all he could for the purpose of obtaining transfer. The evidence of Mr. Welsh is very clear upon the point that he was continually bothered by the plaintiff asking him to obtain the transfer. He says he did everything in his power, but, owing to the complication of circumstances in this case, it was wholly impossible in the time to obtain transfer. If the plaintiff has done everything which, under the circumstances, any reasonable man could be expected to do, then I think he is entitled to have the benefit of this contract, which says that he undertakes to transfer the remaining erven as soon as he (the seller) obtains the transfer thereof. Seeing that he has not succeeded in obtaining transfer, he cannot be blamed if he himself is not in a position to give transfer. In the meanwhile, these promissory notes were falling due, and they were all paid until the last note, which was not paid. The defendant now says, first of all, that more than a reasonable time has elapsed, and his second ground of defence is that there was a special agreement between the parties that the plaintiff should not sue upon the last promissory note, unless he had first given transfer of the remaining erven. I quite agree also with Mr. Burton that if this agreement had been clearly and distinctly proved, it would have been a good defence to the action. But it is a condition in a case of this kind that such an agreement should be distinctly proved, because, on the one hand, we have a promissory note definitely undertaking to pay a certain amount at a certain date. It continually happens

in this court, upon application for provisional sentence, that the defendant comes forward and says there has been a kind of understanding that time is to be given. The Court has always said that a mere understanding which does not amount to a definite contract between the parties cannot be allowed to set aside a definite agreement to pay a fixed sum on a certain day. It is essential, therefore, in a case of this kind, that there should be clear proof, not a vague understanding between the parties, as seems to me to be proved in this case, but a clear and definite agreement, having the same force and effect as the original agreement, which it is sought to annul or vary. According to the evidence of the defendant, this agreement was made before the note of October, 1905, fell due. He said it was somewhere about the 10th October. This new agreement is said to have been made at East London. I am satisfied, however, that at that date the plaintiff was in Burghersdorp. His books clearly show that, unless we are to disbelieve his statement that these books were kept in the regular course, and that the entries were made on those dates on which they purport to have been made by him. As far as I can judge of the handwriting, the handwriting is the same. The entries were made at the time when the plaintiff was alleged to have been in East London. So far as they go, the cheques which have been produced seem also to support the evidence of the plaintiff. But, more than everything else, it seems to me that the receipt given by the manager of the Grand Hotel, East London, fully supports the plaintiff's statement that he was not in East London early in October. This receipt was given to him on the 28th October, 1905. The amount is only £2 8s., so that, unless the hotels at East London are cheaper than any other hotels known in South Africa, plaintiff could not have been staying at East London for fully two weeks for the sum of £2 8s., and I am, therefore, quite prepared to accept the statement of the plaintiff that this is the account for a stay of two or three days at the utmost. It seems to me extremely unlikely that this man, who had his business at Burghersdorp, would have been at East London only a fortnight before the 28th October, and I quite accept his statement that he had not been in East London in October until the 26th of that month. Well, if that statement be correct, I do not say it casts discredit upon the evidence of the defendant—I dare say he fully believes his own statement—but he must be mistaken, and I am satisfied that he is mistaken when he says that the plaintiff called at his office somewhere between the 10th and 13th October and, if he were mistaken upon one point, he might easily have been mistaken on another point. The utmost that I think

any conversation between the parties could have amounted to would have been this, that he (plaintiff) would endeavour or would see that transfer was given before any further instalments were due. But that does not amount, as is urged, to a *pactum de non petendo*. It does not justify the Court in saying that it will order a postponement of the payment, which had been definitely fixed for a definite day. I quite believe that Mr. Gately and Mr. Parker are satisfied that some conversation took place at some time in the office of Mr. Billingham, but they are very vague. Under these circumstances, I am of opinion that no such definite agreement has been made between the parties as would justify the Court now in postponing judgment upon the amount. Of course, I would intimate that the plaintiff is bound to use further efforts for the purpose of expediting transfer to the defendant, and, if he should not do so, the defendant will still have his remedy to compel the plaintiff to pass transfer, but, on the facts disclosed in the present case, I am satisfied that the plaintiff has done everything that could reasonably be expected of him under the peculiar circumstances in this case, and, therefore, that the plaintiff is entitled to judgment as prayed with costs.

On the application of Mr. Gardiner, plaintiff was certified as a necessary witness.

[Plaintiff's Attorneys: Sauer and Standen. Defendant's Attorneys: Walker and Jacobsohn.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

WILSON AND SPURGIN V. } 1906.  
BURT. { Oct. 24th.

Partnership—Agency—Giving of credit.

*Before the marriage of the defendant to B., she carried on a hotel business, and after her marriage out of community she continued, ostensibly, to carry on the business in her*

*own name; the licence was in her name and the premises belonged to her, but there was an oral understanding between B. and his wife that the business should belong to B. The plaintiff regarded B. as his wife's manager, but in the books debiting the hotel business the name of B. only appeared.*

*Held, that as the Court found on the facts that credit had been given to the defendant, she was liable.*

*Held further, that the defendant was not entitled to deduct from the plaintiff's claim the amount of certain "good-fors" given to the defendant by the plaintiff's partner S. for liquors supplied in the premises to such partner.*

This was an action brought by Katherine Georgina Wilson, trading as a forwarding agent at Prieska, under the style of Wilson and Spurgin, against Jane Elizabeth Burt (married out of community to Francis E. S. Burt), proprietor of the Prieska Hotel, to recover balance of an account.

Plaintiff, in her declaration, said that between the 31st May, 1904, and 10th March, 1906, plaintiff sold and delivered certain goods to the defendant, advanced moneys to and performed work, labour, and services for the defendant at her special instance and request, on account of which £136 13s. 9d. was owing. This amount defendant refused to pay. Plaintiff claimed payment of the said sum, with interest *a tempore morae*, and costs.

Defendant, in an amended plea which she now filed, said that on the 6th April, 1906, she tendered £45 7s. 9d., with taxed costs, to date of tender, and subject to that tender she prayed that the claim be dismissed, with costs. Alternatively she pleaded that since the 1st August, 1904, she had leased the Prieska Hotel to her husband, and that she had no indebtedness for goods supplied or work done for the hotel subsequent to the 31st July, 1904, and she denied liability under the claim, which she said was for goods supplied, moneys advanced, and work and services performed for her husband. In case the Court should hold that she was liable, defendant pleaded that she was only indebted to plaintiff in the sum of £109 15s. 9d. She further said that plaintiff was indebted to her in the sum of £64 7s. 9d. for accommodation and food supplied, and a further sum of

£10 for cash lent, which, she said, she was entitled to set off against the plaintiff's claim, thus showing a balance of £35 8s., which was less than the tender made herein. In reconvention the defendant claimed £64 7s. 9d. and £10, as aforesaid, and said that the tender was more than the balance due to plaintiff.

Plaintiff pleaded in reconvention that she was not indebted to defendant in the sum of £64 7s. 9d., or any part thereof. She admitted the loan of £10 and the tender, but said the tender was wholly insufficient, and also said that the defendant was now estopped from denying liability for the claim.

Mr. Gardiner (with him Mr. Pohl) was for plaintiff; Mr. Benjamin was for defendant.

Mr. Gardiner said that his client was willing to take £109 15s. 9d., less £10 as the amount owing on the account, and the question was whether the defendant was entitled to bring up the account of £64. He submitted that the defendant, having tendered £45, could not now set up the defence that the account was for services rendered to her husband. He submitted that the onus was upon his learned friend to prove the counter-claim.

De Villiers, C.J., however, directed that the case must proceed in the ordinary way.

Plaintiff was called, and said that she had carried on business as a forwarding agent since May, 1903. She originally traded in partnership with Mr. Tannock as Wilson and Tannock. She had latterly traded as Wilson and Spurgin, but Mr. Spurgin was simply her salaried manager, and he had no interest in the business. On the 29th July, 1904, witness went to England, and she returned on the 19th May, 1905, Spurgin in the meantime carrying on the business under general power of attorney, which witness cancelled on the 26th June, 1905. Spurgin continued as her manager until February, 1906. Prior to defendant's marriage with Mr. F. S. Burt, witness had known her as Mrs. Black. Defendant's account was entered in the books against F. S. Burt, who was the manager of the hotel, acting on behalf of the Mrs. Burt whose name appeared over the door as licensee. Witness's books had been kept by Spurgin. At the Circuit Court Spurgin was convicted of stealing her moneys. The present claim was in respect of goods and work done in connection with the hotel. Witness admitted liability for an item of £3 3s. in the account furnished by defendant in respect of accommodation for an employee named Taylor. Other items, such as suppers, tobacco, goodfours, beer, brandy, dop, and so on included in the defendant's claim, witness had not ordered, and she was not aware that they were required for the business. She had not

authorised Spurgin to incur those debts on her behalf, nor had she authorised him to settle defendant's bill of £64 7s. 9d. per contra. Spurgin left her service on the 14th February. Witness was not aware of any account by defendant against her of £64 odd until she received the claim on the 19th April.

Mr. Gardiner (in answer to the Court) said that the amount of £64 7s. did not appear in the plaintiff's books. It was entered in the defendant's books first against Spurgin and afterwards against Wilson and Spurgin.

Cross-examined: Spurgin had never been in partnership with her, and it was also only decided to trade as Wilson and Spurgin in order to give weight or stability to the firm. This was done upon Spurgin's suggestion. Spurgin had had sole management of the business. He had repeatedly promised to give her a document showing that he had no interest in the business, but had failed to do so. A notice appeared in the "Gazette" on the 28th February last, stating that Spurgin would retire from the business, and that it would be carried on under the direction of R. H. Wilson. She was not aware that there was a settlement by Mr. Burt in July, 1905, when he gave a cheque for £3 15s. 2d., balance of account. She had known for some time that defendant's account had stood in her firm's books as F. S. Burt, since the defendant's marriage. She knew that cheques had been paid by F. S. Burt, and the receipts had been made out to him since his name had appeared in the books.

De Villiers, C.J., said that he did not see how the defendant could consistently adopt the attitude now that Mr. Burt and not Mrs. Burt should be sued.

Mr. Benjamin said that the tender was made in order to make a settlement of all disputes. Mrs. Burt was married out of community.

Thomas B. Davy, law agent, Prieska, spoke to the fact that when a search was made of Spurgin's box after his arrest, an account for £59 10s. 6d. from F. S. Burt to Spurgin personally was found. The account was to the end of December, 1905, and was identical with the account of £64, except for the omission of one item. An account for £64 odd settled per contra was also discovered in Spurgin's box. On the 8th February witness sent out notices to the plaintiff's clients, including the defendant, that all moneys were to be paid to Mr. Wilson (son of the plaintiff).

Mr. Gardiner closed his case.

Defendant said that she was married to Mr. Burt on the 14th July, 1904. About the 1st August, 1904, witness agreed with her husband that he should take over the hotel business, and notice was given to the various creditors that the business had been transferred to her husband. Notice of this was given verbally to Mr. Spurgin at De Aar by Wit-

ness, while she was returning from her honeymoon.

[De Villiers, C.J. (to counsel): I cannot understand how this defence can be raised in face of the tender.]

Mr. Benjamin: Except this, that the Court has laid down that one can plead a general denial, notwithstanding an unconditional tender in the plea. Counsel cited *Van der Spuy v. Colonial Government* (14. Supreme Court Cases, 410).

Witness (continuing) said that the only account that she had paid to the plaintiff firm since her marriage was for an amount of £57 for carriage of furniture that she had imported from England. Clerks from Wilson and Spurgin's used to come and stay at the hotel.

Cross-examined: Witness's husband carried on the hotel business, and drew any profits, and he paid witness a rental of £50 per month for the first year. She was not aware that under the liquor laws she was liable to forfeit her licence if she continued as licensee, and allowed someone else to hold the licence, carry on the business, and draw the profits.

Francis E. S. Burt (defendant's husband) said that the plaintiff's account was for forage supplied, commission charges and so on in connection with the hotel business which witness had carried on. Witness had a contra account for £64 7s. 9d., for suppers, tobacco, meals, good-fors for beer, brandy, etc., supplied to Spurgin and employees connected with Wilson and Spurgin. In July, 1905, witness made a settlement with Spurgin to the end of June, and paid a cheque for £3 odd. On the 9th February last witness effected a settlement *per contra* with Spurgin to the end of January. A good deal of the goods in the account were supplied for the purposes of Wilson and Spurgin's business. The plaintiff's account was continued in the hotel books in Spurgin's name, simply because it was in his name when he (witness) took over the business. Later, witness entered the account in the name of Wilson and Spurgin. A lot of the goods-for referred to hospitality dispensed by Spurgin on behalf of the firm.

Cross-examined: Witness was formerly a lieutenant in the Cape Police.

Mr. Gardiner: You were not a man of property?

Witness: Property, sir, is a relative term.

Cross-examination continued: Witness had been lessee of the hotel, and had been acting as owner of the licence. Mrs. Burt was now carrying on the business, and had been doing so since the 1st August this year.

Mr. Benjamin closed his case.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The one undisputed fact in this case is that the plaintiff has supplied value to the extent of £99 15s. 9d. to the

business of the Prieska Hotel. The first question is, to whom was credit given? Was the credit given to Mrs. Burt, who is sued in this case, or to her husband, Mr. Burt? It is clear from the evidence that the business had been the business of Mrs. Burt before her marriage, and that, after her marriage, the licence for the business was hers, and the name upon the premises was that of Mrs. Burt, the defendant. The only circumstance which might lead one to suppose that credit was given to Mr. Burt is that in the books of the plaintiff's business the name of F. S. Burt appears, but it was assumed that Burt was the manager of the business, and as Mr. Burt was married then to Mrs. Burt, I do not think that the fact that the books set forth the name of F. S. Burt should be held conclusive in the matter, and considering that there has been a tender of the sum of £45 by the defendant, I think that the Court may fairly come to the conclusion that the business really was carried on, on behalf of the defendant, by her husband, as the manager. No written agreement has been put in as between the partners showing that the intention was to alter the course of dealing which had existed before. All we have is that there was an oral understanding between husband and wife that in future the business should be otherwise conducted, but there is no such clear proof as would justify the Court now in coming to the conclusion that Mrs. Wilson, the plaintiff, is wrong in stating that she intended to give credit to Mrs. Burt, who was the owner of the licensed premises, and in whose name the business was being carried on, and who up to that time had been the reputed owner of the premises. I consider, therefore, that the credit must be held to have been given to the owner of the premises, to the licensee of the premises, viz., Mrs. Burt, the person who, according to the board upon the premises, appeared to be the owner and the person on whose behalf it was conducted. That being so, the next question is, is there any sum to be deducted from the £9 15s. 9d.; in other words, whether the defendant has proved that there is indebted to her business by the plaintiff the sum claimed, viz., £64 7s. 9d.? An account has been put in, and it shows items for suppers, for tobacco, for accommodation for meals, for beer in considerable quantities, and for bottles of brandy in considerable quantities. Credit had been given to Spurgin by the hotel business, but I think the Court should treat this case now as between the parties in the present case, as if Spurgin were really a partner of Mrs. Wilson. She had given notice in somewhat equivocal terms, from which persons might fairly gather that they were partners, and there is nothing to show that the defendant knew of a private understand-



ing between Mrs. Wilson and Mr. Spurgin that they were not to be partners, and, therefore, I am quite prepared to treat this case as if they were partners. But it does not follow, merely because they were partners, that the defendant would be justified in charging the partnership with every debt which was incurred by Spurgin. If Spurgin comes to the hotel and treats a lot of friends there, it cannot be held that that is a debt incurred on behalf of the partnership, and really, in regard to most of these items, there appears to be considerable doubt as to whether they should be allowed at all. The plaintiff has agreed to admit "accommodation of Mr. Taylor, £3 3s.," and the husband of the defendant has stated that several of the liquors supplied had really been supplied for the purpose of enabling Spurgin to give brandy and liquor to some of the employees under him. Now, giving him credit for that statement and allowing him to charge for meals, seeing that previously such allowances had been made, there still remains the item of good-fors. There were good-fors given to the extent of £41 18s. 9d., and I asked the defendant's husband, who managed the business, whether he could explain what they were for, and he was wholly unable to explain what they were for. The good-fors themselves were not put in and, in the absence of any explanation as to what these good-fors are given for, I do not think the Court would be justified, even treating Spurgin as a partner, in saying that the partnership shall be held liable for good-fors given at an hotel bar or at an hotel. It seems to me extremely likely that these good-fors were given in respect of liquors consumed upon the premises. I cannot understand why they should appear only as good-fors, and not in any other form if that were not the case. If it had been for meals supplied, then it would have appeared, as items of meals supplied do appear, in this account. If it had been for liquor taken away from the premises, I think that would also appear, because liquor taken away from the premises appears in this account. There is nothing to explain what these good-fors are for, and I consider that it might fairly be presumed that they were given for liquors supplied on the premises to Spurgin. That clearly was not an amount for which the partnership could be held liable, and in any case it is not an amount which, by law, can be sued for at all. But even if those good-fors were not for liquors supplied on the premises, I think that if the charge is made against the partnership, it lies upon the defendant to explain in what respect credit notes to that amount, good-fors, were given on behalf of the partnership, and, if no satisfactory explanation is given by the defendant, then clearly the defendant is not entitled to set up the amount of

these good-fors as against the admitted debt of £99 15s. 9d. Deducting £41 18s. 9d. from £64 7s. 9d. there remains £22 9s., which is the sole amount which ought, in my opinion, to be deducted from the £99 15s. 9d. Making that deduction there would remain £77 6s. 9d., and for that amount there must be judgment for the plaintiff with costs.

On the application of Mr. Gardner, his lordship certified the plaintiff as a necessary witness.

[Plaintiff's Attorney: G. Trollip. Defendant's Attorneys: Mostert and Son.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

### PROVISIONAL ROLL.

VIRET AND OTHERS V. HAZELL. { 1906.  
{ Oct. 25th.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

### ARDERNE V. MILLER.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent. The matter had previously been before the Court, and had been ordered to stand over. Counsel now read affidavits to the effect that defendant had not paid interest on the bond since the 1st January, 1904, and that it was in the interests of the creditors (according to Mr. Steytler, of the Colonial Orphan Chamber) that the estate should be sequestrated.

Defendant said that the statements in the affidavits were untrue. He complained that expenses were being piled up against him.

[De Villiers, C.J.: Can you pay your debts?]

Defendant: Not at present.

De Villiers, C.J.: The final order will be granted, but at the same time, I think Mr. Arderne might have taken the hint of the Court given on the last



occasion, and seen if some settlement could not be arrived at. If he insists upon it, he must have his order.

#### JONES V. HEROLD.

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### VALUE SUPPLY CO. V. STEWART.

Mr. Lewis moved for provisional sentence on an unsatisfied judgment of the Court of the Resident Magistrate, Glen Grey, for £12 13s. 10d., and for costs.

Order granted.

#### TURPIN V. PIZER.

Mr. Swift moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court, Middelburg, defendant having removed out of the jurisdiction of Steynsburg. Counsel said that defendant had offered to pay 10s. a month. The Magistrate had ordered him to pay 15s. a month. Failing payment, the plaintiff applied for a decree of civil imprisonment against the defendant.

Judgment as prayed, failing payment of which within one month, decree of civil imprisonment granted with costs, to be suspended on payment of 15s. per month until debt and costs are paid.

#### OOSTHUISEN V. MICHELSON.

Mr. Payne moved for provisional sentence for £250 on an agreement of sale and purchase, being instalment due of purchase price and for £42 19s. 8d., interest due on purchase price.

Order granted.

#### GRAAFF-REINET BOARD OF EXECUTORS V. RAYMOND.

Mr. Pohl moved for provisional sentence on a mortgage bond for £200, with interest from the 1st October, 1902, the bond had become due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ESTATE MILLS V. BEYER.

Mr. Close moved for provisional sentence on a mortgage bond for £4,800, with interest, less £693 paid on account; and for the property specially hypothecated to be declared executable.

Order granted.

#### SELLAR BROS. V. FORSYTH.

#### Compulsory sequestration—Benefit of creditors.

*On an opposed application to have a provisional order of sequestration made final, the Court would not grant the order in case of collusion between the plaintiff and the defendant for the purpose of obtaining a sequestration which would not be obtainable on the petition of the defendant himself; but it would lie on the party opposing to prove that there was such collusion, or that the sequestration could not benefit the creditors.*

Mr. Douglas Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Mr. Burton opposed the application on behalf of Wm. Hy. Louw, holding power of attorney from J. E. Poole, who is a judgment creditor against defendant for £6,000. The reason of the opposition was that, apart from the Fountain Hotel, which he had no interest in, the defendant had no assets of any kind, and it was not for the benefit of his creditors generally that the estate should be sequestrated, inasmuch as it would only mean expense that would have to be borne by the creditors.

Mr. Buchanan read an affidavit by petitioners' manager, who urged that there was need for an investigation of the defendant's connection with the Fountain Hotel, and that the most satisfactory method of dealing with the matter would be to sequester his estate. Counsel also read an affidavit by another creditor in support of the application. Petitioners were creditors to the amount of £244 13s., and the supporting creditor had a claim for £650.

Mr. Burton (in answer to the Court) said that they did not suggest collusion between the plaintiff and the defendant. He submitted that there were circumstances in connection with this case which the Court should take into consideration as affecting creditors.

De Villiers, C.J.: If there had been any proof of collusion in this case between plaintiff and defendant, I should certainly not have granted the order. In the case of voluntary surrenders the Court has always held that where there are no assets, and it would not be for the benefit of the creditors that the estate should be sequestrated, the sequestration should not be adjudged. In the case of a creditor applying for compulsory sequestration, there is proof that such creditor, at all events, be-

lieves that the sequestration would benefit the creditors. If there is any reason for believing that he is acting in collusion with the debtor for the purpose of obtaining a sequestration which would not be obtainable on the petition of the debtor, the Court would, of course, not grant the order. But there is no reason in the present case for believing that there is any collusion between the parties, and not sufficient ground for holding that the sequestration would not be for the benefit of the creditors as a whole. It is clear that the defendant is unable to pay his debts, and the Court will therefore adjudge the sequestration, with costs occasioned by the opposition.

DE JAGER V. DE WIT.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £200, with interest, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Order granted.

BAHLMAN V. PEELTON VILLAGE MANAGEMENT BOARD.

Mr. M. Bisset moved for provisional sentence on a judgment of the Resident Magistrate of King William's Town for £21 19s. 9d., with interest at 6 per cent. from the 1st August, 1902, and £2 3s. 4d., taxed costs of judgment, and also costs of this application. Counsel also moved that certain rates, which are due to defendant Board and collected for them by the Divisional Council of King William's Town shortly to be paid over, be attached to satisfy judgment and writ.

Order granted.

VAN RHYN V. VAN RHYN.

Mr. Louwrens moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate of Van Rhyn's Dorp for £205, with interest, and £2 2s. 9d., taxed costs, and costs of this suit, and for certain landed property to be declared executable.

Order granted.

FEIN V. VAN RHYN.

Mr. Louwrens moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate of Van Rhyn's Dorp for £30 18s. 4d., and £2 1s. 10d., taxed costs, and

costs of this application, and for certain landed property to be declared executable.

Order granted.

OOSTHUIZEN V. MARINCOWITZ.

Mr. Sutton moved for provisional sentence on a notarial bond for £250, with interest, and for a certain inheritance to be declared executable.

Order granted.

ESTATE ATTWELL V. CABBITA.

Mr. De Waal moved for provisional sentence on a mortgage bond for £2,000, with interest, less £400 paid on account, and for the property specially hypothecated to be declared executable.

Mr. Rowson appeared to consent to judgment, and applied for a stay of execution, stating that the defendant was willing that plaintiff should receive the rent of Ariam Cottages, which would be more than sufficient to pay the interest. He also asked that plaintiff should be ordered to return two diamond rings that had been pledged with him in security for the interest.

Provisional sentence granted, and property executable, with stay of execution for two weeks.

De Villiers, C.J. (to Mr. Rowson): In the meanwhile, you may induce the plaintiff to take the rents in lieu of the capital; it would be for the benefit of both, I think. As to the rings, I suppose they were pledged with the plaintiff, and the Court cannot now order the rings to be given up.

Mr. Rowson: I submit that the rents are ample security for the interest.

De Villiers, C.J.: But the interest has not been paid.

ILLIQUID ROLL.

WILLMOT V. SNYDERS. { 1906.  
{ Oct. 25th.

Mr. Gardiner moved for leave to sign judgment against plaintiff (Snyders) for not proceeding with her action within the period fixed by the Rules of Court.

Order granted.

FICK V. JOHNSTON.

Mr. De Villiers moved for judgment under Rule 329d for an order of ejectment from a certain piece of ground of which plaintiff was the registered owner, plaintiff tendering £2 for improvements made by defendant.

Order granted.

**ARMSTRONG AND CO. V. JEPPE.**

Mr. Payne (for plaintiffs) moved for judgment in terms of consent paper.  
Judgment in terms of consent.

**REHABILITATIONS.**

Mr. Van der Byl applied for the discharge from insolvency of Charles Theodore Bailie.

Granted.

Mr. Watermeyer applied for the rehabilitation of Gustav Meyer Schmolle.

Granted.

Mr. Watermeyer applied for the discharge from insolvency of Samuel Gibson.

Granted.

**GENERAL MOTIONS.**

*Ex parte* OSBURN. ) 1006.  
Oct. 25th.

Dr. Greer moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

***Ex parte* ESTATE DUKE.**

Mr. Sutton moved, on the petition of the executrix testamentary, for leave to sell certain building stands in the estate in order to pay off liabilities.

Order granted, subject to conditions recommended by the Master.

***Ex parte* ESTATE VAN DER HEEVER.**

Mr. Burton moved for an order confirming the election of petitioner (Mr. Cloete, of Lady Grey), as sole trustee in the insolvent estate. An objection had been lodged by insolvent's husband on the ground that the trustee owed a sum of over £400 to the estate. This was denied by Mr. Cloete.

Order granted.

***Ex parte* ESTATE LE ROUX.**

Dr. Rainsford moved, on the petition of the executor testamentary, for authority to take over certain movable property in the estate of his late wife. Petitioner proposed to re-marry, and to pay for the movables in accordance with a sworn valuation, and to pass a *kinderbewys* securing the shares to the children. The will said that in such circumstances the movables must be sold by auction. It was stated, however, that the proposed arrangement would be in the interests of the minors.

[De Villiers, C.J.: The surviving spouse must carry out the terms of the will, which says that if he re-marries, he must sell the moveables by auction. He may then buy the movables.]

Dr. Rainsford: There is an affidavit that this offer is better than any that would probably be obtained at public auction.

De Villiers, C.J.: It is a very dangerous thing for the Court to interfere with the desires of testators. The husband and wife made a mutual will, and they directed that in case the survivor should wish to re-marry, the movables of the joint estate had to be sold, and she died in the belief that that provision would be carried out. Well, the Court cannot enter into a speculation now as to whether it is the best thing for the minors. It may be that it would be better for them that the property should be taken over by their father, but, on the other hand, the wishes of the mother as set out in the provisions of the will should be carried out. If the father is anxious to pay a high price for this property, he can pay it, and others, no doubt, in the interests of the minors, will attend, and bid, and probably the goods will realise more than is at present anticipated. I do not think there can be any order. No order will be made on the application.

***Ex parte* ESTERHUIZEN.**

Mr. Toms moved, on the petition of M. E. Esterhuizen, of Carnarvon, for leave to sue her husband, Samuel Jacobus Esterhuizen, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. It was stated that respondent was living in Fordsburg, Transvaal.

Leave to sue by edict granted, citation returnable on the 14th November, personal service to be effected.

**CAVANAGH V. STRASSBURGER.**

Mr. M. Bisset moved, on the petition of James Cavanagh, formerly proprietor of the Grand Hotel, Cape Town, for leave to sue the respondent by edictal citation to recover a sum of £215. Strassburger supplied certain champagne to the hotel while one James Welsh was manager, and it was alleged that double payment was made by Welsh for the champagne. Petitioner applied for the attachment of respondent's interest in the Cape Canning Company, now in liquidation, under which he would be entitled to a dividend approximately of about £300. Strassburger was now in Paris. A letter had been received from respondent saying that he did not remember the matter.

Leave granted to sue by edict, dividends to be attached *ad fundandam jurisdictionem*, citation returnable on the 1st February, personal service to be effected.

*Ex parte* LEZARD AND WIFE.

Mr. Gutsche moved for leave to register an ante-nuptial contract excluding community of goods, petitioners stating that their impression had been that they could, after their marriage, enter into such an agreement.

De Villiers, C.J.: This goes rather further than any previous applications. The Court has always refused to register anything in the way of a post nuptial contract, but if the parties were prepared to say that, before the marriage, there had been an agreement as to certain terms, then if those terms were carried out in the contract executed after marriage, the Court would give effect to it, not as a post-nuptial contract, because no such thing as that can be registered, but as an ante-nuptial contract. Here it seems that the parties did intend to marry in community of property, and it was only afterwards that they both thought themselves of excluding community.

Mr. Gutsche said that under the circumstances he would ask the Court to allow the matter to stand over in order that a supplementary affidavit might be filed.

De Villiers, C.J.: I think that would be the best course, because it is a dangerous precedent to allow people to be married in community, knowing they were married in community, to alter the position. If they can clearly prove that it was their agreement before marriage that there should be no community of property, and that it was only because they believed that a post-nuptial contract could be executed that they failed to execute a contract before marriage, then I might consider the application. There will be no order, but leave will be given to file a supplementary affidavit.

*Ex parte* WARD.

This was an application for leave to sue *in forma pauperis*.

Referred to Mr. Russell for certificate.

O'CONNOR V. MARAIS.

Mr. Upington moved, upon notice to the respondent, calling upon him to show cause why an attachment made by the Deputy-Sheriff of Robertson of the stock-in-trade of applicant at Ashton should not be removed.

Mr. Bailey appeared for the respondent to oppose.

It appeared that applicant, who is an hotelkeeper and general dealer at Ashton, was interested in the Montagu Baths. Respondent had taken judgment against him on a mortgage bond, and in satisfaction of that judgment the Baths property had been attached, and also the applicant's stock-in-trade at Ashton. Applicant was proposing to bring an action, but he said he could not proceed unless the attachment on his stock was removed. He was prevented meanwhile from carrying on his business at Ashton. Respondent said that he was willing to release the stock at Ashton, provided that other and good security was given by applicant.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: In cases of attachment of property in execution of judgments there must be a certain amount of hardship upon an execution debtor. His goods are attached; he has no longer any control over those goods, and he is hampered in his business accordingly. The one thing that could be said in the present case is that the hardship is somewhat greater than is usual, but I do not consider that any case has been made out to justify the interference of the Court. The execution creditor is entitled to payment of the judgment debt, and he is entitled to attach sufficient property for the Sheriff to satisfy his judgment. Of course, if more property is attached than is necessary, or reasonably necessary, it might well be that an action for damages might ensue, but such question would have to be decided by action. But, upon this motion, it is impossible for me to decide definitely that more property has been attached than under the circumstances is justifiable, and, therefore, I do not think that this application should be granted. The application must be refused, with costs. At the same time, I would intimate to the respondent that it would be well for him to come to some terms with the applicant, and consider whether part of the property cannot be released. This is a matter for friendly negotiation. It is not a matter for the interference of the Court. If the applicant would approach the respondent, value all his assets that have been placed under attachment, and make it clear to him that more has been attached than is reasonably necessary, I have no doubt that the respondent would meet him and release part of the property. That can only be done at this stage by friendly arrangement, and not by the interference of the Court.

BURCHELL V. BURCHELL AND OTHERS.

This was an application brought by Ignatius Theodore Price Burchell, as

one of the executors testamentary of the estate of the late James Mathew William Charles Burchell, for funds out of the estate for the purpose of defending an action pending between the second-named respondent and the executors of the estate in respect to the execution of certain will. Applicant also sought to purge default.

Mr. Burton was for applicant; Mr. Benjamin was for Mrs. Watson (one of the surviving executors); Mr. W. Porter Buchanan was for J. E. L. Burchell (plaintiff in the suit).

The matter was ordered to stand over until Thursday next, question of costs of the day also to stand over.

*In re* B.S.A. ASPHALTE AND MANUFACTURING CO. 1906. { Oct. 25th.

Rent—Preference—Tacit hypothecation—Act 5 of 1861.

*The tacit hypothecation of a landlord in respect of rent due on premises let to a company must, in case of the company being ordered to be wound up, be confined to the proceeds of goods that were on the premises at the time of such order.*

This was an application for confirmation of the second report presented by the liquidators of the B.S.A. Asphalte and Manufacturing Company, Limited.

Mr. Molteno appeared for the liquidators; Mr. Burton appeared for Andrew Allan, the late managing director of the company, to oppose the application.

From the report, it appeared that a good deal of the time of the liquidators had been occupied in an endeavour to adjust accounts between the late managing director and the company, and they now recommended that he rank as preferent creditor for £582 3s. 5d., and as concurrent creditor for £182 14s. 3d. They reported that they had been unable to recover any of the outstanding calls on shares. The liquidators also reported that they had called for tenders for the company's business, and they had received one from Messrs. Tredgold, McIntyre, and Bisset, acting on behalf of the Neuchatel Company, of £3,000 for the assets, excluding the book debts and the right of purchase of tar under contract with the Gas Company. This they had accepted. Some two weeks afterwards they received an offer from Mr. G. J. O'Reilly, acting on behalf of A. G. Searle, of £3,500, also excluding book debts, but including purchase of tar under contract with the Gas Company. They were not satisfied that the latter offer would have been

more beneficial to the liquidation than that of the Neuchatel Company, and they recommended that the agreement with the Neuchatel Company be confirmed by the Court. The liquidators added that the sale of the assets would, they estimated, result in a dividend to the creditors of 9s. in the £, but there was no prospect of any return to the shareholders.

Mr. Allan excepted to the report in regard to the way in which several portions of his claims against the company had been dealt with, and he put his side of the case before the Court at some length. He also submitted that the liquidators ought to have accepted the offer of Mr. Searle, instead of that of the Neuchatel Company, inasmuch as it would have been more to the interest of the liquidation.

Affidavits having been read and counsel having been heard in argument on the facts,

Mr. G. W. Steytler was called to speak as to a point of practice raised in connection with insolvency proceedings.

[De Villiers, C.J. (to Mr. Steytler): We know that you have had a large experience as trustee in insolvent estates. A question has arisen as to actual practice where there is a preferent claim in respect of rent in an insolvency, whether that preference is awarded in practice where there are no goods upon the premises?]

Witness: No, my lord. We do not recognise that preference. The practice has been that a landlord has only a lien on the property in the premises belonging to him.

[De Villiers, C.J.: In respect of property on the premises let?—Yes.

[De Villiers, C.J.: Supposing there is any property whatever, would you allow for the whole of the rent even if the rent is in excess of the value of the property?—No, my lord, whatever is the value of the property in the premises.

De Villiers, C.J.: Several objections have been raised in this case to the confirmation of the report of the liquidators, but there is only one of these objections that, in my opinion, has been proved, and that is the objection in regard to the salary which has been allowed to Allan, the objector, after the date of liquidation. I think that the letter which has just been read written to Allan by the liquidators, shows that up to the time when that letter was written Allan was recognised as still the managing director in terms of the arrangement which had been made with the company before liquidation, and I think that Allan, in being retained in that position, might fairly have believed that the intention was to pay him full salary. It might well be that he did not perform all the work, which before liquidation he would have performed, but I think if the liquidators



had intended to dispense with his services they ought to have informed him of their intention at the time when they undertook the liquidation. Apparently they did not inform him of it, and they subsequently wrote this letter, in which they dispense with his services in that capacity, showing that up to that time they recognised him as having that office. I consider that, once having retained him in that capacity, they should have given him a month's notice, and, failing the month's notice, that he is fairly entitled to £83 6s. 8d. claimed by him. The total amount claimed by him as remuneration for services is £195 1s. 5d., and the liquidators have allowed only £100, and I think, in fairness, Allan should be allowed the sum of £95 1s. 5d. in addition. In regard to the other objections, I am of opinion that they do not hold good. As to the rent, the practice in insolvency has been to confine the landlord's tacit hypothecation to goods on the premises at the time of insolvency. This practice appears to me to be perfectly correct. Before the passing of Act 5 of 1861 there was no recognised limit of time for which rent enjoyed a preference, and the 5th section of the Act limited the tacit hypothecation to one year's rent. But this tacit hypothecation affected only goods on the premises, and the Act made no difference in this respect. Then, in regard to the £500, which has been claimed by Mr. Allan, I do not think that he has given sufficient ground for being allowed to re-claim that £500. The transaction was one which no Court can possibly approve of. At the time Mr. Allan was the managing director of the company, there appears to have been no meeting of directors at which this arrangement, by which 500 shares were taken over as the payment of a debt of £500, was ever approved of. It is said that some meeting of shareholders was subsequently held at which this was sanctioned, but the circumstances of that meeting are not explained. It does not appear whether the shareholders had full notice that this question was to be raised at that meeting, and even if they had, I do not think that that would validate a transaction of this kind, and I am not, therefore, inclined to allow the £500 to be deducted. Moreover, there is no evidence whatever as to what the value of the shares was at that time. The value of the shares at that time is shown by the ultimate result, that the company has gone into liquidation, and that there will be nothing paid ultimately to the shareholders out of the assets of the company, and if Mr. Allan wants to rely upon his contention that these shares had any value at the time, it lay upon him to give clear proof of that value, in order to validate such proceedings as I have commented upon. Then, in regard

to the sale of the property, I think that that is a matter in which the Court should not interfere with the discretion of the liquidators. They gave ample opportunity to persons inclined to send in their tenders to tender, and the Neuchatel Company did tender in time, and was successful in having its tender accepted, and I do not think it would be fair either to the liquidators or the Neuchatel Co. to reopen the matter and allow other tenderers to come in. Moreover, I am not satisfied that even if the question had been opened at the time, even if the other tender had been sent in and considered at the same time as the tender of the Neuchatel Co. was considered, the liquidators would be justified or bound to have accepted the tender of Searle in preference to the tender of the Neuchatel Co. They have exercised their discretion in the matter fairly, honestly, and reasonably, and I do not think this Court should now interfere. The effect of my judgment will be that the Court will order that the report be confirmed, subject to this amendment; that in lieu of the sum of £100 as remuneration for services after liquidation, the sum of £195 1s. 5d. be allowed to W. Allan. Costs of opposition will be paid out of the assets of the company.

Mr. Molteno asked if the costs of opposition would include the affidavits, which contained so much extraneous matter.

De Villiers, C.J.: Costs will come out of the assets, with the exception of costs of affidavits, so far as they refer to objections which have not been allowed by the Court.

[Applicants' Attorneys: Van der Byl and De Villiers. Allen's Attorney: Not on record.]

#### *In re* ASSETS REALISATION ASSOCIATION, LTD.

Principal liquidator—Official liquidator.

*In a competition for appointment as official liquidator of a company that is being wound up, the provisional liquidator should, ceteris paribus, be preferred to other candidates.*

This was the return day of a rule *nisi* calling upon all concerned to show cause why the Assets Realisation Association, Ltd., should not be placed under a winding-up order, and Wyndham Bishop and Alfred Theo. Lougher appointed official liquidators.

Mr. Alexander (for the petitioner, W. T. Seccombe) appeared to move for the rule to be made final.

Dr. Greer, on behalf of W. L. Scott and W. G. Coulton (as creditors of the company), appeared to show cause against the appointment of Messrs. Bishop and Lougher as official liquidators.

Hilyard Home Drummond, who was in custody, also appeared to oppose the appointment of Messrs. Bishop and Lougher.

It will be remembered that the rule was granted on the application of Secombe, who said that he was the holder of a £1 share in the company, and that the company was a bogus one, and had been run by the managing director (Drummond) for his own behoof and interest (16 C.T.R. 860).

Dr. Greer read an affidavit by W. L. Scott, of St. George's-street, who said that he had a claim against the company for £100 on a promissory note. Petitioner, as far as deponent was informed, had practically no interest in the company. He submitted that Lougher was not a fit and proper person to be liquidator of any company, there being several judgments against him in the Magistrate's Court. He also complained that the provisional liquidators had sold all the goods in the company's office, including certain furniture belonging to him (Scott). An affidavit by W. G. Coulton, attorney, was also read, in which he said that he had a claim against the company for £6 2s. 10d. for rent and expenses of attachment. He did not consider Bishop and Lougher to be fit and proper persons to be appointed liquidators.

Drummond, in an affidavit, alleged that the financial embarrassments of the company had been due to the defalcations of the late solicitor and book-keeper, and that the former had now joined Lougher, one of the provisional liquidators. He declared that Lougher had been put forward as a liquidator in order to save the late solicitor of the company from conviction for a felony. Deponent also said that the only acquaintance that Bishop had with such matters was the knowledge he had got when his own affairs went through the insolvency branch. As to Lougher, he was well-seasoned in such proceedings. Deponent also complained that all his goods had been sold by the liquidators, including his wearing apparel. The petitioner had not even paid up the £1 share issued to him.

Mr. Alexander read an affidavit by H. J. Atkinson, late book-keeper in the company's employ, who said that Drummond's allegations, so far as they referred to him, were untrue. Bishop, in an affidavit, said that he was thoroughly acquainted with the Company Law of this Colony, and that he had acted as curator under appointment from this Court. The assets alleged by Drummond to be in existence were a pure

myth. Although Drummond said that he held 2,000 shares in the company, it did not appear from the share register that he was the holder of a single share. There was abundant evidence to show that the company had been carried on solely for his personal ends. The books were irregular and a disgrace to any company or trading concern. The other allegations as to his insolvency were, he said, ridiculous and erroneous. Lougher, in an affidavit, said that he could not find that Scott was a creditor of the company. The £100 represented moneys and interest on an advance by the said Scott to Drummond personally, which moneys were employed for the sole use and benefit of the said Drummond. The other allegations in the affidavit of Drummond were false, scandalous, and malicious. The company (he added) was hopelessly insolvent. An affidavit by H. Stanley Jones, late solicitor of the company, was to the effect that the charges which had been made against him were groundless and malicious.

Dr. Greer was about to read further affidavits by Scott, when

Mr. Alexander objected to further affidavits going in.

The affidavits were, therefore, excluded.

Dr. Greer applied for the appointment of Scott as liquidator. He said that Scott was the only person who had been proved to have a real interest in the company.

Drummond submitted that the association ought not to have been placed under a winding-up order. The whole of this business, he added, had been brought about by one gentleman, who was the solicitor of the company, Stanley Jones, and it was through his defalcations that the liquidation of the company had been brought about, and it was through his machinations that he (Drummond) was now in custody. He would support Dr. Greer in the appointment of Scott as a liquidator. The application was the outcome of venom. The company was not insolvent, and had assets exceeding £500, including one item alone of £250 Russian Four per Cent. Bonds.

Mr. Alexander submitted that no good and sufficient reason had been shown why the rule should not be made absolute. He said that the assets were not worth more than £50.

De Villiers, C.J.: An order has already been made for the winding up of this company, and there has been no appeal from that order. It still stands; it is not proposed in the present application that that order should be superseded, and the only question to be decided is who are to be the liquidators? *Ceteris paribus* the provisional liquidator, should, in a competition for appointment as official

liquidator, be preferred to other candidates. We have had an affidavit by Mr. Scott and also by Mr. Drummond, and they both of them object to the liquidators already appointed, and they both make vague, general charges against the two gentlemen. As to Mr. Bishop, it appears that he has been appointed by the Court as curator in certain other cases, and there is nothing, so far as I can judge, against him. As to Mr. Lougher, it is said there are writs of civil imprisonment against him, but all the statements made against him are denied, and the writs have not been put in. The best evidence as to the existence of writs of civil imprisonment would be the writs themselves, and not one of them has been put in. But the Court can secure the creditors and persons concerned by directing that security shall be given by both liquidators. As to the amount, Mr. Drummond says that there are £500 of assets, and the applicant says there are £50. Between them, I should think that £300 might fairly represent all the assets of the company. Then it is suggested that the Court should appoint Mr. Scott to be liquidator, but I know nothing about the capacity of Mr. Scott to be liquidator. I will assume that the amount of debt which he alleges is owing to him, but by whom? It is alleged that the money which he is said to have advanced to the company was really not advanced to the company, but to Drummond personally. If there is any question on this point, I think it would be exceedingly undesirable to appoint Mr. Scott. No one else has been suggested, and on the whole, therefore, I think that these two gentlemen, Bishop and Lougher, having already received the provisional appointment, and as they can only be confirmed subject to proper security being given should be retained in their appointment. The Court will, therefore, appoint Wyndham Bishop and Alfred Theodore Lougher as official liquidators, with powers mentioned in the 149th section, security for £300, to the satisfaction of the Registrar of the Supreme Court, to be given.

Mr. Alexander applied for costs of opposition against the other side.

Dr. Greer urged that costs of opposition should come out of the assets.

De Villiers, C.J.: What will there be left? There will be no order as to costs, except that the applicant will have his costs out of the assets.

[Applicant's Attorney: L. Alexander. Attorneys for Scott and Coulton: C. Brady.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

FOUCHE V. FOUCHE. { 1906.  
Oct. 26th.

This was an action brought by Maria Magdalena Fouche, of Robertson, against her husband, Barend Albertus Fouche, described as a blacksmith and wagon-maker, of Graaff-Reinet, for a decree of divorce by reason of defendant's adultery, with one Jooste.

Mr. Benjamin was for plaintiff; defendant did not appear.

The Rev. A. McGregor, retired minister, of the D.R. Church, gave formal proof of the marriage at Robertson in November, 1884.

Plaintiff said that after the marriage she lived with defendant at her father's farm, and then they went to Kimberley, and remained about a year. While at Kimberley she had reason to suspect her husband's fidelity. Afterwards they removed to Uitenhage, where they remained about five years. Then her husband went to Johannesburg, and promised to send for her, but he failed to do so, and the next she heard of him was at Cradock. He visited her at Uitenhage, but did not remain in the house. About seven years ago he went to Graaff-Reinet, where he had since been living. Defendant had not contributed towards her support, except as to two small amounts. She had written to him, but had only received abusive letters in return. There were four children of the marriage, all boys, aged respectively 20, 18, 15, and 13 years. Witness asked for maintenance, as well as custody of the minor children.

Mr. Benjamin applied for leave to prove the adultery by means of affidavits, pointing out that plaintiff was a poor woman, and the case could not very well be tried at the Circuit Court, as the parties were living some distance from each other.

De Villiers, C.J., said that a letter had been received by the Registrar from the defendant, in which he admitted the allegations in the plaintiff's declaration, and said that he did not intend to defend the action. Under the special circumstances, plaintiff would be allowed to prove the adultery on affidavit.

Mr. Benjamin read affidavits by an amateur photographer at Graaff-Reinet and the Deputy-Sheriff, from which it appeared that defendant had been living in Cradock-street under another name with a woman and a child.

Mrs. Fouche identified her husband in a photograph of a man, woman, and child taken by the amateur photographer at Graaff-Reinet.

Decree of divorce granted, with costs, plaintiff to have custody of the minor children of the marriage, defendant declared to have forfeited benefits under the marriage, and ordered to pay to plaintiff £4 per month for the support of the children for two years from this date.

#### MCMORROW V. COLONIAL GOVERNMENT.

**Lunatic Asylum — Attendant —  
Responsibility for injury done  
by patient to attendant.**

*The plaintiff, who was an attendant on lunatics at a Government Lunatic Asylum, was suddenly attacked by one of the lunatics and had his jaw broken. There was no proof that the lunatic was dangerous or violent, except that on a previous occasion he had given another attendant a push.*

*Held, that although the plaintiff had not been informed by the Asylum authorities of the previous assault, he was not entitled to claim damages from the Government in respect of the assault committed upon himself.*

This was an action brought by Andrew McMorrow, an attendant at the Valkenberg Asylum, against the Colonial Government, for £3,000 damages sustained by reason of the alleged negligence of the defendants or their servants.

Plaintiff, in his declaration, said that on or about the 10th November, 1904, he had some ten patients entrusted to his charge for exercise, each and all of whom he had reason to believe, and did believe, belonged to the non-refractory class. In contravention of the rules and regulations of the aforesaid asylum, one Basil Elliott, who was well-known to the authorities of the asylum to be a dangerous and refractory patient, was on the said occasion entrusted to the care of the plaintiff. During the time the said Elliott and other patients aforesaid were exercising, Elliott suddenly, unexpectedly, and without provocation, inflicted a severe assault upon the plaintiff, whereby his jaw was fractured in two places. In consequence of the assault, plaintiff had suffered great pain and a severe shock to his nervous system, so

as to be unfitted for his duties and for manual labour. His sufferings had been increased by reason of the unskilful surgical treatment which he had received at the Asylum. He claimed £3,000 damages.

Defendants originally excepted to the declaration on the ground that it disclosed no cause of action, but the exception had been withdrawn. In their plea, they admitted the formal paragraphs, except that they denied that plaintiff had no reason to believe that the patient referred to belonged to the non-refractory class, and especially said that there was no such classification recognised at the said Asylum. They denied the alleged contravention of regulations, save that the said Elliott was on the occasion referred to entrusted to the care of plaintiff. They admitted that plaintiff had suffered injuries in consequence of the assault, but denied the alleged unskilful treatment. Plaintiff had since the time of the assault, and was now, employed as an attendant at the Asylum, and he performed his duties as efficiently as he did prior thereto.

Mr. Rowson was for plaintiff; Mr. Howel Jones (with him Mr. Lansdowne) was for the defendants.

Plaintiff said that he entered the service of the Government at Valkenberg Asylum in September, 1904, at a remuneration of 3s. 10d. per day, which had now been increased to 4s. per day, with board and quarters. He estimated that the office was worth £144 a year. About the middle of November, 1904, he was sent out with ten patients from Ward No. 1. He had been warned by the chief attendant not to allow one of the patients, Basil Elliott, to walk behind him, and to keep another patient, B., at his side. Witness had no idea from the warning that Elliott was dangerous. It was not usual to entrust ten patients, amongst whom there might be one or two dangerous subjects, to one attendant. If a man were known to be a dangerous patient, he was put under special observation. He noticed that Elliott was lagging behind, and he asked him to walk out in front. While witness's attention was diverted by B., Elliott rushed up and struck him on the jaw, stunning him, and causing blood to issue. He afterwards saw Dr. Black, and told him that he thought his jaw was fractured. Dr. Black, however, said he did not think so. A four-tail bandage was put on witness, and he was kept in his room for two and a half weeks.

De Villiers, C.J., asked Mr. Rowson what he founded his case upon?

Mr. Rowson said that the plaintiff alleged negligence, in that he was not properly warned of the dangerous character of the patient, and in that he was not properly treated by the doctors at the Asylum.



Witness (in reply to the Court) said that he had not held any previous appointment at an asylum.

[De Villiers, C.J.: I suppose there is a certain amount of danger that a lunatic may at any time become dangerous?]

Mr. Rowson: An attendant takes ordinary risks in a dangerous occupation, but he does not take extraordinary risks.

[De Villiers, C.J.: How do you make the Government responsible for the bad treatment of the surgeon?]

The surgeon acts as the agent of the Government.

[De Villiers, C.J.: Oh, no. If the Government employs a surgeon who is known to be a skilful surgeon, then, if he does not do his work skilfully, the Government is not responsible.]

The Government is responsible for the torts of its servants.

[De Villiers, C.J.: What is the tort here?]

The tort is that this man was unskilfully treated.

Witness (continuing) said that he complained about the injury he had received to Dr. Black, who said that no man could do anything for him at present. Dr. Dodds advised him to go to a dentist. Witness subsequently saw Dr. McMullen.

By the Court: Witness had been permanently injured. He had constant pain in his jaw. There was a constant dragging on his teeth, trying to get into their natural position. His articulation had also been interfered with.

Witness, in further evidence, said that he was brought up on his father's farm, and there was no other occupation that he could turn to, as he was unfit for hard manual labour and he had no trade.

Cross-examined: When witness came out here he went on the Breakwater service. He left that service in order to better himself, as an attendant at the Asylum. He did not leave because he had seen a warder struck by a convict. He had seen an attendant struck by a patient at the Asylum before he was appointed. He had reason to believe that Elliott was a dangerous patient, because of assaults he had previously committed. Elliott was in the habit of loitering. He did not speak harshly to Elliott, who was a gentleman by birth.

Mr. Jones asked witness what rule and regulation had been contravened by entrusting Elliott to his care?

Witness said that he did not understand the question.

De Villiers, C.J., said that plaintiff's counsel had admitted that there was no rule and regulation that had been contravened.

Further cross-examined: Dr. Black told witness at first that he did not think that his jaw was fractured, but he after-

wards said he thought his jaw was fractured in one place. He told Dr. Black that his teeth had tilted in in consequence of the assault. He had often suffered from headache in consequence of the blow. His nerves had also suffered, and he had a constant dragging on his teeth, which prevented him from masticating his food. Witness was now in receipt of 4s. 2d. a day. He considered that he had been injured for life, although he had been working two years since the accident occurred.

Re-examined: Witness was not constitutionally nervous prior to the accident.

Joseph R. Price, dental surgeon, produced two models—one of the mouth of a man who had perfect articulation and the other of the mouth of plaintiff. The first model was of witness's assistant.

[De Villiers, C.J.: But then, has everyone a perfect mouth?]

Witness: Very few.

[De Villiers, C.J.: Your assistant has a perfect mouth?]

Nearly so.

[De Villiers, C.J.: Can you say what the other mouth was like before the blow was struck?]

No.

[De Villiers, C.J.: Can you say why plaintiff's mouth is not perfect?]

No.

Dr. McMullen, of Cape Town, said that he had had considerable experience of surgical cases. If a person had a double fracture of the lower jaw, witness would call in a dentist at once. When plaintiff called to see him, witness noticed that he had a double fracture. The union had been properly effected, but there was a mal-position of the teeth.

Mr. Rowson: Do you think that if plaintiff had been properly treated his teeth would have articulated in the normal fashion?

Witness: I believe they would. In further evidence, witness said that there was a danger that plaintiff would extract his own teeth in time if he tried to eat anything hard. He had been unable to get the plaintiff's pulse down to the normal. He did not think the plaintiff was fit to be continued in his office.

Cross-examined: Witness had never treated a double fracture of the jaw. He held that it was imperative that a dentist should have been called in to put a splint on the plaintiff's jaw. He was not surprised that plaintiff suffered from headache, seeing that his pulse was regularly 100. A normal pulse was from 65 to 75.

George W. Club, an attendant at Valkenberg Asylum, said that he had been at the Asylum about two years and seven months. He was not aware that Elliott had assaulted anyone at the Asylum prior to the attack which he made upon plaintiff. Witness was not



aware whether a ward was set apart at Valkenberg for dangerous patients. Patients who were known to be dangerous were mixed with the others. Elliott had never been under his charge.

Cross-examined: There were about 200 patients at the Asylum, and about fifty of them had been known to assault the warders.

Charles S. Still, another attendant, said that on the day of the assault plaintiff spoke to Elliott in an ordinary tone. Elliott ran away after he had struck plaintiff, and witness gave chase, and he had a struggle with him before he could get him back again. He had known him commit one assault, viz., upon Warder Quirey, prior to the attack upon plaintiff.

Cross-examined: Elliott pushed Warder Quirey, but did not inflict any injuries upon him.

Dr. F. M. Morris said it was difficult to say whether the malformation of plaintiff's teeth was natural or due to violence. Certain of the deformities, he should say, were due to injury.

Archibald McCorkindale, manager of the New York Mutual, said that the cost of an annuity of £150 to a man of 26 years would be £3,000.

Mr. Rowson closed his case.

Sir Edmond Sinclair Stevenson said that he examined the plaintiff's jaw on the 24th September last, but he found no signs of any fracture. There was an abnormal formation of the teeth. He could not say whether there had been a fracture. Assuming that there had been a fracture, he could find no signs of unskilful treatment, in fact, he should say that, so far as the jaw bones were concerned, the treatment had been successful. The teeth were tilted inwards.

Dr. Wm. Johnson said that he had had a good deal of experience of dental surgery. He had taken a model of the plaintiff's teeth this month, and he was unable to find that the jaw had been fractured. Plaintiff's teeth were irregular, and he had an overcrowded mouth. Some of the teeth had never articulated.

De Villiers, C.J., intimated that it was unnecessary to lead further evidence for the defence. He stated that he had read the evidence given on commission by Dr. Black.

Mr. Rowson: Our case is that the Government, by its servants, has been guilty of two species of negligence: (1) They did not warn the plaintiff as to the dangerous character of this patient, Elliott, who, together with nine others, was entrusted to his care. (2) He was improperly and unskilfully treated after his accident.

As to the first point, I must, of course, admit that when a man undertakes a dangerous employment, he undertakes such ordinary risks of that employment as by the use of ordinary human pru-

dence he can foresee, but he does not undertake altogether unforeseen risks. The principle upon which this taking of risks is based is *volenti non fit injuria*. But how can a man will a thing of which he is utterly ignorant? *Nihil volitum quin praeognitum*. The plaintiff had a perfect right to believe, and did believe, that each of the 10 patients entrusted to his charge was harmless. He was not cautioned beyond being told not to let Elliot walk behind him, but that was not a caution as to the man's dangerous character. He might have been a dirty patient, or a mischievous patient, or a patient who would be likely to attempt an escape; there may have been fifty reasons for not allowing him to loiter behind. One witness has told us that dangerous patients are constantly sent to exercise with non-dangerous patients. Well, if that is true I do not know what stronger proof we could possibly have of the negligent management of this institution. If this is so, for what purpose is the dangerous ward? In the plea it was denied that any such classification of patients exists, but for the credit of the institution, I am happy to say, that this allegation is contradicted by the evidence.

But then it is denied that Elliott was known to be a dangerous patient. Well, he had committed at least one previous assault on an attendant, and after the assault on the plaintiff it was as much as two men could do to overpower him. How many assaults must a patient commit before he is considered dangerous? We have it in evidence that one patient was sent to the dangerous ward after having committed one single assault: but then that assault was committed, not on an attendant, but on Dr. Black.

As to my second point the evidence, especially that of Dr. McMullen, shows that the plaintiff was unskilfully treated, and that as a result of such unskilful treatment he is disabled for life from following the only kind of occupation for which he is fitted. True, he has continued for some time to perform his duties at the Asylum, but that does not prove that he is fit to do so. A man with shattered nerves, suffering almost constant pain, is not the sort of man to fulfil the onerous duties of an attendant on the insane. He has continued to perform those duties to the best of his ability because he must either do so or starve; and his services have been retained by the authorities because had they discharged him as unfit for duty they would have given their whole case away. The cast of his mouth speaks for itself: it shows lateral displacement and bad articulation of the teeth, while the facets and grooves on the teeth clearly prove that at one time the articulation was good. Dr. Morris considers that some of the dental deformities are certainly due to injury. Sir E. S. Steven-

son, the chief Government witness, carries the case no further. All he can say is that the jaw has well united, but that does not prove that it was properly set. He admits an abnormal formation of the teeth, and that they are tilted inwards. I take it that it is hardly necessary to argue that unskilful medical treatment by a medical practitioner is a tort whether it arises from want of care or want of skill, and that the Government is responsible for the torts of its servants if committed in the discharge of their official duties. All actions against the Government for personal injuries sustained by reason of railway accidents are based on this latter principle.

As to the damages claimed, no doubt £3,000 may seem rather a large sum, but it is really very moderate as it is based merely on the present emoluments of the plaintiff, and takes no account of what would have been his future prospects had he not met with this accident. His present position is worth to him nearly £150 a year, and Mr. McCorkindale tells us that a man of plaintiff's age would have to pay fully £3,000 to purchase a life annuity of that amount.

Mr. Jones was not called upon.

De Villiers, C.J.: The plaintiff, while employed as an attendant at the lunatic asylum at Valkenberg, was injured by reason of an attack made upon him by one of the patients. The patient was a Mr. Elliott, who, while the lunatics under the charge of the plaintiff were exercising, lagged behind. He was called upon by the plaintiff to go on, and he suddenly rushed upon the plaintiff and gave him a blow on the jaw, which resulted in a fracture of the jaw. The plaintiff was treated by Dr. Black, who was one of the medical attendants at the asylum, and after the treatment was over, he returned to his work, and has for nearly two years since been in the service of the Government and employed as an attendant at the asylum. He now claims £3,000 damages on the ground that the injury which he had sustained was so great as permanently to disable him, and he states that there is two-fold negligence on the part of the Government officials—first of all, in that he (the plaintiff) was not duly warned that Elliott was a dangerous patient, and, secondly, in that, after an injury had been done to him (plaintiff), he had not been skilfully treated by Dr. Black, the surgeon at the lunatic asylum. With regard to the first ground of negligence, there is no satisfactory evidence to show that Elliott was, in any sense of the term, a dangerous patient. It is true that on one occasion he did make a rush upon one of the attendants, that is before this occasion, but he seems to have given the attendant merely a push, no serious

results ensued from it, and, in point of fact, the statement is made by Dr. Black, and it is not denied, that there is no charge of previous assaults recorded against Elliott in the record books of the asylum. According to Dr. Black, he says: "I certainly do not call Elliott a dangerous lunatic; he is easily managed as a rule; he is like an overgrown boy, etc." Now, a person who undertakes a duty like that of an attendant at an asylum must know that he would be exposed to sudden attacks of this nature. It is in the nature of the occupation. Every person confined in that asylum is a person who, legally, is not responsible for his actions, and, although the majority of them may not actually commit assaults, every attendant knows that he may at any moment be exposed to an assault. I do not say that there would have been a case if Elliott had been a dangerous patient, but I do say that inasmuch as there is no proof whatever that Elliott was a dangerous patient there was no necessity for giving plaintiff any caution as to Elliott, and that when the plaintiff was assaulted it was one of those matters which he might have expected, and which does not give him a legal claim against the Government for damages. Of course, as to the claim from other points of view, I say nothing, but as to the legal claim there is none. Well, then, the further question is raised as to whether, after the assault, the plaintiff had been properly treated. The medical attendant at the asylum, who was employed for the purpose of treating the plaintiff, was Dr. Black. He seems to have devoted his time and skill to the case of the plaintiff. He attended him regularly, and he did everything that he thought was reasonably required. He used what is called a four-tail bandage, and I am satisfied, from the medical testimony given to-day, that the treatment was perfectly sufficient under the circumstances. It may well be that if the plaintiff had been sent away to the hospital, and had been left to himself entirely, it would have been better for him, but, seeing that he was under the immediate care and daily attention of Dr. Black, there seems to have been no necessity for doing more than using this four-tail bandage which was used. Now a very good test as to whether there was proper treatment or not seems to me to be whether this fracture is still discernible now or not. The setting seems to have been so skilful that it is now impossible, from feeling the jaw or looking at it, to see where the fracture was. It is no longer possible to see the point where the fracture took place. I can quite understand the statement of Dr. Stevenson that, if this setting had not been skilfully done, the point at which the fracture of the jaw

took place would have shown the marks of this fracture, but there is nothing at present to show any such mark. No lateral displacement was observed by Dr. Stevenson, and I am quite satisfied that everything that could reasonably be expected was done by Dr. Black, and that there was no unskilful treatment on his part. Therefore, I do not go into the further question whether, supposing there had been proof of unskilfulness in this case, the Government would have been liable for the acts of the surgeon. It may well be argued that if the Government employed a fit and proper person to attend to the plaintiff and that fit and proper person does go wrong in this instance, it does not necessarily produce any legal liability on the part of the Government. But it is not necessary now to express any opinion on that legal question, seeing that upon that question of fact, I am not satisfied that the plaintiff has proved such unskilfulness on the part of Dr. Black as to entitle him (the plaintiff) to sue either Dr. Black himself or the Government that employed him. For these reasons, I am of opinion that the judgment of the Court must be for the defendant with costs.

Mr. Rowson submitted that the plaintiff should not pay costs of the commission to take Dr. Black's evidence, and of the exception withdrawn by the Government.

De Villiers, C.J.: My own view is that it is to be regretted that the exception was withdrawn, because if the exception had been argued possibly all the further expense would not have been incurred of witnesses coming into Court to prove this case to-day. I can see no reason, however much one sympathises with the plaintiff, why the Court should not follow the ordinary practice in this case, that, when the defendant has wholly failed in his case, he must pay the costs. As far as this Court is concerned, it must follow the ordinary course, and give judgment for the defendant with costs. If the Government wish to treat the plaintiff liberally, of course that is another question, but I must follow the ordinary course and give judgment for the defendant with costs.

[Plaintiff's Attorney: J. H. Walker.  
Defendant's Attorneys: Reid and Nephew.]

#### GENERAL MOTIONS.

*Ex parte SELLE.* { 1906.  
Oct. 26th

Dr. Greer moved for an order authorising registration of a certain bond.  
Order granted as prayed.

#### PARKER V. FEDER.

##### Withdrawal of case—Costs.

*The plaintiff having instituted an action against the defendant for a debt, discovered that it had been paid; and, according to his own statement, which the defendant denied, informed the defendant that the action would be withdrawn. Two days afterwards, the defendant called on the plaintiff's attorney, who knew nothing about the withdrawal of the case, and thereupon the defendant gave instructions to his own attorney for the defence of the case: Subsequently notice of withdrawal was given.*

*Held, that the plaintiff should pay the defendant's costs incurred before receipt of such notice.*

This was an application upon notice calling upon respondent to show cause why he should not pay £7 16s. 5d., taxed costs incurred in certain proceedings in which respondent was plaintiff and applicant was defendant, which proceedings were withdrawn without (applicant alleged) due notice being given.

From the affidavits it appeared that the application arose out of an action commenced by respondent to recover £55, alleged to be due upon a certain notarial bond by reason of an instalment not having been paid. Applicant said that he had paid the instalment to another party on behalf of respondent, and that he should not have been sued.

Dr. Greer was for applicant, B. Parker, of Kalk Bay; Mr. W. Porter Buchanan was for respondent, Harry Feder.

Mr. Buchanan having been heard in argument,

De Villiers, C.J.: Summons was issued at the time when there was nothing owing to the plaintiff. The applicant in the present case, who was the defendant, went to the plaintiff's place, and explained the matter, and what took place at the interview is in dispute. According to the applicant, nothing was said about withdrawing the case. According to the respondent's statement, it was said at the time that the case would be withdrawn. But I do not think that a case of this kind should have to depend on the question of credibility between these two persons. There was a formal summons issued as against the present applicant, and it would not have been safe for him to act

upon a mere verbal arrangement that the summons would be withdrawn until there was a formal withdrawal. On the Saturday when this alleged arrangement took place the respondent ought there and then to have telegraphed to his attorney to withdraw the matter, or, at all events, if he did not do it on Saturday he should have done it on Monday morning, and informed his attorney as to what had taken place between him and applicant. Applicant went to Cape Town apparently in the belief that the action was to come on, else I do not understand why he should have come to Cape Town. He went to the office of the respondent's attorney, and the respondent's attorney did not then tell him that the action was withdrawn. The attorney had got a summons issued, the attorney had got the proceedings in hand, and he (applicant) would naturally look to the attorney as the one who would indicate whether the summons had been withdrawn or not. The attorney does not say anything of that kind. Naturally, the applicant instructed his own attorney to defend the case. But then it is said that, when he went to his own attorney, that attorney ought to have known that the action would not be proceeded with because he had a receipt. But in the absence of a formal withdrawal by the attorney of the action, the applicant was justified in believing that the action would proceed, and I cannot accept a vague statement of what took place between the parties on the Saturday as amounting to such a formal withdrawal as would compel the applicant to stay his hand and take no steps to meet the case. For these reasons, I am of opinion that the applicant is entitled to his costs. The Court will grant as order as prayed, with costs.

[Applicant's Attorney: C. J. A. Friedlander. Respondent's Attorney: A. W. Steer.]

#### INSOLVENT ESTATE DICKSON V. TURNBULL.

This was an application to make absolute a rule nisi calling upon respondent to show cause why he should not be restrained from removing or disposing of certain goods, being furniture and stock of liquors contained in the Royal Hotel, Wynberg, pending an adjustment of the rights between himself and applicant by action.

Mr. Upington was for applicant; Mr. Burton was for respondent.

Having heard counsel in argument on the facts,

De Villiers, C.J.: The rule in question called upon the respondent to show cause why he should not be restrained from removing or disposing of certain goods pending adjust-

ment of the rights between himself and the applicant by action. It would seem that before this rule was served upon the respondent, the respondent had obtained from the auctioneer a sum of £50, as a charge upon these goods, and he had already paid over the money to his attorneys for the purpose of prosecuting an action against Ohlsson. The rule, therefore, cannot operate upon the £50. Already that £50 had been paid. The rule could only operate upon the goods, to prevent the removing or disposing of the goods; that is all. Then, after that, there was an agreement between the parties that the goods should be removed and disposed of, and that the proceeds should be paid over to Mr. Steytler (the trustee), pending further action. But the whole of the proceeds could not be handed over to Mr. Steytler, because £50 had already been paid over, and had been handed over by the respondent to his attorneys. I do not see, therefore, that the Court can now make the rule absolute, or make any order as to the £50. As to the rest of the property, it has already been sold by an agreement between the parties. The only course, therefore, now will be for the present applicant to proceed with his action against respondent, or else the trustee may retain the money until the question of Turnbull v. Ohlsson has been decided, in which this question of partnership is also raised. There will, therefore, be no order upon the present application, but I do think that the costs of this application may fairly be reserved for the final decision.

After hearing counsel further,

De Villiers, C.J., said there would be no order, except that the applicant's action must be brought to trial during next term, costs to be costs in that action.

STOWE V. BROMBERG AND { 1906.  
ANOTHER. { Oct. 26th.

#### Police Offences Acts—Exception—Amendment of Record.

*The applicant, having been convicted by the Resident Magistrate of S. of having in the main street of S. used threatening, offensive and insulting language and behaviour towards B., with intent to provoke a breach of the peace in contravention of the 10th section of Act 27 of 1882, applied to the Supreme Court for an order to have the Record amended so as to make it clear that an exception had been*



*taken to the summons to the effect that Act 21 of 1894 ought to have been mentioned. The Magistrate denied that the exception had been taken.*

*Held, that there was no necessity for such an amendment, for even if the exception had been on the Record, there would have been no ground for disturbing the conviction.*

This was an application brought by George Frederick Stowe, against Hyman Bromberg and the Acting Resident Magistrate of Steytleville to show cause why a certain record of proceedings in the Magistrate's Court should not be amended.

Mr. Douglas Buchanan was for applicant; Mr. Howel Jones appeared for the Acting Resident Magistrate of Steytleville.

Affidavits having been read, and Mr. Buchanan having been heard in argument on the facts,

De Villiers, C.J.: The charge against the applicant was that "he did, in the main street of Steytleville, use threatening, abusive, and insulting words and behaviour to the said Hyman Bromberg, with intent to provoke a breach of the peace," and it is said that thus the applicant did contravene the 10th section of Act 27, 1882. It is now asked that this Court should order that the record be amended by making it clear that an exception was taken to the summons to the effect that the Act No. 21 of 1894 had been contravened. The Magistrate, however, denies that such exception was taken. He says that the Act was mentioned, but it was not by way of formal exception. Whether the applicant is right or whether the Magistrate is right, it is quite clear that even if the exception had been inserted on the record, it would have made no difference to the result, because not mentioning the Act of 1894 could not possibly affect a charge of using insulting words in a public street at Steytleville, which would have been triable under the Act of 1882, and, moreover, the Act of 1894 distinctly says that "this Act shall be read as one with the Police Offences Act, 1882, and as though the last preceding section were inserted in part 2 of the said Act." Then there is a further objection to the effect that Bromberg, against whom these words were used, and upon whose complaint and information the prosecution had been instituted, desired to withdraw the charge. Well, I shall not inquire now into the question whether, even if it had been mentioned in the record, that there was such a desire that the Magistrate would

have been bound to allow the withdrawal, but if the applicant wishes for an amendment it lies upon him to prove that the application was formally made by Bromberg to withdraw from the prosecution. The Magistrate held that such application was not made. The prosecution was not a private one, he says, and the complainant Hyman Bromberg, said nothing whatever about wishing to withdraw the charge in Court or out of it. Bromberg himself is not called to prove that he did withdraw the charge, and there is this fact, that, upon the record, it appears that Bromberg gave his evidence and fully supported the charge. So that I am inclined to accept the statement of the Magistrate that no formal application was made by Bromberg to withdraw the charge. Under these circumstances, there is no necessity for any amendment of the record, and the application must be refused, with costs.

[Applicant's Attorney: W. G. Coulton.]

#### NATIONAL BANK V. PEEL.

Divisional Court — Appeal to Supreme Court—Security.

*The question as to whether the security offered by the party appellant under Sec. 26 of Act 35 of 1896 is good and sufficient, should in the case of an appeal from a Divisional Court to the Supreme Court be decided by the Registrar of the Supreme Court, as he is also Registrar of the Divisional Court.*

This was an application upon notice calling upon respondent to show cause why he should not be barred from prosecuting an appeal to the Supreme Court from a judgment of Mr. Justice Maasdorp, sitting as a Divisional Court, by reason of his failure to prosecute the said appeal within the time fixed by Rules of Court, or should the Court give leave, why he should not be barred until he has entered into good and sufficient security.

The Divisional Court had given judgment against respondent for £6,601 18s. 5d., with interest and costs. An appeal was noted, but there had been delay in the preparation of the record, and some question had arisen as to providing security for the due fulfilment of the order of Court. Respondent said that he was willing to pass a mortgage bond binding generally his person and all his property, and specially hypothecating his landed property, which was



valued at about £22,000. He submitted that this was ample security.

Mr. Upington was for applicant; Mr. Burton (with him Dr. Rainsford) was for respondent.

Affidavits having been read and counsel heard in argument,

De Villiers, C.J.: It is quite clear that the respondent has been in default, not only in prosecuting his appeal, but also in not giving the requisite security. The Court is now asked to prevent the respondent from proceeding with his appeal at all. Well, I do not think that, in all the circumstances, the Court should prevent the respondent from prosecuting his appeal in case he can give the requisite security, but that security must be given, and it must be to the satisfaction of the Registrar of the Supreme Court. The respondent now, in his affidavit, offers to give certain security, but I do not think the matter should come in the first instance before the Court. If the Registrar were to refuse the security tendered, then, perhaps, there might be ground for applying to the Court, but until it has been before the Registrar, I do not think the Court should express any opinion about the security which has been offered. The Court will therefore order that the respondent be barred from proceeding with his appeal, until he shall have entered into good and sufficient security to the satisfaction of the Registrar of the Supreme Court for the due performance of the judgment of the Divisional Court, and I think respondent should pay the costs of this application. I would, however, suggest to the applicant that he should carefully consider the proposal. If the applicant consent, I suppose the Registrar will raise no further objection. If he refuse, the Registrar will have to go into the whole question. But it does appear, on the face of it, that the security offered by the respondent will be ample security for the judgment.

Mr. Upington asked that some time should be fixed within which security should be given.

De Villiers, C.J., said that leave would be given to the applicant to move for execution on the judgment unless the security were given.

[Applicant's Attorneys: Van Zyl and Buissinné. Respondent's Attorneys: Syfret, Godlonton and Low.]

#### SCHWANER V. HOLMES.

This was an application calling upon respondent to show cause why the case should not be set down for trial on the 12th November.

Mr. Burton was for applicant; Mr. Gardiner was for respondent.

Respondent made a cross-application that the subject matter of the dispute should be submitted to an accountant as referee. The case arose out of a partnership business at Upington.

Having heard affidavits and counsel, De Villiers, C.J., directed the case to be set down for the 12th November, costs to be costs in the cause.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAA&DORP and the Hon. Mr. Justice HOPLEY.]

BULAWAYO MUNICIPALITY { 1906.  
V. BULAWAYO WATER- { Oct. 29th.  
WORKS CO. { Nov. 5th.

Contract—Construction—Supply of electric current—Actual cost—Depreciation of plant—Generating light.

*Under a contract between W. and M., the former obtained a concession to supply the inhabitants of B. with electric light, and M. stipulated that W. should light the public streets on condition, inter alia, that W. shall work the generating plant and maintain the light in all the street lamps for an average of six hours per night on two hundred and fifty nights per annum, "to be fixed by" M.*

*Held, affirming the decision of the High Court of Southern Rhodesia, that the parties must be presumed to have intended that there shall be a corresponding obligation on M. to take and pay for the light and that it was for M. to fix the 250 nights when the lamps should be lit.*

*In consideration of the undertakings given by W., M. undertook and agreed to pay*

*W. at such rate as would yield to W. a return equal to ten per cent. over the actual cost of generating the light.*

*Held, that the cost of generating the light included the cost of generating the electric current as well as transmitting the current to the lamps, and that "actual cost" did not include interest on capital, but did include depreciation of plant and machinery as well as rents, rates and taxes, so far as they relate to the electrical works.*

This was an appeal from a judgment of Mr. Justice Vintcent, senior judge of the High Court, Southern Rhodesia, in an action brought by respondents against appellants for £1,240 2s. 3d., on an account for electric light charges and a declaration of rights in respect of an agreement under which the Waterworks Co. supply electricity to the municipality for street lighting purposes. There was also a cross appeal.

The declaration was as follows:

1. The plaintiffs are a company duly incorporated under the English Companies' Acts, having an office and carrying on business in Southern Rhodesia. The defendants are the Municipality of Bulawayo.

2. On the 28th February, 1895, an agreement, copy of which is hereto annexed marked "A," was entered into between the British South Africa Company and Messrs. Napier, Weir and Clark, whereby the latter undertook to supply the inhabitants of Bulawayo and its suburbs with electric light upon the terms and conditions in the said agreement set forth, and to which plaintiffs crave leave to refer.

3. On the 17th August, 1897, the said Messrs. Napier, Weir and Clark, with the knowledge and consent of the British South Africa Company, ceded all their rights and interest under the said agreement to Willoughby's Consolidated Company, Limited, who in turn with the consent of the British South Africa Company on the 4th September, 1897, duly ceded same to plaintiffs.

4. On the 1st September, 1899, the British South Africa Company ceded and assigned all its right, title and interest under the said agreement to the defendants, who have since that date exercised all the powers previously exercised by the British South Africa Company.

5. The plaintiffs have duly carried out the terms of the said agreement, in terms thereof, and during the months

of October, November and December, 1904, supplied to defendants 12,665 units of electrical power for lighting purposes, for which they are entitled in terms of Clause 20, Sub-section 11 of the said agreement to payment of the sum of £1,240 2s. 3d., the said sum being at the rate fixed by the aforesaid Sub-section, and will more fully appear from the account hereto annexed marked (B).

6. The defendants have refused and still refuse to pay to plaintiffs the said sum of £1,240 2s. 3d., or any part thereof.

7. Under the terms of the said agreement the plaintiffs undertook in the event of defendants desiring to avail themselves of the electric light in their streets or public places, to provide light for such streets or public places upon certain terms and conditions in the said agreement, and set forth more especially in Clause 20 thereof, to which plaintiffs crave leave to refer.

8. The defendants duly notified their intention of availing themselves of the electric light in the public streets, and determined the number and positions of street lamp posts required, and plaintiffs placed them where required, and have from time to time as defendants requested provided additional street lamps.

9. The plaintiffs have since the 1st July, 1904, requested defendants to fix the hours of street lighting in terms of the said agreement, and have always been ready and willing to maintain the light in all such street lamps for an average of 6 hours per night on 250 nights per annum, but defendants in breach of the said agreement have failed and refused to fix the hours aforesaid, and refused to use all the said lamps for the time agreed upon.

10. All times have elapsed, all things have happened, and all things have been done entitling the plaintiffs to bring this action.

Wherefore the plaintiffs claim:

(a) Judgment for the sum of £1,240 2s. 3d.

(b) Interest *a tempore moræ*.

(c) A declaration of rights that plaintiffs are entitled to maintain and keep alight the street lamps for an average of six hours per night on 250 nights per annum, and that defendants be ordered to fix the hours of street lighting.

(d) General relief and costs of suit.

To this declaration defendants pleaded and claimed in reconvention as follows:

1. The defendants admit paragraphs 1, 2, 3, 4 and 8 of the declaration.

2. As to paragraph 5 of the declaration, save that the defendants admit that the plaintiffs during the said months supplied 12,665 units of electrical power for lighting purposes to the defendants and that the plaintiffs are

entitled to be paid for the same in terms of clause 20 sub-section 11 of the said agreement, they deny the allegations contained in the said paragraph.

3. The defendants deny the accuracy of the account annexed to the declaration, or that it is such an account as they are entitled under the said agreement to be provided with by the plaintiffs. They deny that the said account is an account of the costs actually incurred by the plaintiffs in generating the light consumed in the streets, public places, or private property of the defendants for the said months of October, November and December, 1904. The defendants further deny that the plaintiffs are entitled under the agreement to charge against the defendants on the basis of the particulars contained in the said account or to include in the same the items repairs, maintenance, management, rent, rates, taxes, depreciation, interest on capital, or any charges other than the actual cost of generating the said light.

4. As to paragraph 6 of the declaration, the defendants admit the refusal to pay the sum of £1,240 2s. 3d., but deny that they have not paid or refuse to pay any part thereof.

5. The defendants have always been ready and willing to pay the plaintiffs whatever amount is actually due to them in terms of clause 20 sub-section 11 of the said agreement, and have from time to time informed the plaintiffs to that effect, and requested them to provide a proper account showing the amount due in terms of the said sub-section. The plaintiffs, in the breach of the said agreement, have failed and refused to provide the defendants with such an account or to render any account from which the defendants can ascertain what is due to the plaintiffs under the said agreement so as to enable the defendants to pay or tender the said amount.

6. Failing the receipt of such an account, the defendants have, with respect to the said 12,665 units, paid the plaintiffs the sum of £635 5s., being at the rate of 1s. per unit, such payment having been agreed between the plaintiffs and defendants to be without prejudice to the defendants' right to a refund should this Honourable Court hold that they have overpaid the plaintiffs, or to the plaintiffs' right to recover any excess that they may be legally entitled to.

7. As to paragraph 7 of the declaration, the defendants crave leave to refer to the said agreement.

8. As to paragraph 9 of the declaration, the defendants admit that the plaintiffs have since the said 1st July, 1904, being ready and willing to maintain the light as therein alleged, and that the defendants have refused to fix the said hours, but deny that such re-

fusal constitutes a breach of the said agreement, or that it was ever agreed that the defendants should be bound to use all or any of the said lamps for the time alleged.

9. The defendants deny the allegations in paragraph 10 of the declaration, or that the plaintiffs are entitled to a declaration of rights as claimed.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention, the defendants (now plaintiffs) repeat paragraphs 3 and 5 of the plea, and claim a declaration of rights that they are entitled under the said agreement to be provided by the plaintiffs (now defendants) with quarterly accounts showing the costs actually incurred by the plaintiffs (now defendants) in generating the light consumed in the streets, public places or private property of the defendants (now plaintiffs) for each particular quarter, and that the plaintiffs (now defendants) are not entitled to charge against the defendants (now plaintiffs) on the basis of the particulars annexed to the declaration, or to include charges other than the actual cost of generating the said light.

The defendants (now plaintiffs) further crave leave to repeat paragraph 6 of the plea, and should it be found that they have overpaid the plaintiffs (now defendants) for the said light, claim a refund of such overpayment if any.

Wherefore the plaintiffs in reconvention claim:

1. A declaration of rights against the defendants in reconvention in terms as above stated.
2. A refund of any amount which may be found due to them as above referred to.
3. General relief.
4. Costs of suit.

#### PLAINTIFF'S REPLICATION.

1. Save as hereinafter admitted and except in so far as defendants' plea contains admissions, the plaintiffs join issue thereon with defendants.

2. Plaintiffs admit paragraph 6 of defendants' plea, and claim judgment for the balance of the sum of £1,240 2s. 3d.

For a plea to the claim in reconvention the plaintiffs (now defendants in reconvention) say:

(1) They crave leave to refer to the admission made in paragraph 2 of the replication.

(2) They have always been and still are ready and willing to furnish plaintiffs in reconvention with accounts showing the costs incurred in generating the light for the particular quarter ending 31st December, 1904.

(3) Save as above they deny each and every allegation contained in the claim in reconvention, and pray that the same may be dismissed with costs.

The defendants' replication to the plea in reconvention was general.

The judgment of the Court below was as follows:

In February, 1895, an agreement was entered into between the British South Africa Company and Messrs. Napier and Weir and Clark, whereby the latter undertook to supply the inhabitants of Bulawayo and its suburbs with electric light upon certain terms and conditions to so much of which special reference will hereafter be made in so far as is pertinent to the issues in this action.

In August, 1897, Messrs. Napier, Weir and Clark with the consent of the British South Africa Company ceded all their rights under this agreement to Willoughby's Consolidated Company, Limited, who, in September, 1897, ceded the same to the plaintiffs in this action; and, in September, 1899, the British South Africa Company ceded all its rights under the agreement to the Municipality of Bulawayo, who have since that date exercised all the powers previously exercised by the British South Africa Company. The plaintiff company under one management carries on two undertakings, viz.: the supply of water and of electricity.

It was admitted that the primary object of the agreement was for the supply of electricity to the general public. The agreement also makes provision for the supply of electric light for the public streets and to the private property of the British South Africa Company or its assigns when the Waterworks Company is called upon to provide the same.

It appears that prior to September, 1904, with regard to the supply of electric light to the street lamps a special tariff had been agreed upon, and it was only in consequence of a request on the part of the municipality to the plaintiff company for a reduction in the tariff that the present dispute arose.

It is common cause that the plaintiff company have duly complied with the terms of the agreement in so far as the erection of lamps in the streets at the request of the municipality is concerned.

The plaintiffs now sue the municipality for the sum of £1,240 2s. 3d., being as they allege the amount due under sub-section 11 of section 20 of the agreement of 12,665 units of electrical power supplied for lighting the street lamps during the months of October, November and December, 1904. The plaintiffs further claim an order declaring that they are entitled to maintain the lights in the street lamps for an average of six hours per night for two hundred and fifty nights per annum, and that the defendants be ordered to fix the hour of

street lighting. This latter claim is based on the provisions of sub-section 8 of section 20 of the agreement which is in the following terms:—

"The contractors shall work the generating plant and maintain the light in all the street lamps for an average of six hours per night on two hundred and fifty nights per annum to be fixed by the company, the lamps to be lighted within fifteen minutes after sunset."

Annexed to the plaintiffs' declaration is an account showing the method by which the sum of £1,240 2s. 3d. is arrived at.

The defendants in their plea deny the accuracy of this account, or that it is such an account as they are entitled to under the agreement. They further say that it is not an account of the cost actually incurred by the plaintiffs in generating the light for the streets, and they further allege that the plaintiffs are not entitled to charge against the defendants on the basis of the particulars contained in such an account, or to include in the same the items repairs and maintenance, management, rent, rates, taxes, depreciation, interest on capital, or any charges other than the actual cost of generating the said light. The defendants further say that they have always been ready and willing to pay whatever amount is due in terms of sub-section 11 of section 20 of the agreement, and have from time to time requested the plaintiffs to provide them with a proper account showing what is due in terms of such sub-section, but that the plaintiffs have failed and refused to provide them with such an account as would enable them to ascertain what is actually due.

With regard to the charge for the supply of 12,665 units of electricity the defendants have paid (by agreement between them and the plaintiffs, but without prejudice to defendants' right to a refund should the Court hold that they have overpaid the plaintiffs, or to the plaintiffs' right to recover any excess they may be entitled to be paid by the defendants) the sum of £635 5s., being at the rate of one shilling per unit of electricity supplied.

In answer to the second claim of the plaintiffs, the defendants admit that the plaintiffs have been ready and willing to maintain the lights in the street lamps for two hundred and fifty nights per annum for six hours per night, and that they (the defendants) have refused to fix such hours, but they deny that such refusal constitutes a breach of the agreement, or that it was ever agreed that the defendants were bound to use all or any of the street lamps for the time alleged.

By way of claim in reconvention, the defendants allege that they are entitled to be provided with quarterly accounts showing the cost actually incurred in



generating the light consumed in the streets for each particular quarter, and that the plaintiffs are not entitled to charge for electricity on the basis the particulars contained in the account annexed to the declaration. They further claim a refund of such amount as the Court may find due to them in respect of the payment of £635 5s.

I propose dealing first with the second claim of the plaintiffs, and this involves the interpretation of sub-section 8 of section 20 of the agreement. I may at once say that I have no hesitation whatever in arriving at the conclusion that the contention of the plaintiffs is correct. I am of the opinion that when once the plaintiffs, in compliance with the request of the municipality, erected street lamps, it was the duty of the municipality to fix the nights and hours during which the light is to be maintained in the street lamps. I consider that the contention of the municipality that this sub-section merely fixes the maximum amount which can be demanded from the plaintiff company, and which the company is bound to supply if required, is unsound.

Sub-sections 1, 2, 8 and 9 of section 20, when read together, appear to me to mean that as soon as the company (now the municipality) have stated the number of lamps they desire to be erected, such number becomes the minimum they agree to pay for, though they can still ask for more and pay for more.

The acceptance of the interpretation placed on this sub-section by the municipality would, in my opinion, if carried out to extreme lengths, be most inequitable, for it would mean that if the company were called upon to erect at their own expense a large number of street lamps, and to have always in readiness (as they would be bound under the agreement) a supply of electrical current sufficient for the lighting of such lamps, the municipality could quietly lie by and, without incurring any liability whatever, refuse to make use of current for such lamps.

On this part of the case, then, I am of opinion that the plaintiffs must succeed, and that if the municipality refuse to comply with the provisions of sub-section 8, the plaintiff company is entitled to demand payment for so much current as may be sufficient to maintain light in the street lamps for two hundred and fifty nights on an average of six hours per night.

Now I come to what is the difficult part of the case. As I have already said, the plaintiff company carry on two operations under one general management, viz., the supply of water and electricity.

I find that the amount of capital sunk in the waterworks amounts to £86,000 odd, whilst that invested in electrical plant, etc., is £58,000 odd. I think it must be clear from the nature

of things that more management must be devoted to, and more expense incurred in, the electrical than in the waterworks operations. In allocating the expenses of these two operations the plaintiff company have taken as a basis the amount of gross revenue. In connection with this point the defendants contend that the respective capitals should be taken as a test, and that it is not fair to take as a basis gross revenue.

I must confess that I have experienced some difficulty on this question, but I am inclined to the view that gross revenue should be regarded as the more satisfactory test to be applied whenever allocation becomes necessary.

Now taking the account annexed to the declaration it will be found that in order to arrive at the cost per unit for the year 1904, the plaintiffs have taken as a divisor into what they considered as actual cost, the total amount of units sold to the general public and to the municipality.

The amount of electricity supplied to private consumers is ascertained from reading the meters at the consumers' premises, while the amount of electricity supplied to the municipality is shown on a meter kept at the plaintiffs' works. The municipality are thus debited with units generated. It has been said and I accept the statement as a fact that with regard to the electricity supplied to the private consumers, there is a loss of current in transmission to the extent of twenty-five per cent. Under these circumstances it is argued by the municipality that the divisor should not be units sold but units generated, and that being so, there should be added to the total amounts of units sold, thirty-three and a third per cent. of the total amount of units sold to private consumers. In such a case the divisor instead of being 185,347 should be 230,605. I consider this contention to be fair, and in my opinion should be accepted.

I now come to the question of the construction of sub-section 11 of section 20 of the agreement. It is as follows:—

"In consideration whereof the said company undertakes and agrees to pay to the contractors or to their assigns at such rates as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light, payments to be made quarterly at the office of the company in Bulawayo."

The plaintiffs argue that this sub-section means in effect that they are to receive in payment 10 per cent. over all costs incurred by them in supplying the municipality with electricity. On the other hand, the defendants contend that they are only bound to pay 10 per cent. over what is actually expended in the works in and about the generation of current, and that such costs only in-



clude such items as wages, fuel, oil, waste, water and engine-room stores, and repairs and maintenance to plant in the works, and to so much of management as is devoted to the production of electricity at the works. They further contend that if there is any additional liability on them, it is only in respect of what is reasonably incurred in and about the distribution of electricity, that is to say, transmission of current up to the point of ignition at the lamp.

Great reliance is placed by the defendants on the form of yearly returns required by the Board of Trade in England to be made by companies and local bodies supplying electricity. These accounts are divided into various headings, showing the costs of the separate departments. Form "A" deals with the generation of electricity, and shows what charges are allocated to generation. It includes such charges as wages, fuel, oil, waste, water and engine-room stores, repairs and maintenance to plant at the works. Form "B" deals with the distribution of electricity, and provides for the salaries of superintendents and officers, wages to linesmen, fitters and labourers, repairs and maintenance and renewals of apparatus at distributing stations. Form "E" deals with rent, rates and taxes. Form "F" deals with management expenses, such as director's remuneration, salaries of managing engineer, secretary, accountants, clerks, messengers, salaries or commissions of collectors, stationery and printing, general establishment charges, auditors of companies. Form "G" deals with the law and parliamentary charges. Form "H" deals with depreciation. Form "I" deals with special charges such as insurance, superannuation, etc.

Now the municipality urge that the words "generating light" in the subsection under discussion means "generating current," that is to say, the production of electricity at the works, and that being so, they were only chargeable in accordance with Form "A" of the form of accounts prescribed by the Board of Trade, with such items as appear in such form, but that if the Court holds that "generating light" must be interpreted to mean the production of electricity, plus transmission to the lamp, their liability is confined to the items contained in Form "A" plus those contained in Form "B" of the before-mentioned accounts.

Now it is clear that in several clauses of the agreement the term "light" is not correctly used, leading one to infer that the agreement was drawn up by a person not fully cognisant with the technical terms. In my opinion the parties contemplated the cost of production and distribution, and in these circumstances I am bound by the form of

accounts prescribed by the Board of Trade. I do not consider that the form is conclusive in this case. Local bodies and companies in England supplying electricity are bound by Statute to fill up annually statements of accounts in such form and containing such particulars as shall be prescribed from time to time by the Board of Trade. These accounts are framed to enable the Board of Trade as well as the general public to ascertain the cost at which the undertakers are carrying on their operations and for the sake of comparing the costs incurred in each department with a view of framing such tariff of charges as may be considered to be reasonable. In these circumstances I am inclined to the view that in deciding as to what is the meaning of "actual costs of generating light," I am not bound by whatever form the Board of Trade may from time to time prescribe.

Now as I have already stated the argument of the plaintiffs really amounts to this, that "actual costs" mean "total costs," and includes such items as general management, depreciation, and interest on capital.

Reference was made to the cases of *The Harrington*, and the *Grtna Holme*, and *The Marpessa*, in all of which cases charges such as depreciation, repairs and maintenance, and interest on capital were recognised as being recoverable. With regard to these authorities it became practically necessary to define the terms "charges" and "expenses," which in my opinion have a far broader meaning than "actual costs."

I will first deal with the question of interest on capital. I find it difficult to understand why a percentage of this amount should be chargeable to defendants under the heading of "actual costs." In the case of *Hills v. The Colonial Government* (21 Juta, page 59) the meaning of "actual costs" was discussed, and the question arose whether interest should be included in the amount of "actual costs." The Chief Justice in his judgment (*vide* page 70) states:

"The question whether interest should be included in the amount of 'actual costs' was considered in the case between the same parties relating to the two other lines of railway, and I see no reason for departing from the view there taken. That was the case of a contract with an ordinary contractor, whereas the agreement now in question was with a concessionaire undertaking to construct a railway on consideration of a subsidy to be paid to him, but that is no reason for giving a different interpretation to the words in question. Evidence was tendered and not objected to, that the term 'actual cost' would, in commercial dealings, be regarded as including interest, but no definite instance was

mentioned in which this interpretation was accepted. The witnesses do not appear to me to give sufficient effect to the limitation introduced by the word 'actual.' Moreover, the meaning of the phrase must be collected from the terms of the agreement, and not from the opinions of expert witnesses."

It will be noticed that in the report and statement of accounts of the plaintiff company for the year ending 31st December, 1903, there is no record of interest, and in the cost chart for that year I can find no reference to interest on capital. Similarly, in their cost chart for the year 1904, no mention is made of the item interest on capital, and there is an absence of this item in the account originally supplied to the defendants in their letter of the 25th January, 1905. I am of opinion that this charge, interest on capital, should not be included in the term "actual cost."

I consider that the term "actual," when used in connection with cost, must have some limited meaning, and I incline to the view that the nearest approach to it would be "prime cost." I find in Volume 2 of the "Encyclopædia of Accounting," pages 262 and 263, a discussion as to prime cost. It says:—

"Prime cost is literally first cost, and the phrase is best used to mean either the sum expended by a merchant in acquiring a complete article to be sold in the form in which it is bought, or the sums expended by a manufacturer (a) in purchasing raw material, and (b) in paying for the labour in converting the raw material into a saleable product, leaving aside the question of expenses.

"In the United States, 'prime cost' is generally known as 'flat cost.' The word 'cost' alone, if used correctly, should mean the full cost, or 'total cost,' the total outlay in the production of a commodity being 'prime cost,' plus expenses of sale, distribution and administration.

"These 'expenses,' or 'charges,' are broadly divisible into 'direct' and 'indirect.' They are also known as 'establishment charges' and 'oncost' in British practice, and as 'expense burden' or 'general expenses' in the United States.

"The difference between 'prime cost' and 'cost' is therefore the amount of the expenses, while the difference between 'cost' and 'selling price' is the trader's net profit, and the difference between 'prime cost' and 'selling price,' is the trader's gross profit. . . .

"The cost of a product falls into three distinct parts:—(1) Material used in its production. (2) Labour or workmanship, i.e., wages directly expended upon its productions. (3) The ex-

penses of keeping up the factory and establishment.

"The following is a general analysis of a product based upon the above definitions:—Elements of a product (Order or Job).

"Elements of a Product (Order or Job).—Prime Cost: (1) Material. (2) Labour (productive). (3) Departmental or direct expenses (of production); motive power; wages of superintendence, foremen, cleaners, etc., royalties, wayleaves, patent fees; lighting and heating of plant and buildings; rents, taxes and insurance of buildings; depreciation and upholding of plant and buildings."

And then it goes on:—"(4) Indirect expenses (of distribution and administration); salaries of directors, officers and managers; upkeep of office and warehouse; interest and financing expenses; traveller's salaries, commissions and expenses; bad debt allowance."

It will thus be seen that indirect expenses, such as salaries of directors, officers and managers, upkeep of office and warehouse, interest and financing expenses, travellers' salaries, commissions and expenses, are not included in the term "prime cost."

Much argument was devoted to the item depreciation. I am of the opinion that the principle of including depreciation should be allowed. I think it would enter as an element in the cost should enter as an element in the cost of manufacture. In this "Encyclopædia"

"... In relation to profit and loss, it enters as an element in the cost of manufacture represented by the deterioration by wear and tear, decay, or reduction of value arising by reason of age, and use of buildings, fixed and loose machinery, and plant of every description employed in the production of things produced for sale or disposal in the ordinary way of trade. In the ultimate result of this employment, buildings, machinery and plant are, in their nature, an element in the cost of production of any given article of trade manipulated or manufactured, just as are all other articles and things consumed in the process of manufacture . . . ."

It is natural that in the course of generation of electricity, machinery and plant must suffer wear and tear, and I see no reason why this wear and tear should not be part of the cost of generating light.

If I am correct in adopting the definition I have given of "prime cost," it is clear that the item depreciation should enter into calculation, and I am of opinion that the principle should be allowed.

I need make no reference as to wages, fuel, oil, waste, water and engine-room stores, for none of these were disputed on principle by the municipality. With

regard to repairs and maintenance, these should be allowed on principle.

With respect to management, in my opinion only so much should be allowed as is referable to work done in the works. Under this head would be chargeable the salary paid to Mr. Lister, the company's engineer, and there should be excluded from it such salaries as those of managing director, officers—in fact all such indirect expenses as are incurred under the heading of administration.

As to the items rent, rates and taxes, there should be only included such rents, rates and taxes as are payable in respect of the plant and buildings at the works.

I have not dealt, in considering this matter, with the actual figures mentioned in the account annexed to the declaration, for it was agreed by the parties at the hearing of the case the question of figures might be left for reference to an accountant if it were considered necessary, and that my decision at present was requested on matters of principle only.

In coming to the conclusion that "actual costs" do not mean "total costs," I considered that the parties to the contract contemplated that there should be a distinct limitation as to cost of generating light in so far as the municipality were concerned.

The primary object of the agreement was the supply of electricity to the general public, and it does not appear unnatural that the British South Africa Company when granting the concession should make a distinct limitation in its or its successor's favour with respect to the charges for electricity supplied.

In conclusion I am of opinion then:—

1. That plaintiff company is entitled to such declaration as is sought for in paragraph "C" of its claim.

2. That the term "generating the light," in sub-section 11 of section 20 of the agreement, means production of electricity plus distribution.

3. The term "actual costs of generating the light" means "prime cost" of production and cost of distribution.

4. That the item "interest on capital account" should be disallowed.

5. That only so much of the item "management" as forms part of the salaries of those persons employed in and about the works in the course of actually generating and distributing electricity should be allowed.

6. That so much of the items rent, rates and taxes as do not relate to the actual works should be excluded.

7. That so much of the expenditure incurred on joint account of electric and water supply should be allocated to each of these undertakings in proportion to the gross revenue received from each of these sources,

8. That when estimating what is the cost per unit of electricity supplied, the total cost should be divided by the total number of units generated for the supply to both private consumers and the municipality.

9. That if the investigation of figures be referred in dealing with the items "repairs and maintenance," due regard should be had to such items under the heading repairs and maintenance as may be fairly chargeable to depreciation.

That the question of costs of the action do stand over until the receipt of the aforesaid accountant's report. And that, in the event of an appeal by either party to the Supreme Court from the foregoing judgment, the reference to an accountant be postponed pending the result of such appeal.

[For Appellants: Mr. Searle, K.C. (with him Mr. W. P. Buchanan). For Respondents: Mr. Schreiner, K.C. (with him Mr. Upington)].

Mr. Searle said that in 1895 an agreement was entered into between the B.S.A. Company, the rights and obligations of which under the contract were now vested in the Bulawayo Municipality and certain concessionaires, whose successors were the respondent company for the supply of electric light to the municipality and inhabitants of Bulawayo. The action of the Court below arose out of this agreement, and the Court ordered the matter to go before an accountant on the basis of certain nine headings. The municipality now appealed against Nos. 2, 3, parts of 5, 6 and 9.

Mr. Schreiner said that the company cross appealed on paragraphs 3, 5, 6, 7 and 8 of the order of the Court below.

[De Villiers, C.J.: The light is generated the moment it is actually produced.]

Mr. Searle: Light and current are used interchangeably. The wires in the street do not belong to the generating plant; it was specially agreed that they formed the system of distribution.

Continuing, he said that everything beyond the works was the system of distribution. The light was "generated" at the station, and all plant outside the station was distributing plant. The company did not supply "light" to the inhabitants, but "current." Without his lamp, the inhabitant would not get light.

The most important point was the depreciation. Three thousand pounds were set aside for depreciation in the year in question, but this was in addition to repairs and maintenance. In no case could depreciation be part of the cost. It was a confusion between cost and value. He cited the case of *Hills v. the Colonial Government* (P.C. judgment, 16 C.T., 551).

The money put into the plant was not

beneficial expenditure for the municipality; it was put in for the benefit of the company. If £3,000 were allowed every year, the company would get its capital back, although it was specially agreed that the company had to supply the generating plant. He here referred to the remarks of the Chief Justice in *Hills'* case (20 S.C., pp. 107, 132 and 133); and the *Harrington* case (L.R., 13, P.D. 48), which was followed by the Court of Appeal in the *Gretna Holme* case (1896, P.D. 192). If the company could not charge interest on capital, then it could not charge for depreciation. A company was entitled to pay dividends where its balance of revenue was greater than expenditure even where fixed assets had diminished in value. He quoted *Werner v. General Commercial and Investment Trust* (L.R., 1894, 2 Ch., 239); *Bolton v. Natal Land Co* (L.R., 1892, 2 Ch., 124); *Lee v. Neufchatel Asphalte Co.* (41 C.D., 1, judgment at p. 26); *Wilmer v. Macnamara* (L.R., 1895, 2 Ch., 245). For the distinction between fixed and circulating capital he referred to *Werner's* case, *supra cit.*

Mr. Searle was about to read a report by Professor Dicksee, published in the "Electrician," when Mr. Schreiner objected, saying that the witness who wrote it should have been called.

[De Villiers, C.J.: But Mr. Searle wishes to make use of it as part of his speech. We use dictionaries; should the man who made the dictionary be called? Read it, Mr. Searle, as part of your address.]

Continuing, Mr. Searle said that Dicksee regarded depreciation being put in as a reduction of capital. The system of allocation between the water and light was wrong. The rates and taxes could not be brought up as costs of distribution.

On Mr. Schreiner rising to argue, the Chief Justice told him that he need not address himself to paragraphs 1 and 2 of the order of Court.

Mr. Schreiner said that the municipality had undertaken to pay such sum as would yield a return of at least 10 per cent. When it called on the company to go to this large expense, it guaranteed 10 per cent. over and above the actual cost of generation. In prime cost depreciation was included. The company required some expression of opinion as to depreciation, office furniture, etc. Before the company could supply one unit it had to put up the plant; before paying a dividend it had to make provision for plant that depreciated. Its main obligation was to supply light for at least 25 years; if the plant wore out, where was the company going to get capital to buy new plant if depreciation was not allowed. *Id certum est quod certum reddi potest.*

[De Villiers, C.J.: But you disregard the meaning of the word "actual."]

But "cost" is not "payment," and the contract says actual cost and not actual payment.

[De Villiers, C.J.: Then every point of your argument would apply *a fortiori* to interest.]

No, because we cannot get interest if we get depreciation. The dilemma is this, that if they do not pay us the depreciation piecemeal and the plant were to break down then they must put in the whole lump sum for replacing the plant. In *Hills'* case all that was excluded was what the Government had no benefit of. Repair and maintain an article as well as you like, at some time or other it will become useless. The probable life of the plant was not more than 17 years.

[De Villiers, C.J.: Was it not understood that the plant was in existence?]

Mr. Schreiner: No, nothing had been put up yet, and nine months were allowed for the preparations.

Continuing, he said that the dilemma was inexorable, as one had either to pay for the whole plant the first year or pay yearly, so that it did not wear away and leave one with nothing. Counsel cited *Pixley* on the duty of auditors (p. 225, 8 ed.); *Chadwick Healy* (p. 138); *Dicksee* on Accounting (chap. xx), and *Dicksee* on Auditing (ed. 3, p. 213).

Mr. Searle, in his reply, said that the question of depreciation was important because it meant about 4d. per unit on the electric light supplied. His learned friend had put a mistaken view before the Court in regard to the relations of the company and the municipality. He said that the municipality were the guarantors of this undertaking. He (Mr. Searle) submitted that that was not so. "Actual cost" must be out of pocket expenditure incurred for the benefit of the municipality. Depreciation in this case, therefore, could not be included in the actual cost of generating the light. As to office expenses, etc., he would say that they were charged with a management fee of £500 in the expenditure in connection with the office work. The appellants said that of the management fee only an infinitesimal part could be charged against them.

*Cur. Adv. Vult.*

*Postea* (November 5th).

De Villiers, C.J.: This is an appeal, as well as a cross-appeal, from the High Court of Southern Rhodesia, in an action for a declaration of rights, and to recover the sum of £1,240, alleged to be due to the plaintiff company for electric light supplied by the plaintiff company to the defendant Council. The plaintiff is the cessionary of the rights of certain contractors, under a contract made by them with the British South Africa Company, on the 4th of September, 1897, and the defendant is the cessionary of the rights of



the British South Africa Company, under that contract. It was a contract by which the contractors acquired the right to supply the inhabitants of Bulawayo and its suburbs with electric light and power, and undertook, in case the British South Africa Company should desire to avail themselves of the electric light in their streets, public places, or on their private property, to light such streets, public places, and private property upon certain terms and conditions. The first condition is that the minimum number of lamp-posts to be lighted shall be determined by such company, and shall be placed in the positions required by the company. The fifth condition is that the contractors shall supply the necessary generating plant, regulating apparatus, and material in a suitable position on land to be furnished by the company. The sixth condition is that the contractors shall supply and fix the supply wires as well as the posts, insulators, and whatever else may be necessary for carrying the supply wires from the generating station to the street lamps. The eighth condition read as follows: "The contractors shall work the generating plant and maintain the light in all the street lamps for an average of six hours per night on two hundred and fifty nights per annum, to be fixed by the company, the lamps to be lighted within fifteen minutes after sunset." The eleventh condition is as follows: "In consideration whereof the said company undertakes and agrees to pay to the said contractors or to their assigns, at such rate as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light, payments to be made quarterly at the office of the company in Bulawayo." It is as to the construction of the 8th and 11th conditions that disputes have arisen between the parties. The plaintiff's contention as to the 8th condition is that they are entitled to maintain and keep alight the street lamps for an average of six hours per night during 250 nights per annum, and to an order that the defendants shall fix the hours of street lighting. The defendant, on the other hand, maintains that it is optional for the Council to have that number of lamps lit or not, and that the condition was intended to fix the maximum, which the defendant can demand, and which the plaintiff is bound to supply, if required under penalty of committing a breach of the agreement. Reliance is placed by the defendant's counsel on the use of the words "to be fixed by the company," but these words, in my opinion, apply to the particular nights when the defendant desires the lamps to be lighted. During bright moonlight nights the defendant would not require the light, but it was considered that during 250 nights of every year the light would be required, and it was

agreed that those nights should be fixed by the defendant. The obligation rests on the plaintiff to supply the light for the full period, and there is a corresponding obligation on the defendant to accept and pay for it at the rate agreed upon by the 11th condition. It would, no doubt, have been more formally correct to specially mention this corresponding obligation in the contract, but it seems to me to follow as a necessary implication from the terms of the contract. Take the case of a person contracting to deliver two hundred and fifty loads of oathay to A, and delivery to take place in ten days, to be fixed by A, of a given number, and the price to be determined by reference, say, to a particular market quotation, it would be impossible to hold that because it was left to A to fix the particular days on which the delivery is to take place, he is freed from the tacit obligation of taking delivery of the oathay and paying for the same. To hold, in the present case, that the defendant is not bound to take the light provided by the plaintiff would be as unreasonable as to say that a person who directs a shopkeeper to supply certain goods for the use of his household would not be bound to accept delivery and pay for them because he did not expressly promise to do so. The learned judge in the court below held that the plaintiff was right in his contention, and in this part of his judgment I fully concur. The next question arising in this case is whether the expression "generating the light" in the 11th condition means generating the current only, or whether it includes the transmission of the current to the lamps, where the light is finally produced. Upon this point there has been a great deal of expert evidence, and the Court has been referred to the forms prescribed by the Board of Trade in England for the use of public bodies and companies supplying the electric current. The English Acts relating to the Board of Trade are not applicable in Rhodesia, and, as to the expert evidence, it does not greatly assist the Court upon a simple question of construction. In a strictly technical sense it may not be quite correct to apply the term "generating" to the process by which the light is called into existence, but it is reasonably clear what the parties meant. The price of the current supplied to the defendant was to be the actual cost of generating the light, plus 10 per cent. of such actual cost, and the term "generating the light" was intended to include not only the generation of the current but also the transmission of the current to the points where the light is finally evolved. I therefore fully agree with the Court below in the finding that the expression means production of electricity plus distribution. The real dif-



ficulty in the present case is to decide what the parties meant by confining the contractors to the "actual" cost of generating the light. The learned Judge decided that the term means "prime cost of production and cost of distribution," and having so decided he proceeded to examine the different items of the plaintiff's account by the light of that decision. His ground, however, for deciding that "actual cost" means "prime cost" is by no means clear, to me. He refers to the case of *Hills v. Colonial Government* (21 Juta, 59), and he accepts the view that interest on capital is not included under actual cost. In that case it was held by this Court that a concessionary of a railway who, upon the happening of a certain event, would be entitled to claim from the Government payment of the actual cost of such railway, was not entitled to include interest paid by him on the capital expended by him as part of such actual cost. The ground of the decision was that effect should be given to the limitation introduced by the word "actual," which could only be done by confining it to "payments actually made for materials used and for work done by the concessionary." On appeal the Judicial Committee accepted this view, and their Lordships added the following remarks (16 C.T. L.R., p. 551): "To add interest would seem to them to disregard the plain meaning of the word 'actual' as applied to cost. The referees have here, as practical men, found the cost of the works—in other words, they have said that so much money was expended to make them. To add something more in the name of interest would be to add something which never could be actual cost, for it would be either a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor." In neither Court was it held that actual cost meant prime cost. The difference between that case and the present consists in this, that there repayment of the actual capital expenditure was to be made once for all, whereas in the present case quarterly payments are to be made upon the basis of the actual cost, plus ten per cent. thereon. This difference would not justify the allowance of interest as part of the actual cost, but if interest is not allowed the important question arises whether the certain annual depreciation in the value of the plant should not be so allowed. The cost of the plant forms part of the actual cost of generating the light, but as the use of that plant would extend over several years, it could obviously not have been intended that the whole of that cost shall be charged during the first quarter of the contract. But the same objection does not exist to a distribution of the actual cost of the plant over the whole period of the life of

such plant. The effect of allowing a certain sum for depreciation in the quarterly accounts of the plaintiffs would simply be to distribute the actual cost of the plant over the whole period during which it would, in the ordinary course, be of any service in the generation of electricity and light. To add depreciation would not, in the language of the Judicial Committee, "disregard the plain meaning of the word 'actual' as applied to cost," for the initial expenditure upon the plant and machinery forms part of the actual cost of generating the light. A different view might, perhaps, have prevailed if the price had been fixed upon the basis of the actual annual cost of generating the light, but the terms used are wide enough to include as part of the "actual cost" the actual capital expenditure spread over the period of the life of the plant and machinery. It has been urged that as the contractors are bound under the fifth condition to provide the necessary generating plant, it could not have been intended that any part of the cost of such plant should be brought into calculation under the eleventh condition. But this calculation is directed only for the purpose of affording a basis on which to fix the price payable for the supply of electric light. The direction that the contractors shall supply the necessary generating plant is not inconsistent with the view that the parties intended the cost of such generating plant to be brought into calculation for the purpose of fixing the price of the light. Nor is the circumstance that under the 18th clause of the contract the defendant has the option of purchasing the plant at the expiration of 25 years inconsistent with this view. The price—if not mutually agreed upon—is to be determined by arbitration, and the arbitrators would be bound to allow for the depreciation which the plaintiff has himself brought into calculation for the purpose of ascertaining the actual cost of generating the light. I agree therefore, with the Court below, that while interest on capital account should be disallowed a fair allowance should be made for depreciation.

One of the items in the account framed by the plaintiff is that of "management," as to which the Court below decided that only so much as forms part of the salaries of those persons employed in and about the works in the course of actually generating and distributing electricity, should be allowed. The plaintiff appeals against this part of the judgment, in so far as it separates the management of the plaintiffs' waterworks from the management of the electric works, whilst the defendant appeals against it in so far as it includes the distribution of electricity. In my opinion neither appeal should be upheld. I have already said that generating the light should be held to

include the transmission of the current to the lamps. The actual cost, however, of generating the light cannot fairly be held to include the costs of management unconnected with the generation and distribution of the current required for the defendant. In the same way I agree with the learned Judge that so much of the items, rent, rates, and taxes as do not relate to the actual works should be excluded. Under this item the learned Judge seems to have included insurance, and this Court will not disturb his finding. Another question which has given rise to much discussion between the parties was whether expenditure incurred on joint account of electric and water supply should be allotted to each of those undertakings in proportion to the gross revenue derived from each of these sources, or in proportion to the capital sunk in each of these undertakings. The learned Judge has decided in favour of taking gross revenue as the proportion, but I do not quite follow the reasoning by which the expenditure of an undertaking is to be ascertained by reference to its gross revenue. My own view is that the referee to whom the investigation is to be entrusted should be directed to ascertain from the books and accounts what proportion of the joint expenditure should fairly be allocated to the undertaking for the supply of electricity. Wherever he finds this impossible he must allocate the expenditure in equal shares. The next question is whether in estimating the actual cost per unit of electricity supplied, the total cost should be divided by the total number of units generated for the supply to both private consumers and the defendant, or by the total number of units actually supplied to such consumers and the defendant. The Court below has decided in favour of the former course, and the plaintiff has appealed against this decision. It would appear that with regard to the electricity supplied to private consumers there is a loss of current in transmission to the extent of 25 per cent., and if the divisor should be taken to be the number of units actually so supplied it is obvious that the result would not represent the actual cost of generating the electricity as well as evolving the light. The only mode of arriving at a fair and correct result is to divide the total cost by the total number of units generated. No decision was given in the Court below upon the claim in reconvention for a declaration that the defendant is entitled to be supplied with quarterly accounts of the actual cost of generating the light, but on appeal the plaintiff's counsel has not disputed the claim. The result is that the Court will declare that the plaintiff is entitled to be supplied with quarterly accounts, showing the actual cost of generating the light, and

will direct that of the expenditure incurred in joint account of electric and water supply, so much shall be allocated to the supply of electricity as shall be found by the referee from the books and accounts to represent the due proportion expended for the purpose of generating the light, and that wherever this information cannot be obtained from the books and accounts, he shall allocate half the cost to each undertaking. For the rest, the judgment of the Court below will stand. Upon all material points, therefore, the defendant's appeal has failed, and if the plaintiff had not cross-appealed, it might have been a question whether the defendant should not pay the costs of appeal. Seeing, however, that the plaintiff has also appealed, and has failed in obtaining any modification of the judgment, I am of opinion that each party should pay his own costs.

Maasdorp and Hopley, J.J., concurred.

[Appellants' Attorneys: Findlay and Tait. Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

#### OLIFF V. HEARDEN.

Dr. Greer moved, as a matter of urgency, on the petition of J. F. Oliff, for an interdict restraining Mrs. Dearden from removing certain furniture and goods from premises situate at 6, Weltevreden-street, Cape Town, pending settlement of petitioner's claim for rent or an action.

Rule granted, calling on respondent to show cause on Thursday next why she shall not be interdicted as prayed, rule to operate as an interim interdict

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

LAWRENCE V. CAPE DIVISIONAL COUNCIL. { 1906.  
Oct. 30th.  
" 31st.

This was an action brought by James Lawrence, M.L.A., of Kimberley, against the Cape Divisional Council, to recover £3,000 damages, alleged to have been sustained by plaintiff and his wife by reason of the negligence of defendants or their servants.

Plaintiff's declaration was as follows:

1. The plaintiff resides at Kimberley, and he sues on behalf of himself and his wife, to whom he is married in community of property. The defendant is the Divisional Council of the Cape.

2. On or about January 1, 1906, while the plaintiff and his wife were driving in a vehicle drawn by one horse across a certain bridge on the road leading from Tokai to the Main-road from Cape Town to Muizenberg the plaintiff and his wife, together with the said vehicle and horse, were thrown over the side of the said bridge, with the result that both the plaintiff and his wife sustained severe injuries, the plaintiff having both of his arms broken and his skull fractured, and both he and his wife receiving a grievous shock and divers other injuries.

3. The said road upon which the accident happened is a public road which, together with the said bridge on it, are under the control of the defendant, and the control, maintenance, and repair of which were, in or about July, 1902, by arrangement with the Colonial Government, specially undertaken by the defendant for reward, in the interests of the public, and the defendant is responsible to the public for maintaining the said road and bridge in a fit and proper state of repair.

4. The said accident was due to the negligence and default of the defendant in not keeping the said road and bridge in a proper state of repair, more particularly in that, whereas the said bridge had been theretofore provided with a parapet for the protection of travellers on either side, but the parapet on the side of which the accident occurred, had after the defendant undertook the maintenance of the said bridge as aforesaid, been destroyed or removed, yet the defendant failed and neglected to restore, replace, or repair the same, or otherwise render the said bridge safe in that respect for traffic, and the said bridge was not, at the time of the said accident, provided with any proper parapets or protection, or otherwise in a proper state of repair.

5. In addition to the pain and suffering entailed upon the plaintiff and his wife by the said injuries, the plaintiff has been put to considerable expense in the way of medical attendance in connection therewith and otherwise, and he estimates the damage which he and his wife have sustained in the premises at the sum of £3,000.

Wherefore the plaintiff claims payment of the said sum of £3,000 as damages, alternative relief, costs of suit.

Defendants' plea was as follows:

1. The defendant Council admit the allegations in paragraph 1 of the declaration.

2. They do not admit the allegations in paragraph 2, but put the plaintiff to

such proof thereof as he may be prepared to adduce at the trial.

3. They admit that the road leading from Tokai to the Main-road from Cape Town to Muizenberg is a public road, and is together with the bridge on it under their control by an agreement with the Colonial Government entered into in or about the month of July, 1902, under which agreement the said Government contribute a certain annual amount towards the cost of maintenance of the said road. Save as is herein stated, they deny the allegations in paragraph 3, and specially crave leave to refer to the full terms of the agreement aforesaid when produced at the trial.

4. They say that in or about the winter months of 1905 the bridge upon the aforesaid road, together with a portion of the roadway, was swept away by floods, over which they had no control, and was replaced by a temporary structure until circumstances should admit of a permanent one being erected in its place; they say that the said temporary structure was a fit, proper and sufficient one, and protected by a fit, proper and sufficient fence on the side over which it is alleged that plaintiff and his wife were thrown; they say that any injuries which plaintiff or his wife may have suffered were due to the horse which was drawing the vehicle in which they were seated shying or becoming restive, and not because of any act, neglect, or default for which they are liable. Save as is herein stated, they deny each and every the allegations in paragraph 4.

5. They deny that plaintiff has suffered damages in the sum of £3,000, or in any other sum for which they are liable.

Wherefore they pray that the claim be dismissed with costs.

Mr. Schreiner, K.C. (with him Mr. Burton), for plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin), for defendants.

The plaintiff said that he resided at Kimberley and was one of the members of Parliament for that division. He had a house at Muizenberg, where he was staying in January last. On New Year's Day he took his wife in the afternoon in a Ralli cart. Both cart and horse were his own property. They passed off the main road and drove along the Tokai-road. As they were approaching the bridge witness noticed a man with a bicycle. The man was sitting on the parapet. Evidently the horse did not notice the presence of the man until it had got its forequarters on the bridge. As soon as it noticed the man it shied towards a piece of loose earth falling away towards the donga below. That ground was more like garden soil than a portion of the road. When the animal shied

he tried to pull it round, but it kept drifting towards the edge of the donga. Finding that they were going over, that the horse was already on the slope, and that there was no chance of getting the horse back, as it was still on the move towards the edge of the road, witness immediately slackened off the right rein and pulled the animal round towards the donga and went over square into the sluit below.

Mr. Schreiner: Why did you do that?

Witness: Because I felt we were going over, and that the only chance of saving our lives was by taking the donga square. Continuing, witness said that he had been accustomed to driving since boyhood. After the first fall, witness was calm, and he remembered everything until the horse jumped from the boards. Then they were landed down below, and witness became unconscious. Witness described his injuries. He said that he was not now able to bend his hand forward properly in the manner indicated by counsel.

Mr. Schreiner: Was it like that before?

Witness: Not quite so loose as yours. His left wrist was also damaged. Both his arms were broken. He sustained injuries to his nose, face, and the bottom of his spine. Even now he was not able to dress himself without assistance.

Mr. Schreiner: You always have been a pretty strong man?

Witness: I have always been very fit. The siege took it out of me a great deal, and the anxiety of that brought on some heart trouble.

Has that heart trouble been made worse by the accident?—I think so, and the doctors told me so.

Witness (continuing) said that he had been in the habit of taking horse exercise, but he was no longer able to take exercise of that kind. After the accident, witness spent some time in Cape Town, and then went to Caledon, and subsequently he returned to his home at Kimberley. He attended Parliament for about a fortnight, and left for England in June. In consequence of his injuries he resigned his post as Government whip at the beginning of the session. On reaching England, witness underwent treatment at Smedley's Hydropathic at Matlock. Mrs. Lawrence was for some time undergoing treatment at Harrogate, and also at Smedley's. Witness had incurred an expenditure of about £1,100, solely in consequence of the injuries caused by the accident. His health had been permanently affected.

Cross-examined: The horse had been in witness's business at Kimberley about a year before the accident. The horse had been about a fortnight at Muizenberg when the accident occurred. The animal was of quiet habits. He had

not noticed the horse shy before so badly. If the horse saw anything in the road, it would move round it. Witness had driven over the Tokai-road on previous occasions, and was well acquainted with both the road and bridge. He had driven along the road on the Saturday previous to the mishap. Before he reached the Tokai-road he had to pass the bridge at Alphen and other bridges, photographs of which he recognised. He had no difficulty in passing over the other bridges. The bridge where the accident took place could not be seen a long way off. The right-hand parapet could be seen at a distance of about 100 yards. At none of the other bridges had the horse shied. The man was sitting on the edge of the parapet when they arrived at the bridge. Witness did not know whether the man was reading a newspaper. He admitted that the horse got a severe fright.

Cross-examined by Sir H. Juta: Can you suggest what caused this very quiet horse a severe fright?

Witness: I should think the man sitting on the parapet and the bicycle.

Cross-examination continued: Witness had never heard it suggested before that the man had a newspaper. If Jobson himself said that he had a newspaper, he would believe him. The horse got out of his control as soon as it shied.

Sir H. Juta: So that the cause of this accident was that you lost control of this horse?

Witness did not reply.

You do not expect the Council to give you a bridge that will prevent a horse from getting beyond control when it shies?—You expect the Council to give you a road that, even if the horse shies, you can manage it.

Further cross-examined: Witness was unable to give any other explanation as to why the horse shied. The animal had passed over the bridge before.

Sir H. Juta: You are sure that you did not pull the left rein?

Witness scouted the suggestion, and added: We were not out to commit suicide.

Re-examined: The suggestion that he might have pulled the left rein was unfounded and ridiculous. If the road had been solid and level, there was a chance that he might have regained control of the horse.

Patrick Scott Jobson, a general dealer, of Kimberley, said that on the 1st January last he went for a cycle ride, and was resting on the bridge on the Tokai-road when he saw a cart approaching. Witness was holiday-making at the time. It was not true that he was reading a newspaper. He saw the horse come on the bridge: it shied at witness and his bicycle. Mr. Lawrence pulled the right rein, and in a moment horse, cart, and occupants went over the slope into the donga. Witness rendered



assistance. Mr. and Mrs. Lawrence were both injured. The cart shafts were broken, but the horse was uninjured. The level bit of road by the parapet was about 14 feet wide. From that width it sloped away very quickly to the donga. A constable investigated the matter, and witness told him that the animal shied at himself and the bicycle.

Cross-examined: The accident happened so quickly that almost the moment he saw the horse on the bridge, it was going over the side. Witness was about to smoke at the time of the occurrence. He did not think he had matches in one hand. He was a good deal upset by the mishap. He knew Mr. Lawrence, but he was not a personal friend. He was the Jonah, as it were. Witness was quite sure that he had not a newspaper when he was resting on the parapet. He considered that a quiet horse would take a fright even at a pool of water.

Elizabeth E. Lawrence (wife of the plaintiff) corroborated her husband's account of the mishap. Witness said that she was severely injured, though no bones were broken. She had not yet fully recovered from the effects of the accident, her nerves having been permanently damaged.

Dr. B. G. Roscoe, of Tokai, said that he was familiar with the spot at which the accident occurred. He did not remember any parapet on the southern side of the bridge. Before the washaway, there was a level road. The washaway caused more than half the road to fall in. Temporary repairs were made. Witness also gave evidence as to the effects of the accident upon Mr. and Mrs. Lawrence. He did not think Mr. Lawrence would again be able to take part in public life. Witness was at present the owner of the horse, which had been presented to him by Mr. Lawrence. The animal was quiet to ride and drive. He did not regard the fence on the side of the road as any protection against mishap.

Cross-examined: Between January and August of this year witness had used the horse on the roads about the Tokai and Constantia districts. The animal had not shied at motors or cyclists while it had been in his possession. If the road had been hard and level the parapet would have prevented the horse from going over the bridge, but in this case there was a sharp decline, and loose soil and no parapet.

H. Orpen, superintendent of the Tokai Convict Station and Porter Reformatory, said that on the 1st July, 1902, the Divisional Council took over the road from the Government, upon the recommendation of witness. Both the parapets on the bridge were intact at that time. The road was in very good order, about £290 having been spent. The Government were anxious to be relieved of the road. Witness described

the condition of the road and bridge before and after the accident. He considered that the Divisional Council could have taken effective steps after the washaway to prevent an accident from occurring.

Cross-examined: Witness had always regarded the bridge as unsafe. People had been in the habit of visiting him at Tokai, and they had always come by this road. The bridge in the photo produced situated on the Plantation at Tokai, was unsafe, but it was a bridge used for farm purposes, though it was largely used by the public. Witness had never had a high opinion of the Divisional Council. This opinion of his that the bridge where the accident had occurred was dangerous had not been formed in consequence of the mishap. Witness was not biassed against the Divisional Council.

Re-examined: Witness had always found that it was very difficult to get the Divisional Council to move, in fact, they only moved at the point of the bayonet, as it were.

Evidence was also given by Dr. A. E. Thompson, Cape Town; Albert E. Gower, superintendent of plantations at Tokai; and Alex. J. Chiappini (a resident near the scene of the accident).

Mr. Schreiner closed his case.

Mr. Shaw, engineer in the Cape Divisional Council's service, said that he inspected the road before it was taken over by the Council. There was a culvert in which water ran usually from June to the middle of December. There were two parapets, each 18 inches wide and 16 inches high, leaving a hard road 15 feet wide. During the washaway one of the parapets was taken away. Witness described the temporary measures that were taken to restore the roadway after the washaway, as a consequence of which the width of the road was extended about 8 feet. They placed a fence at the side of the slope, so as to protect pedestrians. The public could have used 23 feet of roadway, but the widening was off the line of the road. He saw the road from time to time. After the washaway the whole of the widened road was made up level, and no steep portion was left. There might have been a subsidence of about 6 inches from the middle of the road to the edge. Between the washaway and the accident to Mr. Lawrence, no complaint was received about the dangerous condition of the road or culvert.

Witness gave evidence as to other points in the roads of the Wynberg district, and the Cape Flats, where he considered that a restive horse might go over into the ditch. The ground where the washaway took place was not fit to put any permanent work upon, because it was too soft to put concrete in. The idea of putting in the concrete was to stop further enlargement of the donga. The work was



begun on the 22nd January. They extended the roadway to 30 ft. and put in the concrete work. Witness proved certain photographs of the scene of the accident taken from different points as well as photographs of the bridge coming from the Constantia-road. The washaway took about four feet of the road away between the two parapets. Despite the washaway, the road could safely be negotiated. After the washaway, temporary repairs rendered the road safe for traffic. The road was level, and was of the same material throughout. There was a good 23 feet width of road, and it was quite safe for traffic. In December there were a few holes in the road, but the holes were not dangerous. Witness would not say that the plaintiff was careless; it was the fault of the horse.

Re-examined by Sir H. Juta: He did not touch the road in consequence of the plaintiff's accident.

Robert Macbeth, proprietor of Wynberg Hotel, and four years chairman of the Wynberg Public Works Municipal Committee, stated he remembered the washaway in question. Witness used the road shortly before and after the accident. There was a slight variation in the level, but nothing particularly noticeable, as described by Mr. Orpen and Dr. Roscoe. The road seemed to be fairly wide, and he did not look upon it as dangerous. Of course, he could not say what would happen to him if someone held a paper in front of the horses.

H. H. Scowan, who had been Mayor of Kalk Bay, and who knew the road for the last eleven years, stated he saw the road before and after the accident. After the washaway he noticed the road had been widened and a temporary fence erected.

Cross-examined by Mr. Schreiner: The temporary structure would not keep a horse in the road.

Henry Alfred Reid, Inspector of Roads to the Cape Divisional Council, stated he had charge of the Tokai-road ever since it was taken over. After the washaway he repaired the road temporarily. It was not possible to go on with the permanent repairs at the time of the accident. From the washaway up to the time of the accident he had no complaints as to the danger of the culvert.

Sir H. Juta closed his case.

Mr. Schreiner submitted that the facts he had outlined at the commencement of the case had been abundantly proved by the evidence. In the conflict of evidence as to the width of the road and the condition of the bridge he could only ask the jury to believe that the zeal of the officials of the Divisional Council had carried them away. If what they said were correct, Mr. Lawrence should never have come into court at all, for the defence went to the length

of saying that he was never in any danger at all.

Sir H. Juta submitted that there had not been any negligence proved, for which the Council could be held liable. There was no danger in the Tokai-road that any reasonable man could have foreseen. If it were such a danger as anyone could reasonably have foreseen, it was very singular that the road should have been in use for six months without any complaint having been received. He submitted that the onus rested upon the plaintiff of proving that the accident was occasioned by the negligence of the defendants, and that he had not discharged that onus.

Mr. Schreiner, in his reply, submitted that his learned friend had put up a number of "men of straw" for the purpose of knocking them down again. It was absurd for his learned friend to say that they expected public bodies, wherever there was a bridge on a public road, to put parapets there. What the plaintiff did say was that the Divisional Council took over a road on which there was a bridge and that that bridge was protected by parapets. What the plaintiff complained of was the negligence of defendants in not maintaining a condition of protection for the travelling public that existed when they took over the road from the Government.

Maasdorp, J., said that it was undoubtedly the duty in law of a body in the position of the Divisional Council, who had taken over the control of a road, and the management of a road, and had actually commenced their work upon a road, to do their duty with care and diligence and if, through their negligence, the road was in such a bad state after they had taken it over and assumed the control, as to cause loss to anyone, they were liable in law. There was no doubt that the Council had taken over the road, they had done work upon the road, they were responsible for due care and diligence in regard to it, and the question was, had the Council been guilty of negligence? There were two matters in which negligence was alleged in this case. Firstly, it was said that the Council left in the road an incline which was rough and dangerous to persons using it. Secondly, it was said that the Council neglected to place a lateral protection at the side of the road. In regard to parapets, it was not a matter of law what the Council should do, but a question of fact. Parapets might be necessary in some places and not in others. The question was one which he must leave entirely to the jury. Touching upon the point as to whether there was a dangerous incline in the slope, His Lordship alluded to the direct conflict of evidence which had occurred, and said that it was for the jury to decide on the facts disclosed whether the state of affairs on the 1st January was

dangerous. Again, should the jury find that there had been negligence, they must inquire whether the negligence had caused the injury to the plaintiff.

Sir H. Juta applied to his lordship to direct the jury that they might bring in either a general or a special finding on the facts.

Mr. Schreiner objected to such a proposal at this stage of the case, after the summing-up of his lordship.

Maasdorp, J., said that it must be presumed that the jury knew the law. They could either find a general verdict or make a special finding on the facts.

The jury returned a verdict for the plaintiff for £1,500.

Mr. Schreiner moved for judgment for the plaintiff for £1,500 with costs.

His Lordship entered judgment accordingly.

[Plaintiff's Attorney: G. Trollip. Defendant's Attorneys: Moore and Son.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* ABRAHAM. { 1906.  
Oct. 30th.

Mr. Benjamin moved as a matter of urgency for an interdict restraining the sale of the applicant's property that had been seized in execution of two writs at Clanwilliam. The petition of the applicant, Varin Abraham, set out that he was a general dealer carrying on business as Varin Abraham and Co. at Salt River, Calvinia, and elsewhere in this Colony. On the 18th inst. he received a telegram from one Casim, who was conducting the business at Calvinia, informing him he had received a demand for payment of £100 from one Van Dyk. A further telegram was sent to the petitioner to the effect that two summonses had been served, one for £144 on a promissory note from Van Dyk, and one for £50 from a man named Marais. Both cases, he was informed, would be heard in the Court of the Resident Magistrate, Calvinia, on the 24th inst. The petitioner telegraphed repudiating the debts. Writs were issued in the Magistrate's Court, and the shop was seized. Petitioner stated that he never signed the promissory notes, nor did he ever authorise anyone to do so. He denied that he was indebted to Van Dyk and Marais in the sums mentioned. Through the closure of the business at Calvinia petitioner was suffering a loss, and he intended instituting an action to have the judgment set aside and for damages. It was shown at a meeting of creditors that

his assets exceeded his liabilities, and the creditors were willing to support him, and he was willing that the business should be carried on for the benefit of the creditors.

[Hopley, J.: Will he give security to cover the amount of the judgment?]

Mr. Benjamin: I understand so.

Hopley, J., ordered that the two writs of Van Dyk and Marais be suspended and execution stayed pending an action by petitioner to set aside the judgment, the petitioner to give security in the sum of £250 to cover the judgments and costs in the two cases, the property thereupon to be handed back to the petitioner, the security to be to the satisfaction of the Registrar of the Supreme Court.

## RICKETTS V. RICKETTS.

This was an action brought by Louise Sofia Ricketts against her husband, Arthur Edward Ricketts, for restitution of conjugal rights, failing which a decree of divorce. Mr. Bailey was for the plaintiff, and the defendant was in default.

The parties were married on the 12th February, 1885, in community of property, at Kimberley, and there was issue of the marriage, a girl, aged 20, and three boys, aged 17, 11, and 7 respectively. In 1898, while the parties were living at Cape Town, the defendant deserted the plaintiff, and since 1903 he had not contributed anything to the support of the plaintiff. The plaintiff claimed restitution of conjugal rights, failing which a decree of divorce, custody of the children, and forfeiture of the benefits arising out of the marriage in community.

The plaintiff, in the course of her evidence, stated that when her husband left her in Cape Town he wrote for some three or four years from Kimberley, and contributed to her support. Since the beginning of 1903 the defendant ceased writing to her. On the 3rd August this year witness wrote to the defendant, but he did not answer.

An order was granted, calling on the respondent to restore conjugal rights on or before 30th November, failing which to show cause by the 12th December why a decree of divorce should not be granted, and why the plaintiff should not have custody of the minors, and why he should not pay the costs.

## ESTATE MARTIENSSEN V. DAWSON.

Mr. Sutton, for the plaintiff, moved for judgment in terms of a consent paper for £25, with costs. The claim in reconvention, counsel added, had been withdrawn.

Judgment entered in terms of the consent paper,

## WOLF V. STEVENSON.

Mr. Alexander said he understood the defendant was appearing in person. He filed a plea, and made an offer on Saturday last, but no settlement was arrived at, because he was not prepared to come to any arrangement about the payment of the costs. It was agreed that execution should be stayed for six months, and the only question was one of costs.

[Hopley, J.: What will you get out of him by getting an order as to costs?]

Mr. Alexander: We say he has something.

[Hopley, J. (to defendant): What are you doing at present?]

Defendant: Nothing.

Hopley, J.: There will be judgment against you as prayed, with costs, the execution to be stayed on payment of £3 a month for the next six months, the plaintiff to have the right to apply for a variation of this order, if she can show the defendant has means, the payments to be on the 15th of each month.

WAR DEPARTMENT V. DUFFUS AND CO. { 1906.  
Oct. 30th.  
Nov. 1st.

*Profugus* — Process of Court —  
Edictal citation.

*The plaintiffs brought an action against the defendant and filed a declaration to which he ultimately pleaded. Before he could be served with notice of trial, &c., he left the country without giving directions as to service, his present address was unknown and his attorneys had retired from the case.*

*The Court ordered all further process to be served by edictal citation, with substituted service by one advertisement in the "Government Gazette" and one in the "Cape Times."*

Mr. Upington said the application he was about to make was a novel one. The defendant was originally barred from pleading. He had asked the indulgence of the Court to be allowed to plead, and, having placed a plea upon record, he had now left the country, and it was alleged in the petition he was endeavouring to evade the service of process. His attorneys of record had withdrawn, and there was therefore now no attorney of record upon whom, in terms of any rule of Court, the notice of set down, or further notice could be served. The ap-

plication was for direction in the circumstances from the Court. Counsel did not know of any previous case. The object of the application was to avoid following this gentleman over half the continent of Europe with a notice of set down of the case in the Supreme Court at Cape Town. On the 20th October, 1905, the plaintiffs' declaration was filed, the defendant having failed to file a plea. On the 8th January he was barred from pleading, and the case was set down for judgment under the Rule 319 for the 12th January, 1906. The defendant then petitioned for leave to purge his default, and an order was granted by the Court, and the defendant filed his plea on the 26th January, 1906. The pleadings were closed on the 15th February, 1906. The evidence of Colonel Hoskings was taken on commission in England, and in April last a discovery order was obtained by the plaintiff, calling on the defendant to make a discovery. The petitioner believed the defendant left South Africa for the Argentine, and afterwards left that place, and was at present somewhere in England, but he purposely kept his whereabouts unknown. The defendant's conduct throughout the whole of the proceedings led to the belief that he was treating the proceedings with contempt. The case was now ripe for hearing, but by reason of the exact whereabouts of the defendant being unknown, and the withdrawal of his attorneys from the further conduct of the case, plaintiff's attorneys were unable to serve the notice of set down on the defendant or his attorneys. Counsel did not know he could ask for a specific order, but he felt some relief should be afforded to the plaintiff. He submitted the Court, in its general discretion, would have power to make some special order. For instance, there was a provision that a plaintiff should proceed with his action in a certain time. If the plaintiffs had to pursue this man, who had come within the jurisdiction of the Court, there was every possibility that they might have to go over half the habitable globe. The suit would never come to a termination, and enormous costs would be involved.

[Hopley, J.: What benefit is it to the plaintiff to get this order?]

Mr. Upington: It is the War Department that is suing, and one knows that having started the suit, if the matter is to be continually postponed, they will be considerably embarrassed by not being able to procure their witnesses. Proceeding, counsel referred to the analogy of the Insolvent Ordinance, where provision was made for the service of notice upon debtors who had been absent from the Colony.

[Hopley, J.: Yes, but I do not think I have got the power.]

Mr. Upington: After all, what is to be done? The defendant in this particular case has obtained the indulgence of the Court to be allowed to plead, and surely a defendant cannot come within the jurisdiction of the Court for the purpose of entering an appearance and filing a plea, and then withdraw his attorney from record and proceed to remain out of the jurisdiction?

[Hopley, J.: It may be that we ought to draft a Rule of Court about it, so as to deal with such a case.]

Mr. Upington: I am not aware of any previous application. One feels that there ought to be a remedy for such a position.

[Hopley, J.: I sympathise with you, but I do not see how I can help you. I will speak to the other judges, who may possibly have some precedent which we are all unaware of here. If there is a remedy, I will intimate it at a future date.]

*Postea* (November 1st).

Hopley, J.: I have consulted the other Judges in regard to this matter, and they cannot recall any distinct precedent, but we are of opinion that substituted service should be ordered by a process analagous to that adopted in matters of edictal citation. In such cases leave is granted to sue by edict, and if personal service cannot be effected a substituted service by publication in some form is directed, and the notices, such as the notice of trial, are allowed to be given in the same manner.

Such course being the ordinary practice, it would seem *a fortiori* that in this case a service of the notices by publication might be allowed, as the summons, pleadings and other documents have been served in the ordinary way, and the defendant thereafter chose to leave the country without leaving any address or legal representative. Such are the present circumstances. The process to date has been served in the ordinary way upon the defendant or his legal representatives; but now that the time has arrived to set down the case and give notice of trial, there is no place where or person on whom the notice can be served. No injustice is done in such a case by allowing substituted service, by publication in some paper, to meet the state of circumstances which the defendant has brought about.

The defendant left this country for the Argentine Republic, and after a short stay there, so it is said, left for Europe; but his present whereabouts are unknown. The question is what advertisement might be reasonably expected to reach him? Publication in the last known place of residence, I think, would in this case be sufficient, and the Court will order advertisement once in the "Gazette" and once in the "Cape Times."

*Ex parte* FYSH.

Mr. Sutton moved for an order on the Registrar of Deeds to issue a certified copy of a certain mortgage bond. The petition set out that the applicant's wife had occasion to leave her house at Observatory, and for the sake of safety, she deposited the bond in the oven. Her reason for doing so was that she was afraid the unemployed rioters might break into the place and steal the papers. The applicant's wife had occasion to light a fire under the oven, and the bond, with other documents, were reduced to a heap of ashes. The parties lived in Ash-street, Observatory-road.

A rule *nisi* was granted, calling on all concerned to show cause why the copy should not be issued, the rule returnable on December 12.

*Ex parte* INSOLVENT ESTATE SMITH.

Mr. Upington moved on behalf of the petitioner, William Elliot, of Cathcart, for his appointment as sole trustee in the insolvent estate of Florence W. Smith.

Order granted, the petitioner to have full powers to liquidate the estate, costs to come out of the estate.

WALKER V. BRUNT.

This was an application on notice of motion calling on the respondent to show cause in his capacity as sole trustee, or in his individual capacity, why an order of the Court restraining an auctioneer from parting with the proceeds of the sale of certain furniture should not be set aside.

Mr. Alexander was for the applicant, and Dr. Greer was for the respondent.

It was ordered that the rule be extended for a fortnight and the money handed by the auctioneer to the applicant, unless the respondent previously brings an action to establish his right to the said money, in which case the rule shall stand. It was further ordered that if the applicant give security to the satisfaction of the Registrar for the payment of the said money and costs, the rule to be discharged forthwith, costs to be costs in the cause, or as ordered on further application.

*Ex parte* ESTATE HOLST.

Mr. Pyemont moved for leave to the petitioner, Floretina Holst, executrix testamentary in the estate of Peter Petersen Holst, to dispose of certain property by private treaty, or otherwise as might be most advantageous,

Order as prayed.



# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PIETERSEN V. PIETERSEN. { 1906.  
Oct. 31st.

This was an action brought by Solomon M. Pietersen, a cart driver, of Cape Town, against his wife, Johanna Pietersen, or Dreyer, for divorce, by reason of her adultery with divers persons, including a Chinaman named Kong.

Mr. J. E. R. de Villiers was for plaintiff; defendant appeared in court under the charge of gaol officers.

Mr. De Villiers said that the defendant had been barred from pleading. She had recently been sentenced, along with a Chinaman named Kong, to a term of four and a half years' imprisonment for brothel-keeping in Longmarket and Hout Streets, and for suffering a white girl to resort on the premises for immoral purposes.

W. T. Birch, clerk in charge of the marriage register at the Colonial Secretary's Office, gave formal proof of the marriage, which took place in Cape Town in October, 1900.

Solomon M. Pietersen (the plaintiff) said that defendant left him about a week after the marriage. He did not know of any reason why she should have left him. Witness was at the front about six months during the war. Upon his return they became reconciled, and lived together about three months. One night she went out and did not return until about three o'clock the following morning. He spoke to the defendant about her conduct, and her mother interfered. Since that time he had not often seen her. He believed that she had frequently been in gaol. At the Criminal Sessions last month the defendant was tried, in company with a Chinaman, for brothel-keeping, and for inducing a white girl to resort to a brothel. A few months ago he saw the defendant at a house in Hout-street, and while he was there, Kong, the Chinaman, came in and acted very familiarly towards her.

By the Court: Witness had not told defendant that he had another wife.

Defendant said that during the early days of the marriage she found that her husband was familiar with another woman, and that he was giving money to her.

By the Court: Witness had had one child, of which the plaintiff was the father. She did not go and live with the Chinaman until 1903.

Plaintiff denied the story told by the defendant as to his having another wife.

Defendant (in answer to the Court) said that she had no witnesses in court, as she had been told that it was too late to appear to defend the case.

His Lordship: If you want to bring a charge of adultery against your husband, you ought to prove it.

Defendant: They told me it was too late to write.

Mr. De Villiers said that that statement was incorrect.

Decree of divorce granted.

## MECHAN V. MECHAN.

This was an action brought by Henry W. Mechan, a commercial traveller, of Cape Town, against his wife, Jane Anne Mechan, who was supposed to be in England, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Payne was for plaintiff; defendant was in default.

The suit was by edictal citation, substituted service having been effected by means of advertisements in a newspaper in England and the "Gazette."

The plaintiff said that he was married to defendant on the 2nd May, 1891, at Preston, Lancashire, where they resided for some time. They were living at Wath-on-Dearne, Yorkshire, when his wife left him. She was addicted to drink. He had not since been able to discover her whereabouts, although he had been at considerable sacrifice and expense for that purpose. There were two children of the marriage, aged about 14 and 12. He landed in this country in October, 1900, his intention being to remain here.

By the Court: Witness would be prepared to pay his wife's passage to this colony.

[De Villiers, C.J.: You must try to find out where she is; there must be personal communication.]

Mr. Payne: We have reason to believe that the mother is wilfully concealing her whereabouts.

[De Villiers, C.J.: I must have clear proof that she refused to come out here after the passage money had been offered.]

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th February next, failing which, rule to issue calling upon defendant to show cause on the last day of February next why a decree of divorce should not be granted; personal service of the rule to be effected, accompanied by a passenger's ticket by the White Star Line, enabling the defendant to return to South Africa; failing personal service, service to be made on the defendant's mother, and the ticket tendered to her on behalf of her daughter.



GENERAL MOTIONS.

HAWKSLEY V. ACTING RESIDENT MAGISTRATE, STEYTLERVILLE. { 1906.  
Oct. 31st.

This was an application upon notice to respondent to show cause why he should not be directed to rectify a record of a certain inquiry into the applicant's conduct, which had resulted in his suspension from practising as a law agent for a period of three months.

Mr. Douglas Buchanan was for applicant; Mr. Howel Jones was for respondent.

It appeared that the applicant had been summoned by letter by the Acting Resident Magistrate of Steytlerville to attend before him for the purpose of an inquiry into alleged misconduct in his position as a law agent, by reason of an overcharge of £7 0s. 11d. made to one Buckley. The applicant had excepted to the form of the complaint and the procedure, having set out his exceptions in writing. At the inquiry he paid a cheque for £13.

The present application was for an amendment of the record which had been sent up to this Court pending an application for review, by reason of omission of all reference to the exceptions and the misdescription of the money paid by applicant as a "tender."

Mr. Buchanan read an affidavit by the applicant, and was about to read an affidavit by the applicant's clerk, Greening, when

[De Villiers, C.J.: Is that Greening the man who has been guilty of malpractices in this court?]

Mr. Buchanan: Yes.

[De Villiers, C.J.: Well, if there is any conflict between his evidence and that of the Magistrate, I should prefer the Magistrate's evidence.]

Mr. Buchanan: It was only, my lord, as to the exceptions being taken. Counsel added that he should not, under the circumstances read Greening's affidavit.

Mr. Howel Jones read a replying affidavit by the respondent (Mr. F. J. Lawrence), who said that the record was correct, and who went in some detail into the matter.

De Villiers, C.J., pointed out to Mr. Buchanan that the Magistrate had written saying that he was sending up the exceptions, so that at the appeal they could be considered.

Mr. Buchanan said that if the exceptions were treated as part of the record at the appeal, it would be sufficient for his client. There was, however, the point remaining as to the tender.

De Villiers, C.J., said that the exceptions had been sent up in due order.

Mr. Buchanan said that the applicant objected to the word "tender" appearing on the record, because the £13 was

paid into court pending an action as to who was entitled to it. He submitted that the reference to a tender should be erased, and words should be inserted to the effect that "£13 was paid to the Clerk of the Court, pending result of exceptions and to abide an action."

De Villiers, C.J.: This application appears to me to be wholly frivolous. Several objections were raised in the correspondence, but only two have been urged to the Court to-day. One objection is that the record does not state that certain exceptions had been taken in the Magistrate's Court at the hearing of the application against the present applicant. It appears, however, that the Magistrate informed the parties that a letter, which had been sent to the Magistrate, had been forwarded as part of the record. It is said now that the applicant could not have known that that letter referred to the exception, but if reference had been made to the record in the Supreme Court it could easily have been ascertained before further costs were incurred, whether those exceptions formed part of the record or not. I certainly would have understood by the Magistrate's letter that he intended to convey that the exceptions had been sent to the Supreme Court, but even if that is not the construction, by inspection of the record in the Magistrate's office information could have been obtained, and all this needless inquiry would have been avoided. As to the other point, that the record is not correct in regard to the tender, well, I will accept the Magistrate's statement duly made that "a cheque for £13 is tendered Mr. Buckley; £13 paid, 2.30 this day, 30th September, 1906." There is nothing that has been said in this case that has satisfied me that that is not a correct entry by the Magistrate. These objections fall to the ground, and the application for an amendment of the record must be refused, with costs.

Mr. Buchanan asked if the Court would fix a day for hearing the application for review.

[De Villiers, C.J.: It will be set down in the usual way.]

Mr. Buchanan: It was set down for Monday last.

[De Villiers, C.J.: The matter will be taken in its course.]

*Ex parte* ESTATE VAN DER WEST-HUIZEN.

Mr. Payne moved, on the petition of the executors testamentary, for authority to the Registrar of Deeds to pass transfer to petitioners in their private capacity of estate property at Beaufort West, which they had purchased at public auction.

De Villiers, C.J.: Under the special circumstances of this case, you may take the order, but, otherwise, it would have been necessary to give clear proof that a fair price was paid.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1906.  
Nov. 1st.

Mr. Sutton moved for the admission of Robert Gordon Foord as an attorney and notary.

Application granted, oath to be taken before the R.M. of East London.

Mr. De Waal moved for the admission of Roelof Scholtz as an attorney and notary.

Application granted, oath to be taken before the R.M. of Swellendam.

### PROVISIONAL ROLL.

AHMED V. KHAN.

Dr. Greer moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for taxed costs amounting to £53 19s. and for taxed costs of this application. The matter arose out a promissory note on which the present plaintiff was sued, the Court having given judgment in his favour. The parties were Indians.

It transpired that the defendant was already in custody on a charge of perjury.

Hopley, J., observed that he did not see what advantage was to accrue to the plaintiff by having the man civilly imprisoned when he was already criminally imprisoned.

Dr. Greer said that there was some question as to a sum of about £40 or £50 which defendant had said that he had in the bank.

Defendant said that the money had been absorbed by legal expenses. He had only 15s. in the bank now. He had already paid attorneys over £50.

[Hopley, J.: Expensive work, isn't it?]

Dr. Greer: It has been an expensive case.

Defendant (in answer to Dr. Greer) said that he did not know who was paying his attorney to defend him against the perjury charge.

Dr. Greer applied for the matter to stand over pending determination of the criminal charge.

The matter was ordered to stand over *sine die*.

LAWRIE AND CO. V. GELB.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £250, with interest, bond due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. The matter had previously been before the Court. There had been service upon two defendants only previously, and service had now been made upon the present defendant.

Order granted.

THE MASTER V. SMITH AND OTHERS.

Mr. Howel Jones moved for provisional sentence on certain two mortgage bonds for £10,500 and £6,000, with interest from the 1st January, 1905, bonds due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

BARDY V. MOSTERT.

Mr. Gutsche moved for judgment on a mortgage bond for £700, with interest from the 17th January, 1906, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable and rents to be attached.

Order granted.

GILL V. SHAMSHUDIEN.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £1,600, less £13 5s. paid on account, with interest from the 1st July, 1905; counsel also applied for the property specially hypothecated to be declared executable and the rents to be attached.

Order granted.

SHASKOLSKY V. JOYNT.

Dr. Greer moved for a decree of civil imprisonment upon an unsatisfied judgment of the Resident Magistrate's Court for £13 9s. 2d., with £2 12s. 8d. taxed costs. A return of *nulla bona* had been filed.

Defendant offered to pay £1 a month for the ensuing four months, and £4 a month subsequently.

Decree granted, execution to be suspended upon payment of £1 a month

for the next four months, and thereafter £4 a month until capital and interest have been paid, first payment on the 15th November.

**DREYFUS AND CO. V. TAYLOR AND MYLES.**

Mr. W. Porter Buchanan moved for provisional sentence for £130 8s. 6d. upon a bill of exchange dated 23rd August, 1906, drawn by plaintiffs on defendants, and payable at the Standard Bank, and by defendants accepted on 27th September, and made payable at 105, Castle-street, Cape Town. Counsel also applied for provisional sentence for £70 8s. 6d., upon a bill of exchange, dated 4th September, drawn and accepted, and payable under similar circumstances to the previous bill. Neither of the bills had been paid when due.

Order granted as prayed.

**ILLIQUID ROLL.**

REID AND NEPHEW V. { 1906.  
ROCHESTER BRICK CO. { Nov. 1st.

Mr. M. Bisset moved for judgment under Rule 329d for 33s. 6d., professional services, and for costs.

Order granted.

REID AND NEPHEW V. STEVENS.

Mr. M. Bisset moved for judgment under Rule 329d for £43 7s. 5s., professional services, and for costs.

Order granted.

STREETER V. MYERS, PUXTY AND CO.

Mr. Van Zyl moved for judgment under Rule 319 in default of plea, for £20 6s., advertising charges, with interest *a tempore morae*, and costs of suit.

Order granted.

REHABILITATION. { 1906.  
{ Nov. 1st.

Mr. McGregor moved for the rehabilitation of Willem Hendrik Fourie.

Granted.

**GENERAL MOTIONS.**

*In re* INSOLVENCY OF KUSSEL.

Max Kussel stated that while he was helplessly ill his wife obtained a separation against him by default, and sued him on an alleged settlement of £1,000 in an ante-nuptial contract. He (Kus-

sel) had been made insolvent. His estate had been adjudged as insolvent, but he understood that the Castle Breweries had now desired to withdraw from the proceedings.

[Hopley, J.: Why don't they come and do so?]

Mr. Payne (for the Castle Breweries, Ltd., the petitioning creditors), said that they had no objection to the order being withdrawn provided that Kussel undertook to pay all their costs in connection with the matter.

[Hopley, J.: Once an order is made they are not the only people who are concerned; there are other creditors, no doubt.]

Kussel said that there were other creditors.

[Hopley, J. (to Kussel): The Court with the information now before it, cannot make any order. You had better set about getting good legal advice.]

**MARAI V. MARAI.**

Mr. De Waal moved for a decree of divorce, with custody of the child and division of the joint estate, with costs, in default of defendant's compliance with an order of restitution of conjugal rights.

Decree granted, as prayed.

*Ex parte* PATERSON.

Mr. Louwrens moved for a certain rule *nisi* under the Derelict Lands Act to be made absolute.

Rule absolute.

**EAST LONDON HARBOUR BOARD V. CALEDONIA LANDING, SHIPPING AND SALVAGE CO. AND ANOTHER.**

This was an application for leave to appeal to the Privy Council from a judgment of the Chief Justice and Mr. Justice Hopley in an action for damage to certain craft in the Buffalo River in the course of the freshet of October, 1905.

Mr. W. Porter Buchanan was for applicant; Mr. Benjamin was for respondents.

Mr. Benjamin submitted that the matter should come before a full bench.

[Hopley, J.: Is there an important matter of practice involved?]

Mr. Benjamin said that that was so.

[Hopley, J.: I should prefer that it should be heard on Monday next, when a full bench will be sitting.]

Mr. Buchanan said that he did not object to the matter being postponed until next Monday, only he thought there should be some undertaking by respondents that they would not insist upon an execution in the meantime.

Mr. Benjamin said that he did not think there was any need for apprehension on that head.

Mr. Buchanan said that respondents had by letter threatened the Harbour Board with an execution.

The matter was ordered to stand over, with leave to mention it on Monday next.

#### RUMSEY V. RUMSEY.

Mr. P. S. T. Jones moved, as a matter of urgency on behalf of the defendant in the suit, R. L. Rumsey, of Graaff-Reinet, for leave to set the case down for hearing on the 7th November. Plaintiff had commenced an action against her husband for divorce, on the ground of his malicious desertion, and the defendant had filed a claim in reconvention for divorce from his wife on a similar ground. Plaintiff failed to plead to the claim in reconvention within the time fixed by Rules of Court.

[Hopley, J.: They are suing each other for restitution, so that they are anxious to get back. They will both have to come and express their willingness to receive the other one back.]

Mr. Jones: As far as one can understand, the plaintiff does not intend to proceed. Plaintiff has been barred, and the defendant (plaintiff in reconvention) applies to set down the case for the 7th November. The Registrar declines to set down the case this term by reason of the terms of the 30th Rule of Court. The whole point is as to whether the plaintiff in reconvention, for which we are claiming restitution of conjugal rights, is entitled to take advantage of the 30th Rule of Court and have the case set down for this term. Otherwise, the case will have to set down for the February term. His Lordship said that before he gave any decision he would like counsel to cite some case bearing on the point. He thought the matter might very well be mentioned again.

Mr. Burton (interposing) called the Court's attention to the case of *Smuts v. Ackerman* (15 C.T.R., 711).

His Lordship said that the matter would stand over until counsel had looked up the case mentioned by Mr. Burton.

Mr. Jones, later in the day, cited the case of *Smuts v. Ackerman* (15 "Cape Times" Reports, 711). Counsel added that the plaintiff in convention had abandoned her claim.

Hopley, J.: My own impression was when the matter was first mentioned that the claim in convention and the claim in reconvention should be looked upon as two separate cross actions, and that the plaintiff in reconvention, though he was the defendant in convention, should have

all the benefits of the Rules of Court, which a plaintiff may take. Of course, if the whole of the action had stood, and the plaintiff were proceeding with her claim, then possibly the defendant in the original claim could not take advantage of the fact, and force an earlier hearing than the Rules of Court entitle the original plaintiff to contend for, but it seems to me that when the original plaintiff in convention drops out of the action, or, if not entirely drops out of the action, at any rate abandons her part of it, the defendant can come and say, "I am the plaintiff in the reconventional claim, and I demand to set down my case for hearing like any other plaintiff." I think he is right, and I think the Registrar would be right to accept the set down papers by the plaintiff in reconvention. The case will be set down for the 7th November, costs to be costs in the cause.

#### BELL V. ESTATE DOUGLAS.

Mr. Gardiner (on behalf of the defendants in the action) moved for postponement of trial. Counsel said that the action had been set down by plaintiff for hearing on the 7th November, which was the same day as that for which certain exceptions taken by defendants to the plaintiff's declaration had been set down. The result might be that the witnesses would have to make two journeys to Cape Town.

Mr. McGregor (for the plaintiff) said that his client was shortly leaving Pretoria for British East Africa. He was willing to consent to a reasonable postponement, but it would be a great hardship upon him if the case were to be postponed until the February term.

Counsel having been heard in argument, on the facts.

Hopley, J., said that the exceptions would be heard on the 7th November but the hearing of the action would stand over until some date to be fixed, costs to be costs in the cause.

#### Ex parte DE BEER.

Mr. W. Porter Buchanan moved for the appointment of J. G. Taute as *curator ad litem* to represent Jan Conrad Lotz, of Prince Albert, in certain proceedings about to be taken to have him declared incapable of managing himself or his affairs, and for the appointment of Andries S. Snyman as *curator bonis*. Petitioner was brother-in-law of the alleged lunatic. Mr. Snyman was overseer of Mr. Lotz's farms.

There was also a petition filed on behalf of Mrs. Lotz.

Sir H. Juta, K.C. (for Mrs. Lotz) said that the application was not opposed, except so far as the persons whom it

was proposed to appoint were concerned. He had to suggest that Advocate De Waal should be appointed *curator ad litem*, and that Nicolaas C. van der Hoven, who was the executor under the will, should be appointed *curator bonis*.

Mr. Buchanan suggested that the R.M. of Prince Albert should be appointed *curator ad litem*.

Sir H. Juta said that this was a very rich estate, and there were some very funny things about it, which made it desirable, from their side, to ask the Court to appoint someone who was not in Prince Albert as *curator ad litem*.

Mr. Buchanan consented to the appointment of Advocate De Waal as *curator ad litem*.

Hopley, J., asked why all this competition should be taking place for these appointments. Was there any question of fees?

Mr. Buchanan: The whole fact is that Mr. Taute is an attorney at Prince Albert, and Mr. Theunissen is also an attorney at Prince Albert.

Sir H. Juta said that Mr. Theunissen was not mentioned in the affidavits.

Hopley, J.: It seems clear that the state of mind of Mr. Lotz should be inquired into, and the Court will order that there be an inquiry into his mental condition. It is now conceded by both sides that it will be wise to have an advocate of this Court to go down, independently of all local feeling or knowledge, and inquire into the matter, and act as *curator ad litem* of the alleged lunatic, and Mr. Advocate De Waal will for that reason be appointed he being the person acceptable to both sides. The point really about which the most contention arises is as to who is to be the temporary *curator bonis*. I do not know why there should be all this fuss and heat, unless it be thought that the one who is appointed *curator bonis* temporarily will be appointed permanently. One of the nominees is Mr. Snyman, who has been in the employ of the old man for some years, and the other is Mr. Van der Hoven, who was appointed by the old people the executor under their will. I think on principle the better appointment to make will be that of Mr. Van der Hoven. Mr. Van der Hoven will be appointed *curator bonis* temporarily, costs to come out of the estate. The summons will be returnable for December 12.

*Ex parte MNZOYI.*

Mr. Bailey moved for leave to petitioner to sue his wife, Lydia, *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce. Petitioner's wife was employed at a coffee shop at Idutywa, and declined to join him.

Petitioner, a native, appeared, and answered several questions put to him by the Court.

Rule *nisi* granted, returnable on December 12.

ESTATE WRIGHT V. WRIGHT. { 1906.  
Nov. 1st.  
" 2nd.  
" 5th.

Lunatic — Death of — Executor dative—Act 1 of 1897, Sec. 41.

*An application having been made to the Eastern Districts Court to have W. declared of unsound mind and a curator appointed to his estate, that Court declared him to be incapable of managing his own affairs and appointed curators to his property. Upon the death of W., the curators continued the administration of the estate under the authority of the Master, who acted under the 41st section of Act 1 of 1897.*

*Held, that as W. had not been declared to be of unsound mind, the 41st section did not apply, and the Master was directed to call a meeting of next of kin for the selection of an executor dative.*

This was an application upon notice to the respondent (Archibald H. B. Wright) calling upon him to show cause why an order should not be granted recalling and annulling the order granted by this Court on the 17th September last on his petition authorising the Master to call a meeting of next of kin and creditors of the late G. B. Wright, attorney, Graham's Town, to appoint executors dative, and restraining the present applicants from proceeding with the sale of certain movables. Applicants also asked for an order confirming their appointment as executors dative in the estate.

It appeared that the late Mr. Wright was in February of this year declared unfit to manage his affairs, and the present applicants, along with one of Mr. Wright's sons (B. B. Wright) were appointed curators of his property. The last-named, however, was unable to take up his appointment because of his failure to provide security. Then Messrs. Shand and Grocott proceeded to administer the old gentleman's af-



fairs. Mr. Wright died a little while afterwards, and left a will, without appointing executors. The curators then, under section 41 of the Lunacy Act of 1897, assumed the duties and powers of executors *dative*, being sanctioned by the Master. On the 17th September last an *ex parte* application was made to this Court by Archibald Wright, for an order authorising the Master to call a meeting of next of kin and restraining the curators from proceeding to dispose of the assets in the meantime. Complaint was made that the curators were about to disperse valuable heirlooms, pictures, and so forth, in defiance of the wishes of the heirs, who were not represented in any way in the administration of the estate. The Court granted an order authorising the Master to call a meeting of the creditors and next of kin, and directing the curators to stay further sale of the assets. Since that time, a meeting of the next of kin and creditors had been held at Albany, before the Resident Magistrate, and it was then proposed that Mr. R. H. Walpole, secretary of the Port Elizabeth Assurance Company, and Mr. Archibald Wright should be appointed executors *dative*. The curators, however, were represented at the meeting, and no decision was come to pending the present application.

The present applicants said that they had been duly appointed executors *dative*, and that material facts were withheld from Mr. Justice Buchanan when the *ex parte* application was made by the respondent, inasmuch as on the 23rd August, about a month previously, they (the curators) had made application to the Eastern Districts Court from an order restraining the said B. B. Wright from in any way interfering with or obstructing the petitioners in their administration of the estate. The E.D. Court granted an order as prayed, and thus the petitioners were confirmed and recognised in their appointment as executors *dative*. The present applicants intimated that they were quite willing that Mr. Archibald Wright should be joined with them as executors. Mr. Shand is the secretary of the Eastern Province Guardian, Loan, and Investment Company, Graham's Town.

Affidavits were read on both sides.

Mr. Burton was for applicants (Messrs Shand and Grocott); Mr. Upington (with him Mr. Pohl) was for respondent.

Mr. Burton said that the Court could always recall its own order upon proof being given that that order had been improperly obtained. It was not necessary to allege actual fraud. The Court would recall its order if facts which ought to have been before the Court had not been brought before it. Archibald Wright made no reference whatever in his application to the proceedings which had taken place in the Eastern Districts Court a few weeks be-

fore. He submitted that if Mr. Justice Buchanan had had information before him in regard to the judgment of the Eastern Districts Court recognising and confirming the appointment of the petitioners, in all probability he would not have granted the order which it was now sought to annul. The order granted by Mr. Justice Buchanan was, in essence, in conflict with the order granted by the Eastern Districts Court. It was clear that the object of the application made to this Court in September was to get the petitioners removed from their office as executors, and to have Mr. Walpole and Mr. Archibald Wright appointed in their stead. Mr. Burton went on to urge that the order of the Eastern Districts Court appointing the petitioners as curators was such as to bring the matter within the Lunacy Act, and he submitted that under section 41 of the Act the Master was justified in appointing the curators to continue to administer the estate as executors *dative*. The effect of the order of the Eastern Districts Court in August last was to maintain and confirm the appointment of the petitioners. He submitted that it was quite competent for the application to be brought for an order of the Court to be annulled if it were shown that material facts which ought to have been brought before the Court had not been mentioned. On the power of the Court to recall its own order, counsel cited *Ritchie v. Andrews* (2 E.D.C. Reports, 254), and *Meintjes v. Theunis* (10 E.D.C. Reports, 56).

Mr. Upington said that as to the question of notice, Mr. Justice Buchanan was informed that the Master had received notice of the particular application then made to him, and the Master subsequently reported upon it. It was felt that inasmuch as this was a matter within the Master's department, he was the proper person to come before the Court and raise any objections there might be.

[Hopley, J.: Could executors be removed from office without notice to them?]

Mr. Upington: They are not executors: they are simply curators continuing to act as they did before, as if the late Mr. Wright had not died. Proceeding, counsel said that the most important point in the present application was whether information had been withheld from the Court that should have been placed before it. The high-water mark of the decisions quoted by his learned friend was that the Court would recall its own order where there had been a total misconception of the facts. He submitted that the order made by the E.D. Court between other parties upon a question as to whether or not Bayard Wright was to remain in occupation of a portion of the estate was entirely irrelevant matter when the question came up before the Supreme Court to de-

cide whether or not section 41 of Act No. 1 of 1897 rendered legal the appointment of these curators as executors dative. Counsel submitted that there had not been any such total misconception as would entitle the present applicants to have the order of this Court annulled. He submitted that the record of the case in the E.D. Court could not have affected the question which Mr. Justice Buchanan had to decide. If it were urged that the decision of Mr. Justice Buchanan was wrong in law, then this was not the correct procedure to take to have it put aside.

Mr. Burton, in his reply, said that their position was that Mr. Justice Buchanan was induced, in ignorance of the order of the E.D. Court, to grant an order which was inconsistent with, and did practically override, the E.D. Court's order. He repeated that the petitioners were prepared to accept Mr. Archibald Wright as a colleague of theirs.

*Cur. Adv. Vult.*

*Postea* (November 2nd).

Hopley, J., intimated that in reference to the matter of the estate Wright v. Wright, he thought that this was not a matter which could be decided by one Judge, and the wisest course, perhaps, would be for the counsel on both sides to agree that it should be treated as an appeal. The matter might be heard on Monday before a full Court, or if not treated as an appeal, it might still be heard before a full Court, because he thought it was a matter that a full Court should deal with and not one Judge alone. It might be heard in the form of setting aside an order made by a Divisional Court. The application, at any rate, could be mentioned to the full Court on Monday next.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

*Postea* (November 5th).

Mr. Burton said it was unnecessary to quote authority to show that the Court could recall its own order, where such an order had been made without all the facts being placed before the Court. It was quite clear that the proceedings in the Eastern Districts Court were material, and should have been brought to the notice of the Court. Counsel then quoted section 41 of Act 1 of 1897. Wright had, he proceeded, been declared incapable of managing his own affairs, and so was a lunatic by the definition in the Act.

Mr. Upington said the important point to notice was that G. G. Wright had never been declared of unsound

mind. Curators bonis had been appointed, but it did not necessarily follow that Wright was a lunatic. Section 43 of the Lunacy Act left the jurisdiction of the Court in the appointment of curators untouched. The Court had often appointed curators bonis without declaring the person to whom the curators had been appointed a lunatic. He quoted in *re Rensburg* (3 M., 199), the *Master v. Lehmann* (4 E.D.C., 308), and in *re Filmer* (1875 Buch., 2). Curators were often appointed to prodigals and deaf mutes—Grotius (1—11—1) and Voet (27—10—13). The curator had in this case been appointed because the person in this case was a very old man, nearly 80 years of age, and could not carry on his business, which consisted of large farming operations.

[De Villiers, C.J.: Could the Court have made an order without finding that there was an unsoundness of mind to the extent that he could not manage his own affairs?]

Mr. Upington, continuing, said that the definition certainly used the word incapable of managing himself "or" his affairs, but great injustice would be done if that definition were strictly construed. In every case where a curator bonis was appointed to any person it would necessarily follow that that person was of unsound mind.

[Hopley, J.: The proceedings were under the Lunacy Act; a curator *ad litem* was appointed!]

Mr. Upington: It does not follow that the proceedings were under the Lunacy Act because a curator *ad litem* was appointed. He quoted in *re Zeederman* (1 M., 525).

Continuing, counsel said that so long as an executor could be found who was willing to act, section 41 of the Act did not come into operation at all. The Legislature could not have intended to take away from the next of kin the right to elect an executor. The appointment of the curator in this case was not under the Act at all, but under the Common Law, and so section 41 of the Act did not apply. He referred to in *re G. C. Rens* (Foord, p. 92).

Mr. Burton, in reply, said that the objection that the appointment of the curator had not been made under the Lunacy Act had been brought to the notice of the Eastern Districts Court.

De Villiers, C.J.: This is an application for an order to recall and annul an order granted by Mr. Justice Buchanan on the 17th September, 1906, by which a meeting of next of kin was directed to be held for the purpose of electing an executor dative to the estate of the late George Greatbatch Wright. The ground of the application is that important facts were withheld from the notice of the Judge at the time the application was made. The fact so alleged to have been withheld was that some

question which had previously been raised—the question of the validity of the appointment of the respondents in this case to administer the estate of the deceased after his death—was not brought before the learned Judge. The case now stands thus: The learned Judge has made an order that a meeting of next of kin shall be held. In my opinion, there has been no such withholding of facts as to justify the Court in interfering with the order of the learned Judge, if that order were correct. Upon the whole, the Court has come to the conclusion that the order of the learned Judge should not now be interfered with. The section under which the Master acted in allowing the respondents to proceed with the administration of the estate after the death of the alleged lunatic was the 41st section of Act 1 of 1897, which reads as follows: "When any lunatic, for the care or administration of whose estate a curator has been appointed, shall die intestate, or having left a will, there shall be no executor, or none willing to act, such curator shall continue the administration of the estate of such lunatic and distribute the assets thereof as if he had been appointed an executor dative." Now, it is certainly an anomaly in the law that persons who are appointed for one purpose should, after the death of the person whose estate they are administering, for a wholly different purpose be allowed to continue the administration of the estate. During his lifetime they administer the estate on behalf of the lunatic; after his death the interests of the lunatic cease, and they administer the estate on behalf of the heirs. Under the 41st section the heirs, who are so vitally interested in the administration of the estate, have nothing to say. Persons appointed for a wholly different purpose continue to administer the estate, and at all events the Court must require in every case in which the 41st section comes into question that it should be clearly proved that that is a case in which the 41st section applies. An essential requisite is that the person should be a lunatic in terms of the Lunacy Act, and that the appointment should have been made in terms of the 41st section. Now, we find that the order of the Eastern Districts Court for the appointment of a curator was as follows: "Be it remembered that George Greatbatch Wright, an alleged lunatic, of the farm Krantz Drift, in the district of Albany, the defendant in the above-named suit, duly assisted by his curator *ad litem* was summoned to answer Bayard Bailie Wright of the said farm, the plaintiff in the above suit, in an action instituted for the purpose of having him declared of unsound mind and incapable of managing his affairs, and for the appointment of a curator or curators for

the care and administration of his estate." The Court, in its judgment, is silent upon the first part of the application, viz., to have him declared of unsound mind; it makes no order upon the question of the unsoundness of mind, and makes this order, that "The Court declares the defendant to be incapable of managing his own affairs." This order is quite consistent with a man not being a lunatic or of unsound mind. This Court has frequently appointed curators to persons who, although not lunatics, are wholly unable to administer their own affairs. It is quite consistent with the whole of this record that that is the state of things here. It is quite true that under the 2nd section of the Act the definition of a lunatic is given as follows: "Lunatic includes any idiot or person of unsound mind incapable of managing himself or his affairs." But if a question comes before the Court under the 41st section, it is not sufficient to say, "Here is an order of Court declaring 'a person incapable of managing his own affairs.'" the order should go further and state that the person is of unsound mind, and, until that has been stated, there is not sufficient proof before the Court that it is a case to which the 41st section of the Act applies. The 35th section of the Act, no doubt, says that "where . . . the Court shall be of opinion that the person to whom it relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, such court may make such an order as it thinks fit for the care or administration of the property of the lunatic," etc. But it does not follow from the 35th section that the power which the Court had previously exercised of declaring a person to be incapable of managing his own affairs without declaring him to be of unsound mind was intended to be taken away. At all events, it lies upon those who claim under the 41st section to have this anomalous proceeding of a curator acting as an executor after the death of the person whose curator he was, to prove that the case falls within the 41st section, and such clear proof has not been given in the present case. The Court, therefore, will not interfere with the decision of the learned Judge. I do think that the better course in that case would have been to have granted a rule *nisi*, because it does seem somewhat unfair towards the curators, who had been administering the estate very honestly and fairly, that their appointment by the Master should be set aside without notice being given, and if they were not represented, as I understand they are, in this application I should certainly have directed that an opportunity should be given to them to defend this application. I do consider, however, that all the costs which have been in-

curred should be borne by the estate. They have acted perfectly honestly and fairly, and I would further express a hope that the next of kin in electing executors dative to act in this estate will bear in mind that these men have done good and efficient work, and that they will re-elect them, together with such representatives as they themselves wish to appoint, for the purpose of administering the estate. Of course, that is for the heirs, and the Court will only make the suggestion. The application will be dismissed, costs to come out of the estate. One other remark I would make, and that is, that this decision is by no means intended to be in conflict with the decision of the Eastern Districts Court. The question now raised before this Court was not specifically raised before the Eastern Districts Court. The Eastern Districts Court was not asked to recall the appointment made by the Master.

Maaedorp and Hopley, J.J., concurred.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset. Respondent's Attorneys: Dold and Van Breda.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

FLUCKIGER V. FLUCKIGER. { 1906.  
Nov. 2nd.

This was an action brought by Anna Dorothea Henrietta Fluckiger, of Cape Town, against Jacob Fluckiger, of Berne, Switzerland, for restitution of conjugal rights, failing which a decree of divorce.

Mr. Rowson was for plaintiff; defendant was in default.

Plaintiff sued *in forma pauperis* and by edictal citation.

In her evidence, plaintiff said that she was married to defendant in Cape Town in 1891. In January, 1895, he deserted her, stating that he was going away on account of ill-health, and that he would not return to South Africa as the climate did not agree with him.

De Villiers, C.J., said that the defendant still seemed to be in poor health according to a letter received from him.

Witness said that she believed he had not been in good health lately. She added that she was not in good health.

[De Villiers, C.J.: Then how are you going to be better off by getting a divorce?]

Witness: It is no good being a wife in name only. She added that she had been deserted for fifteen years, and it was only quite recently that, through the efforts of the Salvation Army, she had traced her husband's whereabouts.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th February, failing which to show cause on the last day of next term why a decree of divorce shall not be granted with costs, personal service to be effected.

### ROBINSON V. ROBINSON.

This was an action brought by George Fredk. Wm. Robinson, of Cape Town, an employee of the Customs, against his wife, Hester Gertruda Beatrice Robinson, for divorce by reason of her adultery with one Charles Howard, at Durban, Natal.

Mr. J. E. R. de Villiers was for plaintiff; defendant did not appear.

It was stated that defendant was at present undergoing sentence of four months' imprisonment on a charge of committing bigamy at Durban with Charles Howard, with whom she had gone through a form of marriage in September, 1905. She had since given birth to a child, of whom the plaintiff was not the father. Plaintiff claimed a decree of divorce and forfeiture of the benefits of the marriage.

Wm. Thomas Birch, clerk in charge of the marriage register, gave formal proof of the marriage, which took place at Simon's Town on the 1st September, 1902.

George Fredk. Wm. Robinson (the plaintiff) said that he was a tide-waiter in the Customs, Cape Town. He lived with his wife at Simon's Town until September, 1903, and then removed to Cape Town, where they lived together until August, 1904, when defendant went to Johannesburg. Subsequently he heard from her in Natal. She said she wanted to come back to him. She came back in June of this year, but they did not live together. His wife visited her father on his farm. Soon after her return he received a letter from one Chas. Howard asking whether he (plaintiff) was her uncle, and stating that he (Howard) wanted his wife back. Witness gave information to the Criminal Investigation Department. He did not speak to his wife again. She returned to Durban.



question which had previously been raised—the question of the validity of the appointment of the respondents in this case to administer the estate of the deceased after his death—was not brought before the learned Judge. The case now stands thus: The learned Judge has made an order that a meeting of next of kin shall be held. In my opinion, there has been no such withholding of facts as to justify the Court in interfering with the order of the learned Judge, if that order were correct. Upon the whole, the Court has come to the conclusion that the order of the learned Judge should not now be interfered with. The section under which the Master acted in allowing the respondents to proceed with the administration of the estate after the death of the alleged lunatic was the 41st section of Act 1 of 1897, which reads as follows: "When any lunatic, for the care or administration of whose estate a curator has been appointed, shall die intestate, or having left a will, there shall be no executor, or none willing to act, such curator shall continue the administration of the estate of such lunatic and distribute the assets thereof as if he had been appointed an executor dative." Now, it is certainly an anomaly in the law that persons who are appointed for one purpose should, after the death of the person whose estate they are administering, for a wholly different purpose be allowed to continue the administration of the estate. During his lifetime they administer the estate on behalf of the lunatic; after his death the interests of the lunatic cease, and they administer the estate on behalf of the heirs. Under the 41st section the heirs, who are so vitally interested in the administration of the estate, have nothing to say. Persons appointed for a wholly different purpose continue to administer the estate, and at all events the Court must require in every case in which the 41st section comes into question that it should be clearly proved that that is a case in which the 41st section applies. An essential requisite is that the person should be a lunatic in terms of the Lunacy Act, and that the appointment should have been made in terms of the 41st section. Now, we find that the order of the Eastern Districts Court for the appointment of a curator was as follows: "Be it remembered that George Greatbatch Wright, an alleged lunatic, of the farm Krantz Drift, in the district of Albany, the defendant in the above-named suit, duly assisted by his curator *ad litem* was summoned to answer Bayard Bailie Wright of the said farm, the plaintiff in the above suit, in an action instituted for the purpose of having him declared of unsound mind and incapable of managing his affairs, and for the appointment of a curator or curators for

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curred should be borne by the estate. They have acted perfectly honestly and fairly, and I would further express a hope that the next of kin in electing executors dative to act in this estate will bear in mind that these men have done good and efficient work, and that they will re-elect them, together with such representatives as they themselves wish to appoint, for the purpose of administering the estate. Of course, that is for the heirs, and the Court will only make the suggestion. The application will be dismissed, costs to come out of the estate. One other remark I would make, and that is, that this decision is by no means intended to be in conflict with the decision of the Eastern Districts Court. The question now raised before this Court was not specifically raised before the Eastern Districts Court. The Eastern Districts Court was not asked to recall the appointment made by the Master.

Maasdorp and Hopley, J.J., concurred.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset. Respondent's Attorneys: Dold and Van Breda.]

## SUPREME COURT

### FIRST DIVISION.

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In her evidence, plaintiff said that she was married to defendant in Cape Town in 1891. In January, 1895, he deserted her, stating that he was going away on account of ill-health, and that he would not return to South Africa as the climate did not agree with him.

De Villiers, C.J., said that the defendant still seemed to be in poor health according to a letter received from him.

Witness said that she believed he had not been in good health lately. She added that she was not in good health.

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Witness: It is no good being a wife in name only. She added that she had been deserted for fifteen years, and it was only quite recently that, through the efforts of the Salvation Army, she had traced her husband's whereabouts.

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### ROBINSON V. ROBINSON.

This was an action brought by George Fredk. Wm. Robinson, of Cape Town, an employee of the Customs, against his wife, Hester Gertruda Beatrice Robinson, for divorce by reason of her adultery with one Charles Howard, at Durban, Natal.

Mr. J. E. R. de Villiers was for plaintiff; defendant did not appear.

It was stated that defendant was at present undergoing sentence of four months' imprisonment on a charge of committing bigamy at Durban with Charles Howard, with whom she had gone through a form of marriage in September, 1905. She had since given birth to a child, of whom the plaintiff was not the father. Plaintiff claimed a decree of divorce and forfeiture of the benefits of the marriage.

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George Fredk. Wm. Robinson (the plaintiff) said that he was a tide-waiter in the Customs, Cape Town. He lived with his wife at Simon's Town until September, 1903, and then removed to Cape Town, where they lived together until August, 1904, when defendant went to Johannesburg. Subsequently he heard from her in Natal. She said she wanted to come back to him. She came back in June of this year, but they did not live together. His wife visited her father on his farm. Soon after her return he received a letter from one Chas. Howard asking whether he (plaintiff) was her uncle, and stating that he (Howard) wanted his wife back. Witness gave information to the Criminal Investigation Department. He did not speak to his wife again. She returned to Durban.

By the Court: His wife did not tell him that she was married to Howard. She said that she was under a contract of service as a nurse, and that she would have to return in a few weeks. Witness did not go to Durban to give evidence in the trial of his wife.

Mr. De Villiers put in the record of the criminal trial.

The Chief Justice remarked that it was a pity there was no better evidence of identification of the defendant.

Mr. De Villiers pointed out that the defendant pleaded guilty to the criminal charge, the details of which clearly showed that she was the plaintiff's wife.

De Villiers, C.J.: It should not be supposed that because it is merely a divorce case evidence may be given in a slipshod fashion. Some degree of evidence, and perhaps even more strict evidence, should be given in these cases. In the present case there are special circumstances which would justify the Court in believing that the defendant in this case is the person who is married to the plaintiff, and from whom he seeks a divorce. According to the marriage certificate a marriage took place on the 1st September, 1902, at Simon's Town, between George Frederick Wm. Robinson and Hester Gertruda Beatrix Hugo. Now it appears that in Natal a woman named Hester Gertruda Beatrix Hugo has been convicted of bigamy, and the indictment there alleged that she had been previously married to George Frederick Wm. Robinson at Simon's Town on the 1st September, 1902. The names of the people were the same, the date was exactly the same, and the place was exactly the same, so that it seems almost conclusively proved that the accused in that case, who confessed her guilt, was the defendant in the present case. Well, then, there is the further circumstance that there has been personal service upon her of all the proceedings, and she has taken no notice of them. She has not even written to the Registrar denying that she is the same person, so that, under those special circumstances, you may take the order, but I should be sorry, again I repeat it, if it is thought that evidence of a slipshod character is admitted in these divorce cases.

#### *Ex parte SMITH.*

Mr. Roux moved, as a matter of urgency, for a temporary interdict restraining the Chairman and Commissioners of the Municipality of Ceres from laying certain water mains. Counsel said that the Commissioners had no power to carry out works involving an expenditure of more than £50 unless certain formalities had been gone through. The works in question would mean an outlay of more than £200, and

the requisite formalities had not been gone through.

Rule granted calling upon the Commissioners of Ceres Municipality to show cause on Thursday next why an interdict should not be granted as prayed, rule to operate an interim interdict, with leave to petitioner's attorneys to telegraph terms of the order.

CAPE TOWN TOWN COUNCIL	{	1906.
V. TABLE BAY HARBOUR		Nov. 2nd.
BOARD.		" 3rd.
		" 5th.

Town Council—Harbour Board—  
Invalid agreement—*Restitutio in integrum*—Crown property rates (Act 36 of 1891).

*The Government having promised the plaintiff Council that it would introduce into Parliament a Bill to provide for the taxation of Crown property within Municipal limits, the defendant Board, whose property was regarded as Crown property, proposed to the Council certain exemptions from its rating powers. To these proposals the Council agreed and "in consideration of the Council having the exemption introduced into the Bill, the Board covenanted to pay to the Council the sum of £2,500 upon the promulgation of the Act, and thereafter the like sum annually, so long as the property of the Government is liable to be rated." The exemptions were in substance introduced into the Bill which was passed, but the Bill made no mention of the sum to be paid annually by the Board in addition to the rates which would become payable by the Board under the Act. After the passing of the Act, the Governor in Council, on the recommendation of his Ministers, approved of the agreement substituting special provisions for the taxation of Board property in lieu of the provisions of the Act.*

*Held, that the Board had no power to enter into the agreement and that the approval of*

*the Governor in Council could not render it valid.*

*The agreement contained a separate provision that the Council should supply the Board with all water required by it, and that the Board should pay the same price as should from time to time be paid by householders: and for several years the Board enjoyed the benefit of this provision. For several years also the Board paid the annual contribution of £2,500 in addition to the rates payable by it.*

*Held, that although the Board was entitled to be relieved from further payments of the contribution, it was not entitled to recover back contributions already paid under the agreement.*

This was an action brought by the Town Council of Cape Town against the Table Bay Harbour Board to recover rates upon certain properties situate within the municipal limits and outside the Dock area.

Plaintiff's declaration was as follows:

1. The plaintiff is the Town Council of the City of Cape Town a body corporate constituted under Act No. 26 of 1893 and amending Acts.

2. The defendant is the Harbour Board of Table Bay a body incorporated under Act No. 36 of 1896.

3. The defendant is, and before the levying of the rates, hereinafter referred to, was the owner of the rateable immovable property within the municipality of Cape Town, situate outside the Dock area as enclosed for Customs purposes in the year 1891, and not being land reclaimed from the sea upon which no dwelling house has been erected; the said property is rateable property within the meaning of Act 36 of 1891.

4. In accordance with the provisions of the said Act No. 26 of 1893 the plaintiff duly imposed and levied upon the valuation of the aforesaid property certain rates for municipal purposes.

5. The said rates amounted for the years 1899 and 1900 to 3½d. in the £; for the year 1901 to 3½d. in the £; and for the years 1902, 1903, 1904 and 1905 to 2½d. in the £; and they became payable respectively on the fifteenth day of March in each of the said years.

6. The defendant did not pay the aforesaid rates when due, or any portion thereof, and under the provisions of section 100 of the said Act 26 of 1893,

there became due and payable by any person in default in the payment of rates after the 30th day of June, in each of the said years an additional sum equal to one-twentieth of the rate in respect of which such person was in default.

7. The plaintiff annexes hereto an account marked "A" setting forth in detail the said rateable immovable property of the defendant, its situation, the valuation thereof in accordance with the provisions of the said Act, and the several amounts payable in the years from 1899 to 1905 inclusive, in respect of the rates levied and imposed as aforesaid, including the additional sums for which the defendant has become liable as aforesaid by reason of default in the due payment of rates on or before the 30th June in the said years.

8. The plaintiff craves leave to refer to the said account as though herein inserted and says that the defendant is indebted to the plaintiff in the sum of £4,279 13s. 3d.

9. All things have happened, all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to demand from the defendant the said sum of £4,279 13s. 3d., but the defendant refuses to pay the same or portion thereof.

The plaintiff claims: (a) The sum of £4,279 13s. 3d.; (b) interest *a tempore morae*; (c) alternative relief; (d) costs of suit.

Defendant's plea and claim in reconvention were:—For a plea to the declaration the defendant says:

1. Paragraphs 1 and 2 are admitted.

2. The defendant admits ownership of the immovable property set forth in Schedule A annexed to the declaration, and admits that the said property is situated outside the dock area as enclosed for Customs purposes in the year 1891.

3. The defendant admits that so much of the said immovable property as is shown in the column headed "Rateable" in the schedule hereunto annexed and marked B, is property which is rateable in terms of Act No. 36 of 1891, and that between March 15th, 1899, and March 15th, 1905, the sums shown in the said column from time to time became due and payable by the defendant as rates duly levied upon the said properties, to the amount in all of £751 13s. 7d.

4. The defendant says further that so much of the said property as is shown in the column headed "not rateable" in the said schedule is property which is specially exempted from rates under and by virtue of such sections and subsections of the said Act No. 36 of 1891, as are specified opposite each such property in the "remarks" column of the said schedule, and that upon such properties the defendant is not and has at

no time since 1891 been liable in law to pay rates.

5. The defendant says further that between the 15th March, 1899, and the 15th March 1905, sums amounting in all to £17,500 have been paid annually by the defendant to the plaintiff, far in excess of any amount which in law became due and payable annually by the said Board in respect of rates upon the aforesaid properties.

6. Save as above the defendant denies each and all the allegations in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the declaration, save that the Board refuses to pay the sum claimed or any part thereof.

Wherefore it prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant (now plaintiff) says:

1. It craves leave to refer to the several paragraphs of its plea.

2. On the 2nd June, 1891, the plaintiff Council and the defendant Board entered into an agreement in writing, copy of which is hereunto annexed marked C. The defendant (now plaintiff) prays that the same may be considered as inserted herein.

3. Neither the said Council nor the said Board as then constituted had power or authority in law to enter into such agreement. The said agreement was not thereafter incorporated in, authorised or ratified by Act No. 36 of 1891, nor was it authorised by or recognised in Acts Nos. 26 of 1893 and 36 of 1896, reconstituting the said Council and Board respectively, or any other legislation; the said agreement was and is *ultra vires* the said Council and Board, invalid in law and not legally binding upon either party thereto.

4. From time to time since the year 1891, the defendant (now plaintiff) has made payments to the plaintiff (now defendant) under the terms of the said agreement far in excess of any sums annually becoming due and payable in law by the defendant (now plaintiff) to the plaintiff (now defendant) as and for rates; and between the 15th March, 1899, and the 15th March, 1905, the defendant (now plaintiff) has so paid to the plaintiff (now defendant) the sum of £17,500 in all, being £16,748 6s. 5d. in excess of the amount which in law became due and payable in rates by the defendant (now plaintiff) during the said period.

5. The said payments so far as the same were in excess of amounts in law due and payable by the said Board for rates were payments which were not due to the said Council and which the said Board was not in law required, empowered or authorised to make, and the said Board is now entitled to recover from the said Council the said excess payments.

Wherefore the defendant (now plaintiff) prays:—(a) That the said agree-

ment of the 2nd June, 1891, may be declared null and void; (b) an account of all moneys due in law by the defendant (now plaintiff) to the plaintiff (now defendant) as and for rates between the years 1891 and 1905, and of all moneys paid by the defendant (now plaintiff) to the plaintiff (now defendant) under the said agreement during the said period, and payment to the defendant (now plaintiff) by the plaintiff (now defendant) of such sum as may be shown by the said account to be due, including the aforesaid sum of £16,748 6s. 5d.; (c) alternative relief; (d) costs of suit.

The agreement attached to the plea set out *inter alia* that the "Harbour Board, in consideration of the Town Council having the aforesaid exemption from their rating powers introduced into the proposed bill," should pay to the Council £2,500 a year.

Mr. Scarle, K.C. (with him Mr. Close) for plaintiffs; Mr. Schreiner, K.C. (with him Mr. Bisset) for defendants.

Mr. Scarle read a consent paper which had been entered into between the parties.

David P. de Villiers Graaff said that he was Mayor of Cape Town in 1891, and he was a member of Parliament at that time. He remembered the agreement, which he signed on behalf of the Town Council. The three bodies, the Town Council, Harbour Board, and the Colonial Government were all in accord on the terms set out in the agreement. The municipality had prepared a drastic Bill in which they intended to provide that the Harbour Board property should be taxed the same as other property in the town.

[De Villiers, C.J.: If all the parties were agreed, why was not that agreement made part of the Act?]

Witness: Personally, I understood that it was in order, and that the agreement would hold good, and that the Act was sufficient for all purposes as appertaining to Harbour Board property.

[De Villiers, C.J.: As I understand it now, the Act is not quite consistent with the agreement.]

Witness: At the time I thought they were consistent. In further evidence, witness said that at that time, as far as he was aware, the Harbour Board had no property outside the Dock area except Harbour Board dwellings and cottages.

Cross-examined: Witness was not actually aware of any record of the agreement between the Government and the Town Council. He was perfectly clear that it was an honourable understanding between the members of the Government and the Town Council and the Harbour Board. Amongst the members of the Government who were consulted was the Attorney-General of the day.

Chas. B. Martin, City Treasurer, produced a certified copy of the valuations



of the properties in question. He had visited the various properties. Witness described the property marked "L," near the Amsterdam Battery, in reference to which the Harbour Board said that the rate payable was uncertain. The building was now used for stables in connection with the cartage department. He also described certain of the other property in regard to which there was a dispute.

Mr. Searle closed his case.

Frank Robb, Acting General Manager of the Table Bay Harbour Board, said that as to the unfinished stores and ground off Ebenezer-road the buildings occupied about two-thirds of the ground. The buildings were not now revenue producing. From the 1st July, 1899, to the 31st December, 1901, the buildings were leased to Wilson, Son and Co. Afterwards the buildings were used by the Board for stabling horses for both cartage and works purposes. Some of the horses were used for delivery of goods and others for work inside the Dock area. The iron building in Hospital-road (No. 2 on the plan) was used for keeping meat sold by the lessee of the location store. No additional rent was got from the lessee of the location store for the use of this store.

(Cross-examined: There was no written agreement under which the lessee of the store occupied the iron building. The rental which Wilsons used to pay was £15 a month. The Board made a revenue from the cartage department, and the stables off Ebenezer-road were utilised for horses employed in that department.

Mr. Schreiner closed his case.

Mr. Searle said that his case raised some very important issues both on the claim in convention and on the claim in reconvention. The claim in convention referred to certain specific properties outside the Dock area which the Council said were rateable property under the Act No. 36 of 1891 (section 4, sub-section b). Certain other properties were said not to be rateable because they were on reclaimed land. Counsel submitted that the stables, harness-room, etc., were rateable because they were revenue producing, inasmuch as the Board could not make its revenue without the stables, etc.

[De Villiers, C.J.: But the very docks themselves are revenue producing.]

Mr. Searle: The Board now comes into competition directly with anyone else, and it delivers goods and baggage under regulations which are framed and proved.

[De Villiers, C.J.: But is not the revenue meant in the Act to be of a more direct nature?]

Mr. Searle submitted that anything outside the dock area which was utilised as a means of producing revenue was liable to be rated. The principle which was adopted by the Court in *Aliwal*

*North Municipality v. Colonial Government* (7 S.C.R., 232), should be applied to buildings in connection with which the Board obtained profit. The Board obtained very substantial revenue from the cartage department every year.

[De Villiers, C.J.: Would the office used in connection with the cartage department be liable to be rated?]

Mr. Searle: The offices are inside the dock area.

Counsel went on to argue that the test to apply was that the Municipality had to render the usual services as a municipality to this property situate within the limits of the Municipality, and that as long as there was revenue derived from it it was liable to be rated. If the buildings were used for the purposes of a business and of making a return they must be regarded as revenue producing.

[De Villiers, C.J.: Do you derive a revenue from your chambers?]

Mr. Searle: Someone else does. It would not be easy, of course, for a barrister to carry on his practice unless he had chambers, and I submit that his chambers are revenue producing inasmuch as they are essential to the earning of his income. Counsel went on to contend further that the cartage department had nothing to do with harbour works. Thus the Council had two strings to their bow.

[De Villiers, C.J.: The second is a good deal better than the first.]

Mr. Searle said that he thought the first string, that these buildings were revenue producing, was also a good one.

Counsel proceeded to argue that certain pieces of ground on which works had been laid down to make them suitable for the purposes of the cartage department were liable to be rated. As to the buildings within the location, counsel submitted that the location superintendent's office and the butcher's shop or store room were not part of the Harbour Works. He did not press for a rate upon the hospital, as the Council's practice had not been to press for a rate on hospitals. On the question whether certain properties were rateable because they stood on reclaimed ground, he contended that the exemption in the Act did not apply to those properties. He submitted that the reasonable construction of the words in the Act would be that they referred to land reclaimed by the Harbour Board and under their control. The Council had never claimed rates on the reclaimed land along the coast. The land in question at the foot of Adderley-street was acquired by the Board for the Railway Department, and it had been used for a goods shed prior to offices being built by the Board. If the Board's contention were correct, then the whole of the lower part of Cape Town would be exempt from rating if the Board bought the ground. Counsel also submitted



that the land behind the Sailors' Institute was not entitled to be considered reclaimed land within the scope of the exemption.

Mr. Schreiner submitted that an important question upon which much of this case turned was whether the agreement between the Council and the Harbour Board was valid. It was significant how sedulously his learned friend had tried to escape from the agreement.

[De Villiers, C.J.: The agreement has nothing to do with the claim in convention.]

Mr. Schreiner said that he would argue the claim in reconvention first. As to the agreement of 1891, counsel submitted that the agreement should be made void. It seemed on the face of it that however well-intended the parties may have been, the agreement was bad because it was not put into the Act.

[De Villiers, C.J. (to Mr. Searle): Do you object to the agreement being declared void, or do you intend in the future to act upon it?]

Mr. Searle: We intend in the future to act upon it. The Harbour Board have been glad in the past to avail themselves of it.

Mr. Schreiner (proceeding) submitted that the fact that the agreement might have had the special authorisation of a minute of the Governor in Council in 1892 did not make it any better or worse. The Town Council had no power to make a special contract with any section of its ratepayers that a lump sum should be paid by way of rates each year. Counsel cited *Collector of Customs v. Cape Central Railways* (6 Juta, 402) and quoted Voet (4, 12, 55), and submitted that if the Harbour Board had paid rates for a number of years under a mistaken view of the law they were entitled to a refund. Mr. Schreiner went on to argue that the Harbour Board had been paying a lump sum of £2,500 a year while at the same time the Town Council had no duties to perform in respect of the dock area, and thus the people who did business with the Board had had to pay that sum for the benefit of the Municipality.

[De Villiers, C.J.: But then the Board desired it themselves. They wanted to govern in their own domestic sphere.]

I understand that, but they could only do it by going to Parliament. They could, if necessary, have sought in a special Act to control the relations between this particular Council and this particular Board. But no such thing has been done. Counsel went on to say that this was not a question of money merely, but it bore upon the way in which affairs should be conducted between two great public bodies. There was no power to choose on the part of a rating body who should pay full rates and who should compound for a lump sum.

De Villiers, C.J., said he did not think any Court could say that it would go back all those years and order the money so paid to be refunded. The money had been expended and the rates had been levied on the basis of this lump sum had been paid.

Mr. Schreiner submitted that there had been a total failure of consideration in the agreement.

[De Villiers, C.J.: It might have been a great advantage to the Harbour Board to have sole control in their own domestic sphere.]

Mr. Schreiner said that the Board took upon itself, not only the burden of £2,500 a year, but the extra burden of various services such as the Municipality would have to perform.

[De Villiers, C.J.: I do not think any Court could be guilty of such a thing, after all these years, as to say that the payments shall be refunded. It is against every principle of law. I would go with you to this extent, that if it had been like the Customs case, where there was no possible consideration, there might be much to be said for the view that the money should be paid back.]

Mr. Schreiner contended that on the strength of his lordship's judgment in the Customs case it would be quite possible to make a refund.

He referred to Brice on *ultra vires* (3rd ed., pp. 104, 146, 172 and 489), to several English and American cases, and to the case of *Van Blommestein v. Holiday* (21 S.C., 11).

[De Villiers, C.J.: The Council are now demanding rates from you on property other than that on which you allege that you have overpaid rates. Can you set off these amounts against this present claim?]

You can set off an obligation upon which you can't sue. For example, you can set off a prescribed promissory note. A heavy payment like this is merely a gift, and here it is a gift of trust money, without any *causa*. It is a bad gift. Then the donee claims a lesser amount, and the lesser claim is set off, *ipso jure*. He cited *Kruger v. Van Turen's Executrix* (5 S.C.R., 162).

[De Villiers, C.J.: The Harbour Board has appropriated the payment. Can they now appropriate it to something else?]

Yes. If it were appropriated to something due, then they could not.

[De Villiers, C.J.: Is it correct to say it was not due; was the agreement not binding till set aside?]

No, the agreement was bad *ab initio*. Parliament did not see the agreement. The Government might have known of it, but that was quite different from Parliament knowing of it. The agreement could have no validity, unless it were embodied in the Act. The Auditor-General could not have passed the

payment of £2,500 until he got a Governor's Minute. The Council should return this money, as to a new trustee. It was public money, found indirectly by the taxpayer. It was a sum for which there was no valid consideration.

On the point of the construction of Act 36 of 1891, section 4, sub-section B, the Harbour Board stables were not buildings from which revenue was derived. The horses did not work in the stables. The stables were not Harbour works, but they were used for the purposes of harbour works, and that was covered by sub-section B. Before the Act of 1891 Crown property was exempt from rates, and when it was made rateable railways and harbours were still exempted. As to section 5, sub-section 2, the Act spoke in each year as the rate was levied. If the property was then reclaimed from the sea, and "under control of the Harbour Board," then it was exempt, except where there were dwelling-houses on it.

In reply, Mr. Searle cited the case of the *Woodstock Municipality* (22 S.C., 7). The difference between the agreement and the Act was, that the agreement said "reclaimed land and land to be reclaimed," whereas the Act said "reclaimed land." There was no inconsistency between the Act and agreement. The Town Council was entitled to claim on both. The consideration for the agreement was that the Harbour Board got water at half rates, and that the Town Council would not interfere in the dock area. The case of the *Port Elizabeth Divisional Council v. Uitenhage* (B 1868, p. 221) settled the point as to set off.

[De Villiers, C.J.: Is not the effect of the stipulation for payment of £2,500 per annum in conflict with the exemption from rates conferred by the Act? So far as I can see the only consideration is the supply of the water.]

If the agreement is set aside, then we will be entitled to stop their water supply.

Counsel then cited Brice on *ultra vires* (pp. 637, 696, 697, and 767), and *Rooth v. The State* (K. and B. II., 259), and *Divisional Council of Alical North* (7 J., 232).

After further argument, De Villiers, C.J., recalled Mr. Martin, who said that he had been treasurer to the Council in 1903, but he had been in its service since January, 1895. He could not speak from personal knowledge, but according to the books the Council charged the rate-payers 30s. per 100 gallons of water a day from 1890 to 1898. Persons not paying the general property rate paid 60s. per 100 gallons per diem. From the date of the agreement, the Harbour Board paid at the rate of 30s. The Railway Department paid 60s. up to 1893, when it got its water elsewhere.

In answer to Mr. Schreiner, he said

that he could not say if the Board actually paid 60s. before the agreement. He could not say if there was a change in the rate paid for water by the Harbour Board after the agreement. In 1896 the Town Council tried to make the Harbour Board pay more, but the Board referred to the agreement. After the Act the Harbour Board would still have had to pay 60s. if it had not been for the agreement. The difference between what the Harbour Board would have paid under the old rate and what it paid under the agreement was about £23,000 for the last seven years. For the years 1891, 1892 and 1893 the difference would have been inconsiderable.

*Cur. Adv. Vult.*

*Postea* (November 5th).

De Villiers, C.J.: Before considering in detail the various questions raised in this case, it would be well to decide the very important question whether a certain agreement made between the plaintiff Council and the defendant Board on the 2nd of June, 1891, was valid or not. It appears that the Colonial Government had promised the Council to introduce a Bill to provide for the taxation of Crown property within the municipal limits. Up to that time the property of the Board had been free from taxation as being considered Crown property. The Board being desirous of having property under its control excluded from the provisions of the proposed Bill, proposed certain exemptions from the rating powers of the Council. To these proposals the Council agreed, and "in consideration of the Town Council having the aforesaid exemption from their rating powers introduced into the proposed Bill," the Board entered into certain covenants. The first is "to pay to the Council the sum of £2,500 upon the promulgation of any Act of Parliament which may be passed during the present session of Parliament rendering liable to be rated for municipal purposes the property belonging to the Colonial Government, situated within the limits of Cape Town, and to continue to pay to the Council annually a like sum of £2,500 so long as the property of the Colonial Government is liable to be rated as aforesaid." The second covenant was "that all dwelling-houses and residences which may hereafter be built within the limits of the dock area, and all dwelling-houses and residences outside the dock area which may be the property or under the control of the Board shall be liable to be rated in the same manner, and to the same extent as the property of the Colonial Government. The Board further covenants to perform certain specified duties within the dock area "as would be performed by the Municipality if the properties exempted had been rated." The last covenant is "to pay for all water

supplied by the Council within the dock area (other than that supplied at a special price for the shipping) at the same rate or price as paid from time to time by the householders, the Council undertaking to supply all water required by the Harbour Board." In consideration of these covenants, the Council further undertakes and agrees "that from the rating powers over Colonial Government property to be obtained by means of the proposed Bill shall be exempted the following property: (a) All buildings, land, and other property vested in or under control of the Harbour Board, and situated within the Dock area, other than houses or residences, hereafter built, which shall be liable to be rated under the provisions of any Act which may be passed; (b) all reclaimed land or land hereafter reclaimed, wharves, and buildings, other than dwelling-houses and residences outside the Dock area, which dwelling-houses and residences shall also be liable to be rated under the provisions of the said Act." It further appears that the Government did in the session of 1891 introduce a Bill to abolish the exemption from certain rates in respect of certain immovable property vested in the Crown. The Bill was duly passed, and is now known as Act 36 of 1891. The second section enacts that such Crown property within the limits of any Municipality or corporate town shall, subject to the provisions contained in the Act, "be liable to be rated for Municipal purposes by the Council of such Municipality or town to the same extent, and in the same manner as if the said property had been owned or occupied by a private person. The fourth section enacts that notwithstanding the provisions of the second section no rates shall be levied by or be payable to the Council of any municipality or corporate town in respect of certain specified classes of property, including, amongst others, "any dock, breakwater, wharf, pier, retaining wall, or immovable property of any kind (not being a dwelling-house or a store or a building from which revenue is derived by any harbour authority), which forms part of, or is used for the purpose of any harbour boards." So far the Act is general in its terms, and although the 5th section proceeds to make special provisions for the exemption of certain property of the defendant Board, counsel on both sides appear to have assumed that the exemptions specified in the fourth section are also applicable to the defendant Board. Something might have been said in favour of the view that the fourth section was not intended so to apply, but as neither side has raised the point, and as the fourth section has always been treated by the parties themselves as being binding, I do not propose to raise the question. The 5th section enacts that "no rates shall be

levied by or be payable to the Town Council of Cape Town upon . . . . .

(2) Any immovable property, other than dwelling-houses erected after the promulgation of this Act, which is under the control of the Harbour Board, and is situated within the Dock area, as enclosed for Customs purposes, and any land reclaimed from the sea, which is under similar control, and upon which no building has been erected." On comparing the agreement with the Act I find that with some unimportant variations the exemptions created by the 5th section of the Act agree with the exemptions stipulated for by the agreement, but the agreement is silent as to immovable property (not being a dwelling-house or a store or building from which revenue is derived by the harbour authority), which forms part of, or is used for the purpose of, the harbour works, and is outside the dock area, whereas the fourth section of the Act exempts such property. Unreclaimed land, for instance, outside the dock area, upon which improvements have been effected and which is used exclusively for the purpose of the harbour works, would under the agreement be liable to pay rates, whereas under the fourth section of the Act it would be exempt. In April, 1892, the following minute was submitted by the Ministers to, and approved of, by the Governor in Council: "Ministers have the honour to recommend that His Excellency the Governor may be pleased to approve of the terms of the accompanying agreement entered into between the Town Council of Cape Town and the Harbour Board of Table Bay, under which it is proposed to substitute special provisions for the taxation of the docks, quays, piers, breakwater, warehouses, sheds, and the other property belonging to the Colonial Government, situate within the dock or customs area, and under the control of the Table Bay Harbour Board, in lieu of the provisions enacted by the Crown Property Rating Act, No. 36, of 1891, from the operation of which the property aforesaid was exempted in view of the agreement now recommended for approval." We here find that the Governor in Council deliberately took to himself the power of substituting the special provisions of a private agreement for the provisions of a public Act of Parliament. The minute states that the property in question was exempted from the operation of the Act in view of the agreement thus recommended, but there is no evidence whatever to show that Parliament was informed of the agreement before it passed the Act. If the agreement was valid, it did not require the consent of the Government, and if it was invalid the approval of the Government could not give it validity. If the Governor in Council is to have the power to substitute one form of local taxation for another form which has been deliberately sanctioned by Parlia-

ment, where are his powers to stop? It so happens that in this case the two public bodies concerned agreed beforehand that in addition to the rates to be levied under the proposed Act a lump sum shall be annually payable by the Board to the Council, but the Act does not direct such a payment, and when the Legislature limited the annual rates payable to the Council it could not have intended that any sum in excess of such rates should be legally claimable. The absence of such an intention on the part of the Legislature cannot be made good by any minute of the Ministers. They, as well as the Governor, are bound by the laws of the land, and have no power to suspend, supersede, add to, or in any other manner vary the provisions of an Act of Parliament. As to the agreement itself, I cannot find anything in the Acts under which the Board was called into existence, which authorises it to enter into the first covenant. It undertakes to pay the Council £2,500 annually, in addition to the rates lawfully leviable under the then proposed Act in consideration of the Council having the exemption introduced into the Bill, but the Bill was introduced by the Government, and it was for the Parliament, and not for the Council or the Government, to decide what form that Bill should ultimately take. The Council could not, as of right, claim that there should be no exemption from its rating powers, and consequently the consent of the Council to any such exemption could not possibly be a valid consideration for the Board's promise, made in advance of the passing of the Act, for the annual payment of £2,500 in excess of what the Act would sanction. It cannot be said that any other consideration, such as the supply of water by the Council (was intended, for the annual payment is only to be made so long as the property of the Government is liable to be rated. I am of opinion, therefore, that the Board had no legal power or authority to enter into the agreement, and that it is now entitled to have the agreement set aside to this extent that no payments shall now or hereafter be demanded thereunder.

The next question which arises is whether the Board is entitled not only to set aside the agreement, but to claim that all payments already made thereunder shall be refunded. It was contended, on the authority of *Collector of Customs v. Cape Central Railways* (6 Juta, 403), that if the Government had been in question instead of the Board the Government would have been entitled to a complete *restitutio in integrum*, and consequently to a re-payment of all moneys paid under an invalid agreement. The case itself is certainly not an authority for this contention, but certain *dicta* in the judgment are relied upon as supporting it. It was there

said, on the authority of Voet (49, 14, 2), that the *fiscus* is entitled to *restitutio in integrum* in the same manner as minors, but nothing was said by the Court, from which it could possibly be inferred that a body like the Harbour Board would have the same privileges in this respect as the *fiscus* and minors. Moreover, it is in the nature of a *restitutio in integrum*, as explained by Voet (4-1-21, 22, and 23), that the parties concerned are placed in the same position in which they would have been if the invalid transaction had never been entered into. The practice of this Court in regard to invalid contracts has certainly been to confine the relief to setting aside the contract where it would be manifestly unjust to set aside every payment made or act done under such contract. The annual payments made by the Board are completed transactions, and although the ostensible consideration mentioned in the agreement for the payments, was really no consideration at all, there can be no doubt that the Board derived considerable benefit from some portions of the agreement. In regard to water, for instance, the Council was not bound to supply the Board with water, whilst under the agreement the Board was entitled to receive, and did in fact, receive, during the period now in question, all water required by the Board and that at no higher price than was paid by householders. The Court cannot, from the materials before it, estimate the exact value to the Board of the benefits which it received under the agreement, and it is clear that if the agreement is now to be regarded as having been non-existent until the end of 1905, it would be wholly impossible to restore the parties to their original position. In the case of *Port Elizabeth Divisional Council v. Uitenhage Divisional Council* (Buch., R., for 1868, p. 221), two Divisional Councils had for three years acted under an arrangement by which the tolls of a bridge were equally divided between them. The sum thus paid by the defendant Council to the plaintiff Council amounted to £907. Afterwards the defendant Council disputed the right of the plaintiff Council to share in the tolls on the ground that the toll bar was wholly within the plaintiff Council's jurisdiction, but the Court found that the toll bar was within the defendant Council's jurisdiction. The plaintiff also instituted an action against the defendant to recover £480, the amount of a subsidy due under the Act 10 of 1864. The defendant admitted its liability to pay this sum, but claimed that, as the tolls had been illegally divided between the Councils, under a mutual mistake as to the law, the defendant was entitled to set off against the subsidy the amount thus illegally paid. The Court, however, held that the plaintiff was entitled to the



amount of the subsidy without any deduction of the amount while had been overpaid to it. Connor, J., in his judgment, said: "The two Councils came to a particular arrangement, acted upon that arrangement, and received and paid the money upon the basis of that arrangement, and certainly it would be a strong measure to say that either of them would have a natural equity as opposed to that arrangement, for we must assume that the money was laid out for the proper purpose." In the present case the Council and the Board entered into an agreement, they acted upon that agreement, received mutual benefits upon the basis of that agreement, and the Council expended the moneys received by it under the belief that it was a valid and binding agreement. The Board itself continually relied upon that agreement in disputes that from time to time occurred between the two bodies, and it would be in the highest degree inequitable towards the Council and the ratepayers that money voluntarily paid by the one party to the other should now be ordered to be returned.

The plaintiff Council, by its declaration, claims the sum of £4,279 13s. 3d. as being rates unpaid on certain of the defendant Council's property during the years 1899 to 1905, inclusive together with fines due from delay in payment. The defendant admits the rates to be due to the extent of £751 13s. 7d., which does not include the fines, but claims to deduct this amount from the amounts alleged to have been overpaid. For the reasons already stated, I am of opinion that the deduction cannot be allowed, and I proceed to consider in detail the different properties in respect of which the rates are in dispute. The validity of these rates must be decided under Act 36 of 1891. There are certain stables off Ebenezer-road (marked 4 on the plan), which first appeared in the accounts as unfinished stores, afterwards as iron and brick stores, and finally as stables, cartage department. The horses which are kept in these stables are used for the cartage of goods, which certainly brings in a considerable revenue to the Board. Whilst they were used as stores the buildings were let from 1st July, 1899, to 31st December, 1901. I cannot agree with the plaintiff's counsel that because the buildings are used for horses which are employed in cartage work, the buildings can be said to produce a revenue in terms of the 4th section of the Act. I do consider, however, that the stables cannot fairly be considered as forming part of or being used for the purpose of harbour works. It is true that Mr. Robb, the manager of the defendant Board, says that besides being used for the cartage of goods, the horses are used "for works pur-

poses in connection with the Board," but this vague statement is not sufficient to bring the value of the buildings within the exemption of the fourth clause of the Act. From the amount of the value must be deducted the sum of £1,000 as the value of the land adjacent. In respect of these and the other stables, as well as harness room and smithy, in the account, the claim of the Council will be allowed. As to the land in dispute without any buildings upon them on none of them do any permanent works or improvements appear to have been effected, and they are therefore exempt under sub-section (a) of section 4 of Act 36 of 1891. In regard to the iron building in Hospital-road, where the meat sold by the lessee of the location store to the natives is kept, I am of opinion that it is liable to be rated. The iron building is really an appurtenance to the stores which are leased. The rent payable for the leased portion has not been increased since the addition, but I consider that revenue may fairly be said to be derived from all these buildings as a whole. In regard to the building let to Van der Byl and Co., there can be no doubt that revenue is derived from it, but the Board contends that inasmuch as it was built upon reclaimed ground it is not liable to be rated. But it is not sufficient for the purposes of exemption within the fifth section of the Act to prove that the land has been reclaimed, for it must be land under the control of the Board. I am of opinion that as the building has been let and is in the actual occupation of lessees, it cannot be regarded as being under the control of the Harbour Board. It is a more difficult question to decide whether the offices at the foot of Adderley-street are exempt or not. These offices were used during the period covered by the action in connection with the work of the Harbour Board as offices for the General Manager, accounting and cartage departments, with the exception of certain rooms let as offices. The number of offices let seems to have gradually fallen off, until in 1904 only two, and in 1905 only one were so let. The attorneys of the Board, in a letter written by them to the Council on 7th November, 1903, admitted the liability of the Council to the payment of rates on such portions of the building as were let to tenants. The building stands on reclaimed land, and in so far as it is under the control of the Council it is certainly exempt from taxation. In my opinion the only portions of the building which should be held to be exempt are those which had not been let from time to time to tenants. Those portions thus let should be held to be liable. As to building marked 7, I am of opinion that it is exempt. The result is that the Court will give judgment for the plaintiff for the amount of the rates on the properties so found liable



to be rated. On the other hand, the Court will order that the agreement of 1891 be set aside, and will declare that the plaintiff Council will not be entitled hereafter to claim payment of any moneys thereunder. Each of the parties having failed upon substantial portions of its claims, the Court will order that they pay their own costs.

Mr. Searle said that there was one point raised in the case which was not dealt with in his lordship's judgment, viz., the position of the location superintendent's office.

Having heard counsel further,

De Villiers, C.J., said that the Court was of opinion that the location superintendent's office was exempt from rating.

A further question was raised as to the value at which the land adjacent to the stables off Ebenezer-road should be taken for the purposes of exemption, and after argument it was ordered, by consent, that the land should be taken as of the value of £1,000.

Hopley, J., concurred.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Reid and Nephew.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

WOOD V. OXENDALE AND CO. { 1906.  
Nov. 2nd.  
" 3rd.  
" 14th.

Principal and agent—Breach of contract—Measure of damages.

*Defendants had by letter, dated July 7th, 1906, appointed plaintiff as sole agent for the sale of their goods in Cape Colony, and stated that they had forwarded samples by the same mail. Plaintiff accordingly hired show rooms and made all preparations necessary for the carrying on of the business. On July 14th, defendants wrote, treating the contract as still incomplete, and on August 1st they entirely disavowed it. Only a few samples were received, and those not till September.*

*Held, that plaintiff was entitled to damages for breach of contract, notwithstanding that the*

*contract had not been entered into for any fixed time.*

*Held further, that the measure of damages must be estimated by the expenses to which plaintiff had been put in connection with the work of his agency, together with a reasonable remuneration for his time and labour, but that the commission he might probably have earned had defendants adhered to their contract could not be taken into account.*

This was an action to recover £2,500 damages for breach of contract, brought by the plaintiff, a merchant and general agent, of Cape Town, against the defendant, who traded as Oxendale and Co., wholesale warehousemen, of Northallerton, Yorkshire. The plaintiff had obtained leave to sue by edictal citation. By a cablegram from the defendant to the plaintiff on the 27th of June, 1906, confirmed by letter of the defendant of the 7th July, 1905, the defendant entered into a contract and appointed him agent for the Cape Colony on certain terms. By these terms it was provided that the plaintiff should receive as and for commission 10 per cent. on all orders sent to the defendant. Plaintiff said that the orders would have amounted to between £15,000 and £16,000 per annum, and his commission would have been £1,500 to £1,600 per annum. Immediately upon receipt of the cablegram, and induced by the contract, the plaintiff set about freeing himself from a certain contract in a partnership in the firm of B. Wood and Co., from which he obtained a release. The plaintiff, for the same reason, leased a certain showroom at the corner of Strand-street and Burg-street for a period of six months at £15 a month for the defendants' samples, and there were other expenses for advertising the goods. The defendant undertook to send on samples immediately after the 27th June, 1905, the samples necessary to the due discharge of his showing as agent. The defendant had failed and neglected to do so. The samples ought to have arrived about the middle of July, 1905. As they did not so arrive, the plaintiff wrote he would suffer great loss unless the samples were sent forthwith. On the 9th September, 1905, as they had not arrived, plaintiff cabled to the defendant that he would hold them liable for a breach of contract. For the loss of the summer trade the loss of the profits to be derived, advertising and fitting of the premises, he claimed £2,500 damages with costs.

The defendants, in their plea, admitted the formal allegations, and they ad-

periences in the past in this respect, and we do not wish to repeat them. Bear in mind that you are not personally known to us." After having secured the services of the plaintiff and promised to enable him to begin business at once, they give out that they delayed doing so because they were reluctant to trust an unknown man. In the ordinary course of business, if the defendants had performed what they undertook to do, the plaintiff could have commenced work about the beginning of August. He waited until September 9, when it became evident that no serious attempt had been made by the defendants to carry out the contract, seeing that the samples then forwarded were not such as to suit the summer business, which was, in the contemplation of the parties, the only business the plaintiff could then carry on. In my opinion the agency entered into was not for any fixed and certain period, such, for example, as a particular season, and it could be terminated by notice, provided it was not determined in an untimely or unreasonable manner. Upon these facts I was inclined to the opinion that there had been a breach of contract by the defendants, in respect of which the plaintiff was entitled to claim damages, whatever the measure of the damages might be, but a case of considerable importance was cited by Mr. Benjamin on behalf of the defendants which raised some doubt in my mind. It is the case of *Joynson v. Hunt and Son* (93 L.T.R., page 47), in which the plaintiff claimed damages for breach of contract by the defendants in respect of an agreement, the substance of which was contained in a letter written by the defendants to the following effect: "We will give 2½ per cent. commission on all business you do for us in London. You let us know to whom you show our samples, and if business results from the transaction we will forward your commission quarterly. This refers to orders executed." The breach complained of was the termination of the arrangement without notice. The Court of Appeal held that the defendants were entitled to terminate the agreement whenever they pleased, without being liable to make compensation to the plaintiff, on the ground that there was only an arrangement that the plaintiff might obtain orders for the defendant if he thought fit to do so, and that if he did obtain orders the defendants might accept them if they thought fit to do so, and that if business resulted commission should be paid; and neither party was bound to do anything. Though there are points of similarity between the case cited and the present case, there are also points of difference. In this case the defendants virtually promised to make the plaintiff their sole agent in a certain area, thereby undertaking to do no business except through his instrumen-

talities, and it cannot be said, as is the case of *Joynson v. Hunt*, that the plaintiff was not bound to do anything. The plaintiff is also entrusted with the safe-keeping and the sale of the samples, sent to him for the purposes of the business. In respect of this safe custody he must necessarily go to some expense. Then, again, the matter of advertising is placed in his hands. On the whole I come to the conclusion that in this case rights and liabilities come into existence through the action of the parties, which could not summarily be put an end to by the defendant without compensation to the plaintiff. To this case should, in my opinion, be applied the principles laid down in the case of *Simpson v. Lamb* (17 C. B., 615), where Jervis, C.J., said that "the authority of the agent was revocable, but this does not carry with an absolute right on the part of the principal to revoke without reinstating the agent where his position has been altered; or without paying for his labour and also any expense incurred in the course of his employment." In the present case the plaintiff was not prevented from carrying on the agency by revocation, but rather by default on the part of the defendants in not furnishing him with the means for carrying on the business. However, it seems to me that the principle as to the measure of damages will be the same. In my opinion the plaintiff was entitled to regard the contract as at an end, or to put an end to it, after waiting in vain for two months for the fulfilment of the conditions by the defendants, and he is now entitled to damages. But the damages, upon all the authorities, must not be measured by an estimate of the commission he might probably have earned, but by the labour actually devoted to, and the expense actually incurred in, the part performance of the agency. There is no reason to think that the defendant devoted all his time to this particular work, and there is nothing in the contract which prevented him from carrying on other business. I think the sum of £80, including the rent of the room for two months, will cover the loss actually suffered by the plaintiff. Judgment is given for the plaintiff for £80, with costs. The claim in re-convention is disposed of by holding that the defendant in re-convention was justified in putting an end to the arrangement, and judgment is given for him, with costs, on the claim in re-convention.

[Plaintiff's Attorneys: Friedlander and Du Toit. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

ginning of August. A week or a fortnight made a great difference. If the samples arrived in the middle of September the best part of the trade would be lost.

Frederick Dalton, partner in the firm of Dalton and Reid, corroborated the last witness as to how the plaintiff stood with the defendants in this class of business.

Benjamin J. Hill, sub-manager of Messrs. Jagger and Co., agreed with the previous witnesses as to the time when the samples should be sent out.

Mr. Burton said there were three points to be considered: (a) Whether there was a contract between the parties; (b) whether the breach of contract was the breach of an essential condition; (c) what damages should be awarded. It was clear that the contract was broken; it was admitted on the pleadings, and the breach was a breach of an essential condition. The whole basis of the contract was the sending of the samples.

Mr. Benjamin said the whole contract should be performed in the defendants' usual way of business, because the plaintiff approached the defendants and asked for their agency. The defendants did not keep their English summer goods in stock after September, so the plaintiff could not expect to get samples of their coming season's goods. Time in this case was not of the essence of the contract. Even if there was a breach of contract, the plaintiff could not recover damages for a longer period than a month or six weeks. The contract was terminable without notice at any time. He cited *Bowstead on Agency* (2nd edition, p. 433), and *Joynson v. Hunt* (93 L.T. 470). If contract were not terminable at a moment's notice, then the breach of contract was not one that entitled the plaintiff to rescind the contract. Counsel quoted: Addison on Contracts (1, 4, 8, p. 158); Anson on Contract (p. 303, 9th edition); and Anson (2, 1, 3).

Mr. Burton was heard in reply, and referred to Anson on Contract (Part V., Ch. 3).

*Cur. Adv. Vult.*

*Postea* (November 14th).

Maasdorp, J.: As the upshot of a correspondence ranging over upwards of two months, an agreement was concluded between the parties by letter of the defendants of the 7th of July, whereby the plaintiff was appointed agent for the sale of the defendants' goods in this colony. The defendants reserved the right to appoint their agents in parts of the Colony other than Cape Town and the suburbs, but undertook not to appoint any agent in Cape Town and the suburbs so long as the plaintiff was doing a reasonable amount of business. This agency was subject to the following terms and con-

ditions: (1) 10 per cent. commission to be paid by the defendants to the plaintiff on all orders sent by him, such commission to be remitted on the 1st of each month. (2) All parcels to be delivered direct to the customers, carriage paid, if the order is above £2 value; if below, carriage forward. (3) All parcels to be sent c.o.d., unless the cash is remitted with the order. Cash to be collected by the defendants' carrying agents. (4) The defendants give an undertaking that the goods will all be exact to sample, and that nothing will be substituted except by consent of the plaintiff or the customers. By letter of the 7th July, it was agreed that the samples sent, which will be entered up to the plaintiff personally, are to be disposed of when he receives the next lot of samples at the best price possible on behalf of the defendants, commission to be paid to plaintiff on such sales. The samples here referred to are described in a letter of the 9th of March as made-up goods, such as costumes, skirts, and blouses. It will appear from the correspondence that it was contemplated that business should begin at once, and in their letter of the 7th July, the defendants write that they are sending a parcel of their new lists and a box of patterns, and add: "With regard to a full range of samples, we will arrange to have a complete range ready by next mail, and will ship them in travellers' sample skips, made extra strong." Upon receipt of this letter, the plaintiff made preparations to start the agency business, and amongst other things, hired a showroom in Cape Town for £15 per month, which he considered absolutely necessary for the purpose of storing and exhibiting the samples he expected. The lease commenced on the 7th of August, by which time the samples should in the ordinary course have arrived, if despatched at the time promised by the defendants. In the opinion of several witnesses of experience in business at Cape Town the work of the agency could not be carried on without the use of a show-room, and the room in question was a suitable one, procured at a reasonable rent. The expenses incurred by the plaintiff in this respect would, of course, have come out of his commission if the business had gone through. Instead of forwarding the samples as promised the defendants wrote to the plaintiff on July 14, as if no concluded agreement had yet been arrived at, and after repeated remonstrances on the part of the plaintiff the defendants explain the delay in sending the samples by saying, in their letter of the 1st September, "It is only natural that we should wish to make the fullest investigations before engaging an agent to such an important agency as Cape Colony. We may say in passing that we have had most unfortunate ex-

The Welsh coal contracted for was agreed by the parties to be Merthyr coal.

III. Owing to strikes and other causes over which the plaintiffs had no control, and which fell within the exceptions in the aforesaid contract, to wit, congestion of work at and a strike at the Merthyr collieries whence the coal agreed upon was to be supplied, the plaintiffs were unable to despatch the coal in the order of shipment for which they had duly made provision, but they despatched them as regularly as the aforesaid causes permitted.

IV. The plaintiffs despatched for Cape Town and Port Elizabeth sailing ships between the months of February and October, 1902, conveying the quantity of coal agreed on, all of which was accepted by the Cape Government, and the plaintiffs have been paid the price thereof.

V. The said coal for the western system arrived in Table Bay respectively as follows: In May, June, July, August, September, October and December, 5,992, 9,833, 9,787, 9,743, 9,110, 7,378, and 2,006 tons respectively, which coal was carried in 18 sailing ships.

VI. It was the duty of the Cape Government, or its servants and agents, the railway authorities, to take delivery of the said coal immediately on arrival at the aforesaid rate agreed upon, but the said Government in breach of its said contract, failed and neglected notwithstanding that the plaintiffs did all they were bound to do on such arrival, to take delivery as aforesaid.

VII. By reason of the premises the Cape Government became liable in demurrage at the aforesaid rate agreed on, and the plaintiffs have rendered an account to the said Government declaring their claim for demurrage in respect of the said 18 sailing ships, and of which the plaintiffs will refer to at the trial for the various items thereof, and the said Government has paid the plaintiffs the demurrage claimed upon 10 of the said sailing ships, but refuses to pay the sum of £10,788 14s. 4d., which is the amount claimed and due in respect of the remaining eight sailing ships, and for which the defendant is liable.

VIII. (Struck out in terms of Order of Court, dated 31st July, 1905.)

IX. All things have happened, all conditions have been fulfilled, and all times have elapsed entitling the plaintiffs to payment by the said defendant of the sum of £10,788 14s. 4d.

Wherefore the plaintiffs claim:

(a) The sum of £10,788 14s. 4d. with interest on the various items thereof from the time each became due.

(b) Alternative relief.

(c) Costs of suit.

## DEFENDANT'S FIRST PLEA AND CLAIM IN RECONVENTION.

I. For a plea the defendant says as follows:

1. He admits paragraph 1 of the declaration.

2. As to paragraph 2 he denies that it was agreed by the parties that the Welsh coal contracted for must be Merthyr coal. He says further that the terms of the agreement referred to in the said paragraph are contained in a certain letter addressed by the plaintiffs on the 7th August, 1901, to the Agent-General for the Cape of Good Hope, and annexed hereto, and for the greater certainty as to the terms of the agreement he craves leave to refer to the said letter.

3. He denies paragraph 3, and says that the plaintiffs did not duly despatch the coal agreed upon in accordance with the terms of the said agreement.

4. He admits paragraph 4.

5. He admits that the coal referred to in paragraph 5 arrived in Table Bay in 18 sailing ships, and that the quantities arriving in May, June, July, October and December were respectively 5,992, 9,833, 9,787, 7,378 and 2,006 tons, but he denies the remaining allegations contained in the said paragraph, and says that the quantity of the said coal which arrived in August was 18,853 tons, and that none of the said coal arrived in September.

6. It was the duty of the plaintiffs in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2 to despatch the said 54,000 tons of coal to Cape Town in monthly shipments of quantities of 9,000 tons per month, commencing in February, 1902, and continuing in consecutive months until and including July, 1902, but they nevertheless failed and neglected, more especially in the months of February, March and April, by shipping deficient quantities, and in May and June, by shipping excessive quantities, duly to despatch the said 54,000 tons of coal, and thus committed a breach of the said agreement, and became and are not entitled to claim demurrage thereunder.

7. By reason of the aforesaid breach of agreement by the plaintiffs, the coal despatched by them did not arrive in Table Bay in the quantities and at the time contemplated by the agreement and for which it was the duty of the Government to make provision, and the defendant was in consequence of the plaintiffs' breach of contract prevented from taking delivery of the said coal after its arrival as speedily as it would have been taken if duly despatched in manner contemplated by the said agreement, and he says specially that in consequence of the said breach of contract



# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

COLONIAL GOVERNMENT V. HOULDER BROS. AND CO. LTD. 1906.  
Nov. 5th.  
" 12th.  
" 27th.

Construction of contract of sale—  
Demurrage.

*The plaintiffs, by letter dated from London, offered to supply the defendant with 5,400 tons of coal for Cape Town at a certain price per ton c.i.f. on monthly shipments for six months, and stipulated that the defendant was "to accept delivery immediately on arrival in Table Bay at the rate of 120 tons per day, or the defendant to be liable for demurrage at 4d. per nett registered ton per day." The coal was conveyed in ships chartered by the plaintiffs in unequal shipments, so that in the first two months less than 9,000 tons per month, and in the 4th and 5th months more than 9,000 tons were delivered and accepted. Under the charter parties the coal was to be received at the average rate of 120 tons per day, but the lay days were to commence 24 hours after notice of arrival of ship, and the rate of demurrage was to be 3d. per nett registered ton per day.*

*Held in an action for demurrage for the 4th and 5th months at 4d. per ton per day, that according to the true construction of the contract the defendant was liable only for the rate of demurrage payable by the plaintiffs themselves not exceeding, however, 4d. per ton per day.*

*Held further, that after accepting the cargoes of the ships which arrived in excessive*

*quantities during the 4th and 5th months, the defendant was not relieved from paying the demurrage for which the plaintiffs were liable in respect of those ships, whatever damages the defendant might claim for failure to deliver the cargo in equal monthly shipments.*

This was an appeal from a judgment of Mr. Justice Buchanan, sitting as a Divisional Court, in an action brought by the present respondents against appellants to recover £10,788 14s. 4d. for demurrage of certain ships engaged in the carriage of Welsh coal.

The pleadings were as follows:—

## PLAINTIFF'S FIRST DECLARATION.

I. The plaintiffs are a duly Incorporated Company carrying on business in Cape Town and elsewhere. The defendant in his capacity as Commissioner of Public Works, and as the Minister in charge of the railways of the Colony represents the Government of the Cape Colony hereinafter called the Cape Government.

II. In the month of August, 1901, and in London it was agreed between the plaintiffs and the Agent-General of the Cape of Good Hope duly authorised in that behalf, that the plaintiffs were to supply to the Cape Government 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c. i. f. and 60,000 tons for Port Elizabeth at £1 17s. 5d. per ton c. i. f. and on monthly shipments for six months, such shipments to commence to Cape Town in February, 1902, and to Port Elizabeth in October, 1901; that the railway authorities of the Cape Government were to accept delivery immediately on arrival in Table and Algoa Bay respectively at the rate of 120 tons per day for sailers, and 250 tons per day for steamers, or the authorities to be liable for demurrage at 4d. per nett registered ton per day for sailers and 6d. per nett registered ton per day for steamers; that payment was to be made two-thirds in cash by the said Agent-General within seven days of the receipt of policies, etc., and the remainder within seven days after production of the certificate as to delivery; that in the event of Great Britain being at war other than with the Transvaal or other causes, including strikes, beyond the plaintiffs' control the plaintiffs' liability to cease. By the said railway authorities the parties intended the railway authorities of the Cape Government whose agents and servants they are, and the liability for demurrage contracted for was and is the liability of the Cape Government.



5. He admits that the coal referred to in paragraph 5 arrived in Table Bay in 18 sailing ships, and that the quantities arriving in May, June, July, October and December were respectively 5,992, 9,833, 9,787, 7,378, and 2,006 tons, but he denies the remaining allegations contained in the said paragraph, and says that the quantity of the said coal which arrived in August was 18,853 tons and that none of the said coal arrived in September.

6. It was the duty of the plaintiffs in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2 to despatch the said 54,000 tons of coal to Cape Town in monthly shipments of quantities of 9,000 tons per month, commencing in February, 1902, and continuing in consecutive months until and including July, 1902, but they nevertheless failed and neglected, more especially in the months of February, March and April, by shipping deficient quantities, and in May and June, by shipping excessive quantities, duly to despatch the said 54,000 tons of coal, and thus committed a breach of the said agreement, and became and are not entitled to claim demurrage thereunder.

7. By reason of the aforesaid breach of the agreement by the plaintiffs, the coal despatched by them did not arrive in Table Bay in the quantities and at the times contemplated by the agreement and for which it was the duty of the Government to make provision, and the defendant was in consequence of the plaintiffs' breach of contract prevented from taking delivery of the said coal after its arrival as speedily as it would have been taken if duly despatched in manner contemplated by the said agreement, and he says specially that in consequence of the said breach of contract by the plaintiffs, the Government was obliged to provide for the purchase and to take delivery of other coal from other persons to make good the deficiency of the coal which the plaintiffs should have duly despatched in the months of February, March and April, all of which was not contemplated by the parties to the said agreement.

7 (a) The ships referred to in paragraph 4 of the declaration were all of them ships chartered by the plaintiffs. The rates of discharge and the rates of demurrage stipulated for in the charters were different from those mentioned in the said letter of August 7th, 1901. The liabilities of the Cape Government for demurrage (if any) were to the owners of the said ships respectively and not to the plaintiffs and were for amounts which depended upon the terms of the bills of lading for the cargoes transferred by the plaintiffs to the Cape Government and not otherwise.

7. (b) If the plaintiffs suffered any loss or damage by the alleged failures of

the Cape Government in taking delivery or by detention of the said ships the amount of such loss or damage (if any) was in respect of liabilities of the plaintiffs under the said charterparties and no particulars thereof have been rendered by the plaintiffs to the Cape Government or to the defendant. The payments already made by the Cape Government to the plaintiffs in respect of demurrage of the said ships exceed the whole amount of such loss or damage upon all the shipments.

8. The defendant denies paragraph 7 save in so far as he admits that the plaintiffs have rendered to the Government an account declaring their claim for demurrage in respect of certain 16 ships, that the Government has paid to the plaintiffs sums amounting to £7,360 0s. 8d. in respect of demurrage, and that it refuses to pay the sum of £10,788 14s. 4d., or any part thereof.

9. He denies paragraphs 8 and 9 save that particulars of the plaintiffs' claim have been supplied to the Cape Government, and that the said Government refuses to pay the said sum of £10,788 14s. 4d., or any part thereof.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:—

1. He craves leave to refer to the several paragraphs of the foregoing plea.

2. If the plaintiffs (now defendants) be held entitled in terms of the said agreement to claim the sum of £10,788 14s. 4d., or any part thereof by way of demurrage or under paragraph 8 of the declaration, the defendant (now plaintiff) says that such sum has become due and payable by reason and in consequence of the default and breach of contract on the part of the plaintiffs (now defendants) referred to in the said plea, and such sum represents damages for such default and breach of contract to which the defendant (now plaintiff) is entitled.

Wherefore he prays for judgment in reconvention by way of damages for breach of contract for such sum, if any, as this honourable Court may adjudge to the plaintiff (now defendant) upon the claim in convention, together with other relief and costs of suit.

**PLAINTIFFS' EXCEPTION, REPLICATION AND PLEA, AND EXCEPTION IN RECONVENTION.**

Before replying to the defendant's plea the plaintiffs say that they take exception thereto on the following grounds:

(1) That in paragraph 2 thereof the defendant refers to a material document in defendant's possession on which defendant relies, but the defendant has

failed in the said plea either to annex the said document thereto, or to set out the same therein or the material parts thereof.

(2) That in paragraph 6 defendant pleads the construction and interpretation of a certain material document, but has neglected and failed to annex the said document to defendant's plea, and/or to set out the same therein or material parts thereof.

(3) That in paragraph 7 (a) defendant had likewise failed and neglected to annex or set out the said document, being the letter of 7th August, 1901, or the material parts thereof, on the true intent and construction whereof the plaintiffs say it will be for this Honourable Court to decide.

(4) That by reason of the premises the defendant has failed in the said plea to set out defendant's defence with sufficient clearness or particularity and that the said plea is thereby and therein vague, embarrassing, inconsistent and bad in law, and that the plaintiffs are thereby materially prejudiced and delayed in their suit in so much that plaintiffs are thereby prevented from replying, pleading or excepting to the said plea.

Wherefore plaintiffs pray that the defendant's plea be ordered to be amended or struck out accordingly with costs, and that further time be given to plaintiffs to plead, reply or except to the plea, as and when amended: or that this Honourable Court grant such further or other relief as in the premises may seem meet.

And for a replication plaintiffs say that, subject to the above exceptions and saving admissions, plaintiffs deny the allegations in the plea contained and join issue with the defendant thereon.

Before pleading to the claim in reconvention the plaintiffs say that the second paragraph thereof is vague, embarrassing, inconsistent and bad in law, and pray that it may be struck out.

For a plea to the claim in reconvention the plaintiffs say that, saving admissions, they deny the allegations therein contained and join issue with the defendant thereon.

#### DEFENDANT'S REJOINDER AND REPLICATION IN RECONVENTION.

1. As to the exception taken by the plaintiffs to the plea, the defendant says that the said exception is bad in law and prays that it may be overruled with costs.

2. As to the replication and as to the plaintiffs' exception and plea in reconvention, the defendant says that the said exception in reconvention is bad in law, joins issue with the plaintiffs on the replication and plea in reconvention, and prays that the said exception may be

overruled with costs, and otherwise repeats his former prayers.

The judgment of Buchanan, J.:

The plaintiff had for some time before the contract sued upon, supplied the Government with coal delivered at the different ports of the Colony. In some of the former agreements between the parties approximate monthly quantities were stipulated for and delivery was to be made, in some instances into railway trucks, and in others on the quay. The outbreak of war upset the normal conditions of our ports, and especially the state of Table Bay. In July, 1901, plaintiffs cabled from England to the Government here an offer to supply coal for a period of one year or of three years "c.i.f." acceptance on arrival, 120 tons by sailing vessels and 250 tons by steamers daily, monthly aggregate quantities about 10,000 to 20,000 tons to be delivered at the three Colonial ports. The Government intimated to the Agent-General a willingness to accept monthly shipments for six months, whereupon at the request of the Agent-General, the plaintiffs wrote him a letter of the 7th August, 1901, in which they offered to accept a six months' contract on the following detailed terms set forth in the letter: "(1) That we are to supply 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c.i.f., and 60,000 tons for Port Elizabeth at £1 17s. 5d. per ton c.i.f. on monthly shipments for six months, such shipments to commence to Cape Town on February, 1902, and to Port Elizabeth on October, 1901. (2) That the railway authorities are to accept delivery immediately on arrival in Table Bay and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers, and 6d. per net registered ton per day for steamers. (3) Payment to be made two-thirds in cash by you within seven days of the receipt of policies, etc., and the remainder within seven days after production of the certificate as to delivery. (4) In the event of this country being at war other than with the Transvaal, or other causes including strikes, beyond our control, our liability to cease." These terms were accepted by the Government, and plaintiffs' letter is annexed to the plea as being the contract between the parties. Before going further, it may be noticed that the case has been complicated by the fact that since this action was brought in this court, the defendants have instituted proceedings in England against the present plaintiffs, having reference to demurrage paid under the present as well as under the previous contracts. The correspondence between the parties refers to both cases and makes it difficult to prevent the admis-

5. He admits that the coal referred to in paragraph 5 arrived in Table Bay in 18 sailing ships, and that the quantities arriving in May, June, July, October and December were respectively 5,992, 9,833, 9,787, 7,378, and 2,006 tons, but he denies the remaining allegations contained in the said paragraph, and says that the quantity of the said coal which arrived in August was 18,853 tons and that none of the said coal arrived in September.

6. It was the duty of the plaintiffs in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2 to despatch the said 54,000 tons of coal to Cape Town in monthly shipments of quantities of 9,000 tons per month, commencing in February, 1902, and continuing in consecutive months until and including July, 1902, but they nevertheless failed and neglected, more especially in the months of February, March and April, by shipping deficient quantities, and in May and June, by shipping excessive quantities, duly to despatch the said 54,000 tons of coal, and thus committed a breach of the said agreement, and became and are not entitled to claim demurrage thereunder.

7. By reason of the aforesaid breach of the agreement by the plaintiffs, the coal despatched by them did not arrive in Table Bay in the quantities and at the times contemplated by the agreement and for which it was the duty of the Government to make provision, and the defendant was in consequence of the plaintiffs' breach of contract prevented from taking delivery of the said coal after its arrival as speedily as it would have been taken if duly despatched in manner contemplated by the said agreement, and he says specially that in consequence of the said breach of contract by the plaintiffs, the Government was obliged to provide for the purchase and to take delivery of other coal from other persons to make good the deficiency of the coal which the plaintiffs should have duly despatched in the months of February, March and April, all of which was not contemplated by the parties to the said agreement.

7 (a) The ships referred to in paragraph 4 of the declaration were all of them ships chartered by the plaintiffs. The rates of discharge and the rates of demurrage stipulated for in the charters were different from those mentioned in the said letter of August 7th, 1901. The liabilities of the Cape Government for demurrage (if any) were to the owners of the said ships respectively and not to the plaintiffs and were for amounts which depended upon the terms of the bills of lading for the cargoes transferred by the plaintiffs to the Cape Government and not otherwise.

7. (b) If the plaintiffs suffered any loss or damage by the alleged failures of

the Cape Government in taking delivery or by detention of the said ships the amount of such loss or damage (if any) was in respect of liabilities of the plaintiffs under the said charterparties and no particulars thereof have been rendered by the plaintiffs to the Cape Government or to the defendant. The payments already made by the Cape Government to the plaintiffs in respect of demurrage of the said ships exceed the whole amount of such loss or damage upon all the shipments.

8. The defendant denies paragraph 7 save in so far as he admits that the plaintiffs have rendered to the Government an account declaring their claim for demurrage in respect of certain 16 ships, that the Government has paid to the plaintiffs sums amounting to £7,360 0s. 8d. in respect of demurrage, and that it refuses to pay the sum of £10,788 14s. 4d., or any part thereof.

9. He denies paragraphs 8 and 9 save that particulars of the plaintiffs' claim have been supplied to the Cape Government, and that the said Government refuses to pay the said sum of £10,788 14s. 4d., or any part thereof.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:—

1. He craves leave to refer to the several paragraphs of the foregoing plea.

2. If the plaintiffs (now defendants) be held entitled in terms of the said agreement to claim the sum of £10,788 14s. 4d., or any part thereof by way of demurrage or under paragraph 8 of the declaration, the defendant (now plaintiff) says that such sum has become due and payable by reason and in consequence of the default and breach of contract on the part of the plaintiffs (now defendants) referred to in the said plea, and such sum represents damages for such default and breach of contract to which the defendant (now plaintiff) is entitled.

Wherefore he prays for judgment in reconvention by way of damages for breach of contract for such sum, if any, as this honourable Court may adjudge to the plaintiff (now defendant) upon the claim in convention, together with other relief and costs of suit.

#### PLAINTIFFS' EXCEPTION, REPLICATION AND PLEA, AND EXCEPTION IN RECONVENTION.

Before replying to the defendant's plea the plaintiffs say that they take exception thereto on the following grounds:

(1) That in paragraph 2 thereof the defendant refers to a material document in defendant's possession on which defendant relies, but the defendant has

they bear on the issue is that in consequence of the delivery by others to the Government of coal, it is alleged that the defendants had fewer facilities at their disposal to take delivery from the plaintiffs of their coal as it arrived, and, therefore, should not have to pay the demurrage incurred by the slow discharge of the vessels. The plaintiffs' declaration would imply an admission that there had been some delay on their part as they rely on the fourth clause of the contract, and say that, owing to strikes and other causes over which they had no control, they had been unable to despatch the coal in the order of shipment for which they had made provision but had despatched it as regularly as such causes permitted. It does appear that there had been some difficulty at collieries, but the evidence does not show that these difficulties were insuperable, and I understand this part of the declaration is not now relied upon. There would have been more force in this first defence if the defendants had refused to receive the coal altogether and had relied on a breach of contract as founding a claim for damages or as justifying them in securing the quantity at plaintiffs' expense elsewhere. But they accepted each cargo as it came to hand. The witnesses for the defence have spent most of their time in building up hypothetical conjectures of what would have been the result if the ships had been despatched regularly, month by month from February. Taking the tables they have prepared and taking the actual length of passages made of the three vessels they conjecture would have been despatched in February one would have arrived in April and two in May. This, with the statements made in evidence would justify the assumption that the parties expected that May would be the first month in which the coals under the contract might reasonably have been expected to arrive. As a fact, nearly 6,000 tons were delivered in that month, and even with this smaller quantity the vessels could not be discharged within the lay days contracted for. So in June a little over 9,000 tons—the amount expected—could not in the instance of any one of the vessels be discharged without demurrage, and the same in July, and in the same way right on to the last of the cargoes received. These facts go far to show the unreliability of the result arrived at, founded on the theory of what would have happened had the coal been despatched in strict compliance with the letter of the contract, a theory built entirely on suppositions. Much virtue as there may be in an occasional "if," I am not prepared to take the series of "ifs" put forward as of sufficient force to establish as a fact that less demurrage would have been incurred had the vessels been sent off and more

coal been delivered at earlier dates. The congested condition of this port was well known to the parties and may account for the stipulation for the delivery of the coal provided for in the way it was by the contract. Indefinite as the contract may be in other respects it is exact in stating the rate at which delivery was to be taken and what demurrage was to be paid for delay beyond the time stipulated for. As to the delivery of the coal the plaintiffs did all they undertook to perform as soon as they had put the coal on board and had despatched the vessels and had handed the necessary papers over to the defendants to entitle them to receive the coal. When the vessels arrived it was for the defendants to take delivery and if they did not do so within the time specified they contracted to pay demurrage. It was not in the power of the plaintiffs either to facilitate or to delay the discharge of the cargoes, that was a matter for the defendants to see to. In their hypothetical returns they show they could not even then have taken the discharge within the lay days, and this no doubt led them, on the 27th May, 1903, to offer to pay in settlement of the claim sued for the sum of £2,232 3s. 4d., calculated upon the basis of what they estimated would happen had the vessels been despatched at earlier dates. But with the condition of the port it is almost impossible to say what could have been done on days other than those on which the vessels arrived. The tender of the £2,232 3s. 4d. has not been pleaded, but the fact that it was made has not unnaturally been relied upon by the plaintiffs as an admission by the Government of liability for some demurrage at least. And another fallacy in the estimate is shown by the fact that even in the cases of the vessels upon which the Government had paid demurrage the amount ascertained by the actual working is greatly in excess of what by the hypothetical estimates would have been incurred. It is not clear to me why payment should be resisted of the amount actually incurred in respect of at least an approximate 9,000 tons per month. Under these circumstances I am of opinion that the facts set forth do not discharge the defendants from liability for demurrage on the eight vessels sued for. I have some difficulty, however, in determining the actual amount for which judgment should be given. In their letter of June 3, 1903, the plaintiffs assume for the sake of argument, although they say the contract does not admit of such construction that if the Government only had to take delivery of about 9,000 tons per month as there were only three ships with approximately this amount arriving in July, and during August six vessels arriving, they offered not to claim any demurrage for three of these vessels, which arrived in



sion of letters which refer to matters other than the present dispute. This subsequent action cannot be held to bar these proceedings, but it renders it all the more necessary to confine the decision of this case strictly to the issues raised on the pleadings. Without going into details on the various points raised in argument for the purposes of this case, I take it as proved that the letter of the 7th August, 1901, is the contract which bound the parties. The plaintiffs shipped the coal contracted for but not within the six months mentioned in the letter. This coal was sent out in eighteen sailing vessels. The time taken by most of these sailing vessels varied from nine to ten weeks, or thereabouts, though one vessel which arrived during the month of August made an exceptionally fast voyage of 52 days. The statement made by one of the defendant's witnesses shows that the Government expected the first of the shipments for Table Bay to arrive about May. The amount of coal received under this contract, the plea admits to have been as follows: May 5,992 tons, June 9,883 tons, July 9,787 tons, August 18,853 tons, October 7,378 tons, and December 2,006 tons. As a matter of fact the plaintiffs despatched only one vessel in February, carrying a little over 3,000 tons of coal, which vessel arrived in April; but a second vessel, which arrived in May with nearly 3,000 tons seems to have been taken together as making up the quantity of coal stated as having been delivered in May. It will be noticed that the contract is indefinite about the amount to be shipped monthly, but from the correspondence, it seems to me fair to assume that the parties understood it was to approximate 9,000 tons per month for the six months. Considerable discussion has taken place whether, under the contract, the coal should be shipped each month, or should arrive each month in quantities of about 9,000 tons, the latter view being assumed in a number of letters which passed between the parties. But Mr. Schreiner, for the defendants, laid little stress on either contention, the object of the Government being to secure a regular monthly supply. The quantity of coal which the plaintiffs contracted to supply proved clearly insufficient to meet the needs of the railway service and before any coal at all arrived by any of the plaintiff's vessels, the Government in April began to order a large additional quantity. In May they gave further orders and also purchased locally. They also purchased locally some 4,550 tons in June and 2,835 in September. These purchases and orders altogether amounted to about 33,000 tons. Some of the orders given in April and those in May, together with the local purchases in May and June, amounting in all to about 18,000 tons,

the Government now assign as being coal acquired to supplement shortage caused through the delay in shipments under plaintiff's contract. The rest of the coal was to meet the additional requirements of the railway. This supply was secured at a lower price than the rate fixed in the contract with plaintiffs. The bills of lading of all the coal shipped by the plaintiffs were handed to defendants who took delivery of the coal from the vessels and duly paid for it. With the exception of the first arrival none of the other vessels despatched by plaintiffs were discharged after arrival within contract time and demurrage was claimed in respect of each ship. Eight vessels had sailed from England between the 31st May and the 25th June, three arriving in July and five in August. On these vessels the Government refused to pay demurrage. Another vessel, which had arrived in August, foundered when entering Table Bay, and the quantity of coal which she had on board was made up by an arrival in December. The Government paid to the plaintiffs the demurrage claimed on all the vessels which arrived before as well as after the eight just mentioned, amounting to the sum of £7,360. The claim of the plaintiffs for demurrage in respect of the eight vessels was resisted by the Government, and the plaintiffs in this action now seek to recover the sum of £10,788 14s. 4d. in respect thereof. The plea contains averments which may be grouped under two separate defences and these averments also form the basis of a claim in reconvention for damages for breach of contract. The first line of defence may be summarised as follows: The defendants allege that according to the true and proper interpretation of the contract, the plaintiffs were not entitled to claim demurrage thereunder, as it was their duty to despatch the 54,000 tons of coal stipulated for in monthly shipments of 9,000 tons per month, commencing in February and continuing in successive months until and including July; but in breach of their agreement they shipped deficient quantities in February, March, and April, and shipped excessive quantities in May and June whereby the defendants were prevented from taking delivery of the coal after its arrival as speedily as they would have taken it if it had been despatched in the manner contemplated by the agreement. There is a further allegation in this part of the plea that in consequence of the breach the Government was obliged to provide for the purchase, and to take delivery of coal from other persons to make good the deficiency of the shipments in February, March, and April. As a price below contract rate was paid for this coal, no specific damage is claimed in respect of such purchases. The only way in which



tract as set forth in the plea. It is noticeable that no special damages are laid, and the claim has been explained to me that if it is held that the plaintiffs are entitled to the demurrage set forth in the contract then their delay in despatching vessels in good time has resulted in loss to the Government in any sum which may be awarded to plaintiffs in so far as it exceeds the £2,232 3s. 4d. which only under the hypothetical returns would have become payable. This in effect, would be holding that the Government tender which has not been pleaded was a sufficient one which for the reasons stated I am not able to find. It is difficult to follow the argument but this claim in reconvention affords the opportunity of awarding as damages, say, £1,200, which I have estimated would be a fair amount to deduct from the demurrage on account of the 1,800 tons of coal arriving in August instead of 9,000 tons in August and September respectively. The result is that there will be judgment for the plaintiff for the sum claimed, less £1,200, or for £9,588 14s. 4d., and costs with interest at six per cent. *a tempore morae*. I think the date of default should be fixed as the 3rd June, 1903, when the final account was sent in and formal demand made for payment.

*Postea*.—Leave having been granted to amend the pleadings in view of appeal, the following amendments were made:

#### PLAINTIFFS' EXCEPTION, REPLICATION AND PLEA IN RECONVENTION.

Before replying to defendant's plea, plaintiffs' except thereto:

1. As to paragraph 7 (a) in that according to the true intent and construction of the annexed letter the Cape Government contracted liability direct with the plaintiffs and not with the owners of the said ships with whom the said Government had no privity of contract.

2. As to paragraph 7 (b) in that by the terms of the said letter the said Government undertook to pay demurrage at a specific rate on failure to take delivery at the agreed rates of discharge or as damages for detention of the said ships without any reference soever to the liabilities (if any) plaintiffs have or may be under in respect of the said charter-parties.

3. By reason whereof the said paragraphs are irrelevant, embarrassing and bad in law.

Wherefore plaintiffs pray that the said paragraphs may be ordered to be struck out of the said plea with costs.

Subject to the above exception and for a replication, plaintiffs say that subject to the above exceptions and saving admissions plaintiffs deny the allegations

in the plea contained and join issue with the defendant thereon.

Before pleading to the claim in reconvention the plaintiffs say that the second paragraph is vague, embarrassing, inconsistent and bad in law, and pray that it may be struck out.

For a plea to the claim in reconvention the plaintiffs say that, saving admissions, they deny the allegations therein contained and join issue with the defendant thereon.

The exception to par. 7 (a) allowed with costs, with leave to plaintiffs to amend their declaration by striking out the alternative claim in par. 8. Leave to defendant to amend his plea.

#### PLAINTIFF'S SECOND DECLARATION.

1. The plaintiffs are a duly incorporated company carrying on business in Cape Town and elsewhere. The defendant, in his capacity as Commissioner of Public Works, and as the Minister in charge of the Railways of the Colony, represents the Government of the Cape Colony hereinafter called the Cape Government.

2. In the month of August, 1901, and in London it was agreed between the plaintiffs and the Agent-General of the Cape of Good Hope duly authorised in that behalf, that the plaintiffs were to supply to the Cape Government 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c.i.f. and 60,000 tons for Port Elizabeth at £1 17s. 5d. per ton c.i.f., and on monthly shipments for six months, such shipments to commence to Cape Town in February, 1902, and to Port Elizabeth in October, 1901; that the railway authorities of the Cape Government were to accept delivery immediately on arrival in Table and Algoa Bay respectively at the rate of 120 tons per day for sailers, and 250 tons per day for steamers, or the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers and 6d. per net registered ton per day for steamers; that payment was to be made two-thirds in cash by the said Agent-General within seven days of the receipt of policies, etc., and the remainder within seven days after production of the certificate as to delivery; that in the event of Great Britain being at war other than with the Transvaal or other causes, including strikes, beyond the plaintiffs' control the plaintiffs' liability to cease. By the said railway authorities the parties intended the railway authorities of the Cape Government, whose agents and servants they are, and the liability for demurrage contracted for was and is the liability of the Cape Government. The Welsh coal contracted for was agreed by the parties to be Merthyr coal.

3. Owing to strikes and other causes over which the plaintiffs had no control and which fell within the exceptions in

August, until the 1st September, and consequently to reduce their claim by £309 3s. 8d. This offer was at first made without prejudice. They later, on September 7, repeated the offer without reservation. As the offer was not accepted the plaintiffs have reverted to their original position. But this offer may well be relied upon by the defendants as an admission that there was an excessive shipment of cargoes arriving in August, and that with the overcrowded state of the port the defendants are entitled to some consideration on that account. The averments of the declaration which was not proved may here also be brought in to aid the defendants. It is difficult to make any deduction from plaintiffs' claim for this overdespatch of vessels on strictly legal grounds, but it appears to me it would only be equitable to make some allowance for the double amount of coal which arrived in this one month. The plaintiffs' offer was based on a calculation allowing seven days, three days, and two days respectively on the three ships, which would place them in the position as if they had all three arrived on the 1st September. Sitting as a juror I do not consider the amount offered a sufficient reduction. If any reduction at all is to be made I think an allowance of about fifteen days on each vessel would be reasonable. This would come as I work it out to about £1,200. Probably, the more correct procedure and the one I shall adopt would be when we come to the claim in reconvention to allow this sum as damages for breach of contract. But, at any rate, in my opinion, this first defence does not bar the plaintiffs from recovering any demurrage in this action. I find I have omitted to notice the arguments founded on the difficulties caused by the discharge of coal from the other vessels. I do not think the plaintiffs should be held liable for any losses caused thereby. The purchase of a very large quantity of this coal cannot possibly be attributed to any default on the part of the plaintiffs, and moreover the Government would not be entitled to give preference to their own vessels when any arriving from the plaintiffs were awaiting discharge. The second defence pleaded is that no demurrage is payable to the plaintiffs because a new contract was entered into. The plea says that in order to carry out their contract, the plaintiffs chartered vessels at a rate of demurrage less than the contract provided for; that when these vessels are loaded the plaintiffs transferred to the Government the bills of lading, some of which expressly incorporated the conditions of the vessel charter parties, and that by this procedure new contracts were entered into between the plaintiffs, the defendants and the owners of the respective vessels, whereby it was agreed that the con-

tracts for the carriage of the coal should be between the defendants and the shipowners, and that demurrage should be construed and determined in accordance with the terms of such bills of lading and charter parties, and not otherwise, and that the Government became liable to the shipowners and not otherwise, and the plea goes on to say that the plaintiffs have been paid by the Government in respect of the liability of the Government to the shipowners, a sum as large or larger than that represented by the said bills of lading and charter parties. No reason is given why, if there was no liability to the plaintiffs the Government should have paid what they owed the shipowners to the plaintiffs. This plea is also somewhat inconsistent with the first defence, for if new contracts for the payment of demurrage were entered into with the shipowners such contracts could not be affected by any delay on the part of the plaintiffs in despatching the vessels. And it is common cause that all these vessels earned demurrage. The plea, if it means anything, amounts to a defence of novation by which the obligations under the contract have been extinguished by new obligations, not only to the plaintiffs but to third persons. It is the foundation of a novation that it must be intended by both parties that a new contract is to be substituted for the old, and the evidence must clearly establish such a new contract. Here there were no negotiations or proposals made to cancel the old and enter into new contract nor is there anything to show the assent of the plaintiffs to such a course being requested or granted. The transference of the shipping documents were necessary to enable the Government to obtain delivery of the coal and was made for that purpose, not to create a new contract. It is moreover inconsistent with a novation that the Government should have paid the plaintiffs demurrage on some of the vessels at the rate fixed in the old contract. It was argued that at all events the Government should not pay more for demurrage than was stipulated for on the charter parties though at the same time it was contended that had the charter parties been at a higher rate the liability of the Government would then have been limited to the sum mentioned in the original contract. All this is inconsistent with the idea of a novation. This second defence does not require further consideration. In reconvention the defendants claim that should these pleas fail and the plaintiff held to be entitled to claim in terms of the original agreement the sum of £10,788 14s. 4d. or any part thereof, then that an equal sum has become due and payable to the Government as damages for the default of the plaintiffs and their breach of con-

the plaintiffs should have duly despatched in the months of February, March, and April, all of which was not contemplated by the parties to the said agreement.

8. The defendant denies paragraph 7 save in so far as he admits that the plaintiffs have rendered to the Government an account declaring their claim for demurrage in respect of certain eight ships, that the Government has voluntarily paid to the plaintiffs certain sums by way of demurrage in respect of the other ships, and that it refuses to pay the sum of £10,788 14s. 4d. or any part thereof claimed for demurrage.

9. He denies paragraphs 8 and 9 save that particulars of the plaintiffs' claim have been supplied to the Cape Government and that the said Government refuses to pay the said sum of £10,788 14s. 4d. or any part thereof.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:

1. He craves leave to refer to the several paragraphs of the foregoing plea.

2. If the plaintiffs (now defendants) be held entitled in terms of the said agreement to claim the sum of £10,788 14s. 4d., or any part thereof by way of demurrage or under paragraph 8 of the declaration, the defendant (now plaintiff) says that such sum has become due and payable by reason and in consequence of the default and breach of contract on the part of the plaintiffs (now defendants) referred to in the said plea, and such sum represents damages for such default and breach of contract to which the defendant (now plaintiff) is entitled.

Wherefore he prays for judgment in reconvention by way of damages for breach of contract for such sum, if any, as this Honourable Court may adjudge to the plaintiff (now defendant) upon the claim in convention, together with other relief and costs of suit.

The replication and plea in reconvention were general.

#### DEFENDANT'S RE-AMENDED PLEA AND CLAIM IN RECONVENTION.

I. For a plea the defendant says as follows:

1. He admits paragraph 1 of the declaration.

2. As to paragraph 2 he denies that it was agreed by the parties that the Welsh coal contracted for must be Merthyr coal. He says further that the terms of the agreement referred to in the said paragraph are contained in a certain letter addressed by the plaintiffs on the 7th August, 1901, to the Agent-General for the Cape of Good

Hope and annexed hereto. For the greater certainty as to the terms of the said agreement he craves leave to refer to the said letter.

3. He denies paragraph 3 and says that the plaintiffs did not duly despatch the coal agreed upon in accordance with the terms of the said agreement.

4. He admits paragraph 4.

5. He admits that the coal referred to in paragraph 5 arrived in Table Bay in 18 sailing ships, and that the quantities arriving in May, June, July, October and December were respectively 5,992, 9,833, 9,787, 7,378 and 2,006 tons, but he denies the remaining allegations contained in the said paragraph, and says that the quantity of the said coal which arrived in August was 18,853 tons and that none of the said coal arrived in September.

6. It was the duty of the plaintiffs in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2 to despatch the said 54,000 tons of coal to Cape Town in monthly shipments of quantities of 9,000 tons per month, commencing in February, 1902, and containing in consecutive months until and including July, 1902, but they nevertheless failed and neglected, more especially in the months of February, March and April, by shipping deficient quantities, and in May and June, by shipping excessive quantities, daily to despatch the said 54,000 tons of coal, and thus committed a breach of the said agreement, and became and are not entitled to claim demurrage thereunder.

7. By reason of the aforesaid breach of agreement by the plaintiffs, the coal despatched by them did not arrive in Table Bay in the quantities and at the times contemplated by the agreement and for which it was the duty of the Government to make provision, and the defendant was in consequence of the plaintiffs' breach of contract prevented from taking delivery of the said coal after its arrival as speedily as it would have been taken if duly despatched in manner contemplated by the said agreement, and he says specially that in consequence of the said breach of contract by the plaintiffs, the Government was obliged to provide for the purchase and to take delivery of other coal from other persons to make good the deficiency of the coal which the plaintiffs should have duly despatched in the months of February, March and April, all of which was not contemplated by the parties to the said agreement.

7. (a) The ships referred to in paragraph 4 of the declaration were all of them ships chartered by the plaintiffs. The rates of discharge and the rates of demurrage stipulated for in the charters were different from those mentioned in the said letter of August 7th, 1901. The liabilities of the Cape Government for demurrage (if any) were to the owners

of the said ships respectively and not to the plaintiffs and were for amounts which depended upon the terms of the bills of lading for the cargoes transferred by the plaintiffs to the Cape Government and not otherwise.

7. (b) If the plaintiffs suffered any loss or damage by the alleged failures of the Cape Government in taking delivery or by the detention of the said ships the amount of such loss or damage (if any) was in respect of liabilities of the plaintiffs under the said charter parties and no particulars thereof have been rendered by the plaintiffs to the Cape Government or to the defendant. The payments already made by the Cape Government to the plaintiffs in respect of demurrage of the said ships exceed the whole amount of such loss or damage upon all the shipments.

8. The defendant denies paragraph 7 save in so far as he admits that the plaintiffs have rendered to the Government an account declaring their claim for demurrage in respect of certain 16 ships, that the Government has paid to the plaintiffs sums amounting to £7,360 0s. 8d. in respect of demurrage, and that it refuses to pay the sum of £10,788 14s. 4d. or any part thereof.

9. He denies paragraphs 8 and 9 save that particulars of the plaintiffs' claim have been supplied to the Cape Government and that the said Government refuses to pay the said sum of £10,788 14s. 4d. or any part thereof.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:—

1. He craves leave to refer to the several paragraphs of the foregoing plea.

2. If the plaintiffs (now defendants) be held entitled in terms of the said agreement to claim the sum of £10,788 14s. 4d., or any part thereof by way of demurrage or under paragraph 8 of the declaration, the defendant (now plaintiff) says that such sum has become due and payable by reason and in consequence of the default and breach of contract on the part of the plaintiffs (now defendants) referred to in the said plea, and such sum represents damages for such default and breach of contract to which the defendant (now plaintiff) is entitled.

Wherefore he prays for judgment in reconvention by way of damages for breach of contract for such sum, if any, as this Honourable Court may adjudge to the plaintiff (now defendant) upon the claim in convention, together with other relief and costs of suit.

#### DEFENDANT'S FINAL PLEA AND CLAIM IN RECONVENTION.

I. For a plea the defendant says as follows:—

1. He admits paragraph 1 of the declaration.

2. As to paragraph 2 he denies that it was agreed by the parties that the Welsh coal contracted for must be Merthyr coal. He states further that the terms of the agreement referred to in the said paragraph are contained in a certain letter addressed by the plaintiffs on the 7th August, 1901, to the Agent-General for the Cape of Good Hope, and for the greater certainty as to the terms of the agreement he craves leave to refer to the said letter when produced at the trial of this cause.

3. He denies paragraph 3 and says that the plaintiffs did not duly despatch the coal agreed upon in accordance with the terms of the said agreement.

4. He admits paragraph 4.

5. He admits that the coal referred to in paragraph 5 arrived in Table Bay in 18 sailing ships, and that the quantities arriving in May, June, July, October and December were respectively 5,992, 9,833, 9,787, 7,378 and 2,006 tons, but he denies the remaining allegations contained in the said paragraph, and says that the quantity of the said coal which arrived in August was 18,853 tons and and become and are not entitled to September.

6. It was the duty of the plaintiffs in terms of and according to the true and proper interpretation of the agreement referred to in paragraph 2 to despatch the said 54,000 tons of coal to Cape Town in monthly shipments of quantities of 9,000 tons per month, commencing in February, 1902, and continuing in consecutive months until and including July, 1902, but they nevertheless failed and neglected, more especially in the months of February, March and April, by shipping deficient quantities, and in May and June, by shipping excessive quantities, duly to despatch the said 54,000 tons of coal, and thus committed a breach of the said agreement, and became and are not entitled to claim demurrage thereunder.

7. By reason of the aforesaid breach of agreement by the plaintiffs, the coal despatched by them did not arrive in Table Bay in the quantities and at the time contemplated by the agreement and for which it was the duty of the Government to make provision, and the defendant was in consequence of the plaintiffs' breach of contract prevented from taking delivery of the said coal after its arrival as speedily as it would have been taken if duly despatched in manner contemplated by the said agreement, and he says specially that in consequence of the said breach of contract by the plaintiffs, the Government was obliged to provide for the purchase and to take delivery of other coal from other persons to make good the deficiency of the coal which the plaintiffs should have duly despatched in the months of February, March, and April, all of which was not contemplated.



plated by the parties to the said agreement.

7. (a) The plaintiffs in order to supply coal sold by them to the Government chartered certain vessels and in the charterparties entered into by them the rates of demurrage were different from and less than those mentioned in the said letter of August 7th, 1901; the defendant craves leave to refer to the terms of the said charterparties when produced at the trial.

7. (b) Thereafter the plaintiffs from time to time loaded the said ships with the coal sold by them to the Government and transferred the bills of lading for the coal to the defendant and new contracts subsequent to that of August 7th, 1901, were thereupon entered into as between plaintiffs, defendant and the owners of the respective vessels whereunder it was agreed that the contracts for the carriage of the coal should be between defendant and the said ship-owners, and that all incidents arising thereout such as demurrage and the like should be construed and determined in accordance with the terms of the bills of lading transferred as aforesaid and the charterparties, and not otherwise; and the Government became liable to the shipowner direct for demurrage due thereunder, and not otherwise; in the case of certain of the vessels concerned to wit the "Mackrihanish," "Prince Robert" and "Ballaculish," the bills of lading expressly incorporated the conditions of the charterparties; the defendant annexes hereto copies of the said bills of lading.

7. (c) The liabilities of defendant for demurrage (if any) from and after the respective dates of the transfer of the said bills of lading, became and were liabilities to the owners of the respective vessels and not liabilities to the plaintiffs, and such liabilities depended upon the terms of the bills of lading for the cargoes transferred by plaintiffs to defendant, and upon the terms of the said charterparties.

7. (d) The defendant has already paid to the plaintiffs, in respect of his liability to the aforesaid shipowners, a sum as large or larger than than represented by the rates of demurrage specified in the bills of lading and the charterparties, for the days during which the said vessels were detained.

8. The defendant denies paragraphs 7 and 9 save in so far as he admits that the plaintiffs have rendered to the Government an account declaring their claim for demurrage in respect of certain 16 ships, that the Government has paid to the plaintiffs sums amounting to £7,360 0s. 8d. in respect of demurrage, and that it refuses to pay the sum of £10,788 14s. 4d. or any part thereof.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:—

1. He craves leave to refer to the several paragraphs of the foregoing plea.

2. If the plaintiffs (now defendants) be held entitled in terms of the said agreement to claim the sum of £10,788 14s. 4d., or any part thereof, the defendant (now plaintiff) says that such sum has become due and payable by reason and in consequence of the default and breach of contract on the part of the plaintiffs (now defendants) referred to in the said plea, and such sum represents damages for such default and breach of contract to which the defendant (now plaintiff) is entitled.

Wherefore he prays for judgment in reconvention by way of damages for breach of contract for such sum, if any, as this Honourable Court may adjudge to the plaintiff (now defendant) upon the claim in convention, together with other relief and costs of suit.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C., and Mr. Burton, was for the plaintiff; Sir Henry Juta, K.C. (with him Mr. Close and Mr. Struben) was for the respondents.

Mr. Schreiner said that the matter very largely depended upon the construction which the Court would place upon a letter (page 16 of the record) addressed by the plaintiffs to the Agent-General, in London, of the Cape of Good Hope, under date August 7, 1901, in the following terms: "We have the honour to acknowledge receipt of your favour of the 2nd inst., enclosing us copy of cable received by you from the Hon. the Commissioner of Public Works, in which our terms and prices as cabled out by you for the supply of coal has been accepted. You ask us for a copy of a tender, evidently under a misapprehension, as the only offer we made was the cable just referred to, and although that was for a 12 months' supply at the rate named, we are willing to accept in our turn the six months' supply on the following detailed terms: (1) That we are to supply 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c.i.f., and 60,000 tons for Port Elizabeth at £1 17s. 5d. per ton c.i.f. on monthly shipments for six months, such shipments to commence to Cape Town on February, 1902, and to Port Elizabeth on October, 1901; (2) that the railway authorities are to accept delivery immediately on arrival in Table Bay and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or by the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers and 6d. per net registered ton per day for steamers; (3) payment to be made two-thirds in cash by you within seven days of the receipt of policies, etc., and the remainder



within seven days after production of the certificate as to delivery; (4) in the event of this country being at war other than with the Transvaal, or other causes, including strikes, beyond our control, our liability to cease."

The Divisional Court gave judgment for the plaintiffs for the amount claimed, less £1,200 awarded to defendants for plaintiffs' breach of contract, and costs, with interest, at 6 per cent., *a tempore morae*.

The essence of the contract was that Houlder Brothers should make due shipment. Five out of eight ships did not do so. The Government took the coal on the understanding that there had been due shipment, and if there had not been the Government was not liable for demurrage, even if they accepted the coal. Fourpence per ton was a maximum charge for demurrage. Houlder Brothers may never have had to pay anything for demurrage, then how can they claim from the Government. As to the meaning of demurrage, see Carver's Carriage by Sea, McLachlan on Shipping, and Benjamin on Sales (p. 574). We are liable only for the demurrage actually paid by Houlder Brothers. The letter as to lay days (p. 203 of the record) is immaterial.

[De Villiers, C.J.: Is the term "demurrage" ever used save as between owner and shipper?]

I cannot find a case in which a third person has been held liable for demurrage. Demurrage may have a strict meaning, as stipulated for in bills of lading, or a looser meaning as damages for detention. We contend for the stricter sense.

[Maasdorp, J.: Suppose that there were no Charter party, and nothing was said about demurrage in the bills of lading, what then about demurrage?]

In such case there would be no demurrage.

[Hopley, J.: I always thought that if the bills of lading were silent as to demurrage it would be estimated on an equitable basis.]

No, I submit not. One must construe a Charter party very strictly.

See *The Marga* (20 S.C.R., 485). The Government must pay to Houlder Brothers whatever they had to pay for demurrage, but no more. "Liable for demurrage" and "will pay demurrage" are two different things. Had they shipped the coal in their own vessels, and we had agreed to pay demurrage, that would have been a very different question. Mr. Fuller's letter of May 27th, 1903, contains no tender. As to demurrage, see the accounts relating to the various vessels, which is compiled from the Charter parties.

[Counsel proceeded to argue further on the facts, and on the correspondence which had passed between the parties.]

Sir H. Juta cited Carver on Carriage

by Sea (p. 689), and continued: No objection was ever taken by the Government to our interpretation of the contract. In the case of all other ships they paid in accordance with this interpretation (see evidence of Sinclair in cross-examination). As to the pleadings, see their original plea (section 7). Then they amended their plea, and we excepted to paragraphs 7a and 7b. The judge below upheld the exception (15 C.T.R., 320). The defendants again amended their plea and relied on a new contract. That is defendants' last plea, and there we have nothing about the old contract of August 7th. It has been said that we should have called for accounts, but their plea says nothing about accounts (see par. 6). As to bills of lading, see paragraphs 7c and 7d. The defence has nothing to do with accounts. The contract is perfectly clear, the phrase "shall be liable for demurrage" is perfectly clear, and "at fourpence" is also perfectly clear. It is a common term, and "at" never means "not exceeding." The Government never stipulated anything as to demurrage, and the first reference to it occurs in the letter of August 7th. Notice must always be given to the consignee that the ship is ready to discharge, so nothing hangs of the letter of July 31st, 1902. We may have made a profit on the fourpence per ton, but we might have made a loss.

[Hopley, J.: Possibly, having a good coal contract on, you were willing to take a risk in order to keep it.]

There is no evidence as to that. Then does the contract mean that we were to ship certain quantities, or that we were bound to deliver 9,000 tons a month? See Agent-General's call for tenders of June 13th, 1901, our cable of July 6th, 1901, and the acceptance of our tender, August 1st. The first mention of shipments monthly comes from the Government. The Government evidently wanted coal in Cape Town. They did not care about despatch. They wanted regular delivery, or they might have had an impracticable quantity thrown on their hands at one time and none at another. See Sinclair's evidence (16 C.T.R., 104). In answer to our letter of May 6th, 1902, promising to despatch 20,000 tons in May, the Government does not object to receive that quantity, and does not allege breach of contract. The General Manager, in his letter of June 4th, 1902, does not complain of tardy shipments, but of delivery. So also in the letter of July 16th, 1902.

[De Villiers, C.J.: You do not appeal on the question of damages. You admit £1,200 to be sufficient.]

De Villiers, C.J., intimated that they would like to hear counsel on the question of whether £1,200 was a sufficient measure of damages to allow the defendants.

Sir H. Juta said that the Government having accepted coal shipped by the plaintiffs, they could not have treated this non-shipping or non-delivery as a breach. At any rate, not a breach going to the essence of the contract. All that one could say in regard to the damage was that it must be something which the Government had sustained by reason of the ships not being berthed, as they might have been berthed had they arrive in some way or other. But this was all hypothetical. The only damage that they could say they had sustained was that the ships, had they arrived in some other way than they did arrive, might have been berthed somewhat sooner. From the very outset the Government failed to berth these ships on their arrival, and ships carrying coal under other contracts were given berths in preference. The damages awarded by the learned Judge to the Government arose out of the fact that certain of the vessels made an exceptionally quick passage, and arrived unusually early.

Mr. Schreiner in reply.

*Cur. Adv. Vult.*

*Postea* (November 27th).

De Villiers, C.J.: This is an appeal against a judgment of a Divisional Court, awarding to the plaintiffs the sum of £9,588 14s. 4d. as and for demurrage due by the defendant, as Commissioner for Public Works, in respect of eight sailing vessels chartered by the plaintiffs to carry coal to Table Bay for the Colonial Government. The contract, out of which the claim arises, was contained in a letter, dated the 7th of August, 1901, and addressed by the plaintiffs to the Agent-General in London. The material portions of the letter are as follows: "That we are to supply 54,000 tons of Welsh coal for Cape Town at £1 16s. 5d. per ton c.i.f. . . . on monthly shipments for six months, such shipments to commence to Cape Town on February, 1902. That the railway authorities are to accept delivery immediately on arrival in Table Bay . . . at the rate of 120 tons per day for sailers and 250 tons by steamers, or the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers and 6d. per net registered ton per day for steamers. Payment to be made two-thirds in cash by you within seven days of the receipt of policies, etc., and the remainder within seven days after production of the certificate as to delivery." It would appear that it was the practice of the plaintiffs, in carrying out the contract, to charter ships for the conveyance of the coal and to transfer the bills of lading to the defendant. It would further appear that in many cases the rates of demurrage fixed by the charter party were less than the rate of demurrage

agreed upon in the contract, and one of the questions raised in this case is whether, by reason of the transfer of bills of lading, which embody the conditions of the charter parties, new contracts were made superseding the demurrage payable under the contract. The learned Judge in the Court below held that there was no novation of the original contract, and in this view I fully agree with him. But according to the statements of counsel on appeal another and more important question was raised before him upon which he has expressed no opinion in the reasons supplied by him. That question is whether under the contract itself the plaintiffs are entitled to charge the defendant with a higher rate of demurrage than the rate for which they were liable to the shipowners. Probably the reason why the learned Judge was silent on the question is because it is not specifically raised in the pleadings but if, according to the true construction of the contract, the only demurrage owing by the defendant is that which became payable to the shipowners, it is impossible for this Court to avoid an expression of opinion upon the question. The plaintiffs' claim is based upon the contract and, before the Court can decide upon the claim, it must definitely decide upon the meaning of the contract. It was a contract, not between a shipowner and charterer or consignee, but between vendor and purchaser. It stipulated that the defendant should "be liable for demurrage at 4d. per net registered ton per day for sailers," and if the other party to the contract had been the shipowner the liability for demurrage would clearly have been incurred towards such shipowner. But the contract is for the supply of coal to the defendant, and it would be a most unnatural use of the word "demurrage" to apply it to the damages payable by the purchaser of the coal for his delay in accepting delivery thereof. The more reasonable construction of the contract would, in my opinion, be to confine the defendant's liability for demurrage to the amounts payable by the plaintiffs themselves not exceeding 4d. per net registered ton. The price fixed in the contract was to cover cost, insurance and freight and, whatever rate of liability the plaintiffs might incur for demurrage, the defendant was not to be liable for more than 4d. per ton per day. I am bound to say that this question was never distinctly raised between the parties in the course of the long correspondence which has been put in, but this may have been due to the defendant not being aware of the fact that the plaintiffs were themselves liable for a lower rate of demurrage than that which they charged against the defendant. It is worthy of remark that the defendant did not admit the contention of the plaintiffs that the lay days should

commence from the date of the arrival of the ships as stipulated by the contract of August 7, 1901. According to the charter parties entered into by the plaintiffs with the shipowners the lay days were to commence twenty-four hours, and in one case forty-eight hours, after notice of arrival. On the 30th of September, 1902, the plaintiffs wrote to the Agent-General: "It appears to us the railway wants all the benefits of a contract, but decline to implement same when the terms operate to their disadvantage." On the 25th of November, 1902, the plaintiffs wrote: "Whilst our contract stipulates for days to commence immediately on arrival, on which we base our claim, you wish to, or it may be the G.M.R. wishes to advantage himself of more favourable terms between ourselves and the owners by charter party. It might have been the other way about, and I venture to suggest it only needs you to point this out to make matters pleasant." The writer, however, added a postscript as follows: "I find we, in making our claim, have allowed them twenty-four hours, not adhering to the strict wording as above." In his answer of 28th November the Agent-General insists upon the defendant's right to a notice of the vessel's readiness to discharge, but he adds: "I don't think the charter party is involved in the matter, and quite admit (as far as I am individually concerned) that this document is a separate agreement between you and the ship." This expression of the Agent-General's individual opinion cannot of course affect the true construction of the contract. On the 2nd of December the plaintiffs wrote: "You will see we do not adhere to the strict reading of our agreement with you, to commence immediately on arrival. Our object in making it a condition of our contract that days should commence on arrival was the knowledge we had which was universal of the difficulty of getting into dock and, in addition, at times the captain being unable to get ashore to give notice." The object of the stipulation was to protect the plaintiffs fully against any liability which they might incur to the shipowner, and so long as they were thus protected they did not seek to take advantage of what they considered their right under the contract. But the object of fixing the higher rate of demurrage also was to secure themselves in case the rates of demurrage payable in Table Bay should be raised. In their correspondence in regard to demurrage payable under previous contracts with the Government, they had taken great credit for charging only the rate of demurrage which they had themselves paid, but the terms of those contracts were different from the terms of the contract now in question. It is admitted that in regard to the eight ships now in question, the plaintiffs have in-

curred a liability at the rate of 3d. per ton per day, and not at the rate of 4d., as limited in the contract. I am of opinion that an account should be taken of the amounts for which the plaintiffs have rendered themselves liable to the shipowners under the charter parties, and that, if the defendant is not relieved from liability on other grounds, judgment should be given for the amount not exceeding, however, the limit fixed in the contract of August 7, 1901.

It has been contended, however, on behalf of the defendant that, as there has been a failure on the part of the plaintiffs to deliver the coal in equal monthly shipments, he is relieved from the obligation to pay demurrage. The total quantity of coal contracted for was sent by eighteen sailing ships, the first of which arrived in Table Bay in April, 1902, and the last in December, 1902. During the month of April, 1902, only 3,000 tons were received, during May about 3,000, during June 9,833, during July 9,787, during August 18,853, during October 7,378, and during December 2,006 tons. The defendant paid demurrage in respect of the ships which arrived during April, May, June, October and December, but objected to paying demurrage on the eight ships which arrived during July and August, on the ground, as I understand his case, that an excessive quantity arrived during the two latter months, thus contributing to the delay in the discharge of the coal from these ships. But the short deliveries had been accepted by the Government in April and May with the knowledge that if the full 54,000 tons were to be delivered in six months there must of necessity be a delivery of more than 9,000 during some of the subsequent months. Moreover, the coal which arrived by the eight vessels in July and August, 1902, was accepted by the Government without a protest, on this side at all events, against such excessive delivery. It is true that in his communications with the plaintiffs in England the Agent-General drew attention to the fact that if the ships arrive too closely one upon the other there was grave danger of considerable demurrage being payable. On the 16th of July, 1902, the General Manager of Railways here wrote to the Agent-General, saying that "the question will naturally arise as to whether the contractors shall not be called upon to make good all such expenses incurred." On the 11th of August the Agent-General wrote to the plaintiffs as follows: "I now send you copy of a letter from the General Manager, who therein points out that your shipment of no less than 23,619 tons of coal between the 31st day of May and 14th June will probably entail the payment of a considerable sum for demurrage, which would have been avoided had you shipped the monthly quantities provided

for in the contract, for which you must, in consequence, be prepared to be held liable." Notwithstanding these letters, the coal was accepted here, and the utmost that can be said is that the Government reserved to itself the right to claim damages from the plaintiffs for their failure to send the coal in equal monthly shipments. That is a different thing, however, from claiming to be relieved from the payment of demurrage altogether during the two months when coal was delivered and accepted in excessive quantities. I am clearly of opinion that to the extent to which the plaintiffs have become liable for demurrage in respect of the eight ships now in question they are entitled to recover the amount from the defendant.

The defendant, recognising that he might fail in being relieved from the payment of demurrage on the grounds just stated, filed a claim in reconvention for the amount of the plaintiffs' claim as damages for their breach of contract. Upon this claim in reconvention the Court below has awarded the sum of £1,200 as damages, to be deducted from the amount awarded to the plaintiffs, on account of the 18,000 tons of coal arriving in August instead of 9,000 tons in August and September respectively. The plaintiffs have not appealed against this part of the judgment, but the defendant objects to the amount of damages as being insufficient. Without going into details, I may say generally that the award does not appear to me to err on the side of insufficiency. The evidence does not satisfy me that if 9,000 tons had arrived in July and the same quantity in August, the liability for demurrage of the plaintiffs, and consequently of the defendant, would have been reduced by more than £1,200, and the defendant's appeal against the judgment on the claim in reconvention must fail. The result is that the Court will amend the judgment by directing an account to be taken of the liability for demurrage incurred by the plaintiffs under the charter parties in respect of the eight ships in question, not exceeding in any case the sum of 4d. per net registered ton per diem, and giving judgment for the amount thus found, less the sum of £1,200. The effect of the amendment will be to effect a considerable reduction in the amount awarded to the plaintiffs, and they will, therefore, bear the costs of appeal.

Hopley, J., concurred.

[Appellant's Attorneys: Reid and Nephew. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BURCHELL V ESTATE { 1906.  
BURCHELL. { Nov. 6th.

Mr. Burton mentioned the case of Burchell v. Estate Burchell, which is set down for hearing to-morrow (Wednesday). He said it was quite clear that the case could not be heard. An action had been brought against the executors of the estate Burchell to set aside the will under which the executors had been administering the estate for about ten or eleven years. The defendants had been barred from pleading and an application had been standing in the roll for some days in which defendants applied for removal of the bar and payment of money to enable the executors to defend the will. That application, it was suggested, should be heard to-morrow, because the action obviously could not be heard.

Mr. W. Porter Buchanan (for plaintiff in the action) said that his clients were anxious to come to trial this term.

Maasdorp, J., asked why the plaintiffs could not put defendant to terms at once, and consent to the action standing over.

Mr. Burton pointed out that the executors applied for money to be paid for the defence of the action. The money in the estate had been placed in the hands of a certain trust company in Port Elizabeth to administer for the executors, who were, therefore, without funds. One of the parties to the action would be this trust company, which declined to pay the money unless by an order of Court.

Mr. Buchanan: Our position is that defendants have been unduly delaying the plea.

Maasdorp, J., said that the application would be heard to-morrow (Wednesday).

DE VRIES V. LUYT BROTHERS.

BOTES V. LUYT BROTHERS.

These actions were consolidated for the purpose of the hearing.

In the first case Hermanus A. de Vries sued the defendants for £90 rent, and in the second Antonie J. Botes, attorney, sued the defendants for £35 11s. 6d. for services rendered in and about the collection of certain insurance money.

The plaintiff, De Vries, in his declaration, said that he resided on the farm Bloemfontein, district of Fraserburg, which was his property, and the defendants carried on business in part-



nership on the said farm. On the 12th March, 1904, he let to defendants certain portion of the farm, with certain buildings thereon, for a period of five years at £90 per year. Defendants had paid the first year's rent to the 31st March, 1905, but although they had been in occupation since, they neglected and refused to pay rent from the 31st March, 1905, to 31st March, 1906. Wherefore plaintiff claimed £90.

Defendants, in their plea, said that they did not admit the words "which is his property." They further said that plaintiff was a clerk at Fraserburg in the employ of Mr. Botes, attorney. They admitted having entered into the lease, but said that they were given a right to buy the property in question, and that in March, 1905, plaintiff sold to L. M. Luyt the ground leased, with the premises thereon, the terms of purchase being that defendants should take over £600 of the bond then existing on the farm, and should pay the balance of £400 in cash. Thereafter in May a fire occurred in the shop and buildings occupied by defendants, and plaintiff thereupon agreed to let the purchase price remain in abeyance until the insurance money had been paid. Thereafter they employed one A. J. Botes, attorney, to collect the insurance money, and in January, 1906, he received a sum of £409 7s. 2d., which sum the said Botes, acting on the alleged instructions of the plaintiff, paid to the plaintiff. The said payment was wrongfully made to plaintiff, but defendants were willing to treat it as a payment on account of the purchase price of the property. Defendants were subject to the above, ready and willing to do all things necessary to take transfer of the property. In reconvention defendants said that by reason of the plaintiff's wrongful conduct and negligence, they had been hampered in their business, and had suffered damage to the extent of £200. They also claimed that plaintiff should be ordered forthwith to sign all necessary documents for transfer of the property to them, and tendered £400 in cash, or to have the money already in the hands of plaintiff so treated, and to enter into a mortgage bond for the balance of £600.

Plaintiff, in his replication, admitted that negotiations had taken place for the purchase of the property, but said that it was arranged in March, 1905, with L. M. Luyt, that the purchase price should be £1,000 in cash, and that certain expenses should be paid by plaintiff. In January, 1906, further negotiations took place between the parties, as a result of which the defendants notified plaintiff that they had finally decided not to purchase the property. As to the insurance money, plaintiff said that the money was paid in respect of

the damage caused to the buildings in pursuance of an arrangement between the parties.

The plaintiff Botes, in his declaration, said that he was employed by the defendants to collect certain moneys due from the Equitable Fire Insurance Co., and he claimed £35 11s. 6d. by way of commission at 2½ per cent. on the amount recovered, plus necessary expenses.

Defendants, in their plea, again went into the question of their right of option over the premises, and said that, although a sum of £763 1s. 5d. was paid in satisfaction of their claim against the insurance company, they had only received £354 odd, and plaintiff wrongfully and unlawfully retained the balance of the £409 odd. They admitted only liability for commission, and necessary expenses of the collection of the money. Defendants claimed in reconvention an account, debate, and payment of any balance found to be due to them.

Plaintiff, in his replication, said that the sum of £409 odd was paid by the insurance company as and for the re-erection of the buildings destroyed by fire, which were the property of De Vries.

Mr. Burton (with him Mr. Van Zyl) for plaintiffs. Mr. Close (with him Mr. Bisset) for defendants.

Hermanus A. de Vries (plaintiff in the first case) said that he had been assisting Mr. Botes as a clerk since the 20th April last, but, prior to that, he was residing on his farm. In March, 1904, he entered into a lease with L. M. Luyt, acting on behalf of the partnership. A special agreement was made as to rebuilding in case of fire, because witness was anxious that he should be protected against loss. Defendants undertook either to rebuild the premises, or to pay any loss that might be suffered. He gave the defendants a right of purchase under the lease. At the end of March, 1905, L. M. Luyt asked him to sell the portion that he had let to Luyt Bros. Witness, being asked what he wanted for half the farm, said £1,250 cash. Luyt offered £850. Witness told him he had better go and sleep. In the following month, Luyt saw him again, and after some negotiations he said that he would take £1,000 cash, but the defendants must pay all expenses excepting of cancellation of the bond, and they were also to give him three months and nine days' notice to enable him to make arrangements with the bond-holders, the S.A. Mutual. A few weeks afterwards both the brothers called upon him at his home and Mr. Luyt asked him to repeat the terms on which he would be prepared to sell. Witness repeated the terms, and L. M. Luyt said, "When I see my way clear I will give you notice." On or about the 12th May, 1905, a fire occurred on the premises occu-



picked by the defendants, and the building and stock were damaged, and witness received no further communication from defendants as to purchasing the property. In December, 1905, L. M. Luyt said that he was going to Cape Town to see about the insurance money, and until that time they had ignored him. Before leaving for Cape Town, L. M. Luyt asked him if he would leave the matter of the option in abeyance. Witness agreed to do so. When the proposals were made in March and April, 1905, the defendants mentioned an extra portion of ground, and the £1,000 named by witness was to include both the leased portion and this extra portion. There was certain correspondence in April, 1906, in regard to the proposed sale, and a meeting took place. L. M. Luyt asked him in January, 1906, to drop £90 sterling, which would be due as rent in April. Eventually Luyt said that witness was putting obstacles in his way, and that he would drop the whole thing. In April a written proposal was received from Luyt Brothers "as per agreement of sale." Witness instituted an action for rent in the Magistrate's Court, and an exception taken by the defendants that the case was beyond his jurisdiction, there being a dispute as to ownership of ground, was upheld.

Cross-examined: Witness would not deny that the meeting at which the arrangement as to terms of purchase was finally come to may have taken place in March. He had looked upon the whole matter as a bogus transaction. By that he meant that he was sitting there on the farm himself and it was a little pastime. He had never agreed with the defendants that they should take over part of the bond; he had always told the defendants that his terms were cash. It was not true that shortly after the fire, R. M. Luyt called and told him that he was unable to carry out the agreement because of the loss he had sustained by the fire. He did not inform the Luyts at the sale of the old zinc that he was willing to let the matter remain in abeyance. Witness instructed Mr. Botes to watch his interests in connection with the lease and the damage. Mr. Botes had not paid over the sum of £409, as far as he knew. Mr. Botes had helped him off and on from time to time, and he might have paid the money to his (witness's) credit. A verbal offer was made by Mr. Botes in January last to the defendants to rebuild the property out of the money. Witness took up the attitude that he was entitled to retain the sum of £409 until the property was rebuilt or good security was given for its due restoration. Botes had held his power of attorney since 1904.

Christian D. Mocke, of Loxton, formerly of Fraserburg district, said that during the month of January, this year, L. M. Luyt had told him that the

purchase of the farm from De Vries was "off."

Antonie Johannes Botes, attorney, described the work which he had to do in the collection of the defendant's claim against the insurance company. The amount paid over by Maxwell and Earp from the insurance company was £763 1s. 5d. Of this sum £409 7s. 2d. was paid to witness's credit in the Standard Bank, Cape Town. Witness had not actually paid over the money to De Vries. Witness also spoke to an arrangement made between himself and De Vries on the 9th January last in consequence of which a note was drawn up setting out the conditions under which witness could sell to defendants the portion of the farm in question. L. M. Luyt called, and a lot of argument ensued, and finally Luyt broke off the negotiations entirely, and said that he would have nothing more to do with the matter. There was a good deal of discussion about the claim, as the insurance company disputed the defendants' insurable interest in the building.

Cross-examined: Defendants had known all along that witness had also been acting for De Vries. He noticed later on that the interests of De Vries and Luyt Brothers conflicted. He denied that he had charged Luyt Brothers with the expenses of trips to Cape Town which he had made on behalf of De Vries. Witness charged £10 for each trip to Cape Town that he made in the interests of Luyt Brothers. Witness had always taken up the position that Luyt could have the money which he held if they would give good security for the re-erection of the building, or he would be prepared to pay out the money as the work proceeded. It was the duty of Luyt under the lease to restore the buildings to their position at the time of letting. He admitted that he had made certain payments, amounting to within £100, on behalf of De Vries out of the funds of £409 odd received to reinstate the building.

Mr. Burton closed his case, subject to the right to call, if necessary, Mr. Richardson, as representing the insurance company.

Louwrens Marthinus Luyt (one of the defendants) said that he and his brother had saved money with a view of buying a farm where they could settle down. In the lease with the plaintiff a right of pre-emption was granted. They insured the buildings for £650, and the merchandise and furniture for £650. Towards the end of the first year they were so satisfied with the trading that they had done that they wanted to buy the property. They had negotiations in March, 1905, as to the purchase of the property. At the first interview there was a difference of about £400 as to the purchase price between plaintiff and witness. At the second interview arranged with the plaintiff that he

should take over the ground they had leased, and also a portion of ground to the north, purchase price to be raised by £600 on bond and £400 in cash. Witness suffered a loss of about £500 by the fire. It was not true that witness ignored the plaintiff from the fire until the time when he left for Cape Town to obtain the insurance money. He made an arrangement with the plaintiff some little time after the fire to wait until he (witness) had arranged matters in connection with the insurance. Plaintiff promised to wait and help him. De Vries had allowed him to have the diagram of the farm for the purpose of raising a loan towards the purchase price. Witness did not learn until December last that Botes was acting on behalf of De Vries in the matter. He also spoke to the efforts which were made to recover the insurance money, and denied that there was any call upon Botes to make the journeys to town on his behalf. He denied that in January, 1906, he broke off the agreement, and said that difficulties about a survey were raised by plaintiff. Witness had been willing to allow Botes to deduct the amount due to him from the sum of £409 which he (Botes) had in his hands. He had never authorised Botes to pay over the money to De Vries. No offer had been made by plaintiff to witness to allow him to draw out the money if he would provide sureties. He had never abandoned the sale, and he had never taken up the position that he could hold the money for De Vries. In the fire claim, in referring to the property, he used the words, "which belongs to Mr. De Vries, for which we are responsible to him." He did not understand the terms properly at the time.

Cross-examined: When witness entered into the agreement to purchase the farm in March, 1905, he had £555 in his safe. He had not got a banking account. The money was in notes and gold. He was not present when the fire took place in May, 1906. The safe had been screwed open. He had not recovered the money. At that time he owed Maxwell and Earp over £500, and he owed Kramer about £100. He had other creditors, amounting to about £50. Even with these liabilities, he had intended to pay £400 in cash towards the purchase price of the farm.

Re-examined: Witness had about £40 in the hands of Mr. Dyason at the time of the fire. In the previous December he had about £600 worth of stock. He considered that at the time of the transaction he was worth about £800 over and above his debts. Witness had suffered £300 damages by reason of De Vries' failure to give him transfer, and his detention of the money so as to prevent him from re-building the premises.

Petrus M. Luyt, one of the defendants in the case, stated he had been carrying on partnership with his brother. Formerly he carried on business at Britstown, and he came to the farm Bloemfontein with a considerable sum of money. Witness and his brother set aside £400 to purchase property, and they took over the farm. In March, 1905, his brother entered into negotiations with Mr. De Vries to purchase the property. Twice in March his brother went to see De Vries, and when witness heard the price he was satisfied with the partnership arrangement. In April he went with his brother to De Vries to make some condition about the agreement. In consequence of what his brother told him, he went to see De Vries, and asked would witness be taken in also as buyer. The conditions of the purchase were discussed and the price was fixed at £1,000, £400 to be paid in cash, and £600 to be arranged on a bond. Witness's brother said at that time he could not pay the surveying expenses. Mr. De Vries wanted a servitude on the dam, and offered to pay a shilling a year, but nothing definite as far as he could remember was arranged as to this. De Vries said it was not necessary to draw up a koop-brief, as his word was his bond. At the time of the fire there was £555 in the safe. The time of payment was allowed to stand over by Mr. De Vries, pending the recovery of the money. The documents were drawn up by Botes in English, and more or less he told witness what they contained. The matter was left in Botes's hands. During that time witness did not know that Botes was protecting the interest of De Vries in the matter. De Vries never threatened an action if witness did not proceed with the rebuilding of the property.

Cross-examined by Mr. Burton: Witness stated in an affidavit that he believed the money had been burnt by the fire, but now he was under the impression that it had been taken away.

Further evidence having been given for the defence, and counsel heard in argument,

Maasdorp, J.: In this case the plaintiff, De Vries, claims from the defendant the sum of £90 for rent due under a lease of certain land and house for the period running from the 1st April, 1905, to the 1st April, 1906. The lease actually commenced on the 1st April, 1904, and for the first year the rent was paid. The defendant now pleads no rent is due for the second year, because in March and April, 1905, he actually purchased this property from the plaintiff, and consequently the lease lapsed and all liabilities and obligations between the parties will rest upon the terms of the sale. The burden of proving that the sale was concluded rests upon the defendants in this case,

and they have attempted to prove it by their own evidence. In considering the parole evidence given we find that the only witnesses supporting the defendant's case are the defendants themselves. On the other hand, we have the evidence also of two interested parties, the two plaintiffs, but they are supported to some extent by other witnesses. It is alleged on the part of the defendants that an agreement of sale was entered into in March, 1905. This is denied by the plaintiff, De Vries, and the only parties that are said to have been present when this transaction took place were the two defendants and De Vries. Here there is a direct conflict of evidence, and if upon their evidence the Court had any difficulty in deciding between the parties; the defendants, upon whom rests the burden of proof must fail. But there is evidence of a subsequent transaction between the parties, which is of very great importance. That is with reference to what took place in January, 1906. Then they have an interview, at which were present only one of the defendants, Louwrens, and the two plaintiffs. The two plaintiffs state that Louwrens met them on that occasion in order to carry through and conclude certain negotiations which had previously taken place, and to complete a contract of sale. The plaintiffs say during that discussion De Vries claimed that before anything else should be done he should receive his rent for the past year, and then the matter of the sale could be considered, and upon that difficulty being raised with another difficulty of the survey expenses, Louwrens broke off all further negotiations, and said he would have nothing further to do with the transaction. Here, as I say, again you have only the interested parties, but as to the nature of this transaction we have a witness with whom Louwrens had a conversation both before and after the meeting. Before the meeting he informed his neighbour, Mocke, that he had been on his way to buy this farm, and on his return he said the matter was off, and that no sale had taken place. I see no reason to disbelieve the evidence of Mr. Mocke in this case, and it is, therefore, to some extent a corroboration of the evidence of the plaintiff. But, now there is some light thrown on the matter by another circumstance, and that is as to what happened according to the evidence of Mr. Earp at the meeting in Cape Town. Mr. Earp says undoubtedly the question was raised as to whether De Vries was not entitled to the insurance money. There was a dispute about the money about to be paid out by the insurance company, and it was said at the time that the difference might be put right upon their return home. What could that difference mean if there had been a sale? There could

have been no difference, because if there was a sale it was merely a matter of receiving the money and paying the money over to Mr. De Vries if the sale had been completed, and I think the difference was the difference Mr. Botes speaks of as to which of the two was to receive the insurance money, and the right to the insurance money could only be an open question if the sale had not taken place. The only persons entitled to the money if the sale had gone through were the two defendants. I regard Mr. Botes's evidence as an important corroboration of the position taken up by the plaintiff, De Vries, that there was a dispute as to the rights of the parties to the insurance money under the terms of their agreement of lease without reference to any sale. The parole evidence in this case is in favour of the plaintiff, but when we refer to the documents I think the omission of certain features in these documents is conclusive proof to my mind that no sale ever took place. As to the insurable interest, I must say it is to some extent a matter of obscurity which every layman could not grasp at once, but they must have known that the insurance office wanted to know what right they had to these houses. I think the direct answer would be if a sale had taken place, that the property was now the property of the defendants, because of a sale, and that the information which the insurance office would have obtained would have been that at the time when the policy was executed there was an insurable interest under the lease, and at the time when the fire took place there was an insurable interest of an extended character, and that the interest then was that they were actual owners of the property. Mr. Botes rendered certain services, and gave certain information. He knew about the lease and the circumstances of the parties, and it is quite clear at that time he had no interest which would influence him either in favour of De Vries or the defendant, whatever he might have now, and at that time he set about giving the necessary information. He, as an attorney, certainly would know the nature of an insurable interest, and in the information supplied by him to the Insurance Company he makes no mention of the sale. I come to the conclusion that no sale ever took place. There were negotiations which never came to a contract. Under the circumstances the plaintiff is entitled to £90 as rent, with costs. As to the case of Botes, he claims the sum of £35 as remuneration for work done. It is admitted he is entitled to some remuneration, but it is said he claims more than he ought to, because in addition to the 2½ per cent. on the moneys he was collecting from the insurance offices, he claims for two trips to Cape Town. I think, however, he is entitled to his

£35. As to the £409, I think it was paid over to De Vries with the consent of the defendants, and Botes consequently is no longer responsible for it. There will be judgment for De Vries in the sum of £90, with costs, and for Botes in the sum of £35, with costs, the plaintiffs declared necessary witnesses.

[Plaintiffs' Attorneys: Walker and Jacobsohn. Defendants' Attorneys: Tredgold, McIntyre and Bisset.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* SYRKIN. } 1906.  
Nov. 6th.

Mr. Benjamin moved for an interdict restraining Mondel Weinberg and Reuben Weinberg, trading as Weinberg Brothers, from using and alienating certain stock-in-trade pledged to the petitioner. Petitioner advanced Weinberg Brothers £300 on the security of certain machinery, stock-in-trade, and outstanding debts; the outstanding debts had not been made over, and the stock-in-trade was in a building leased by the petitioner, who had left respondents in possession of the premises during the day-time.

A rule *nisi* was granted, returnable on Thursday (November 8th), calling on the respondent to show cause why he should not be interdicted from collecting any of the outstanding debts pledged to the applicant, or for using any stock-in-trade so pledged by the applicant on 1st October, 1906, the rule to act as an interim interdict and to be served forthwith.

## FEIN AND COHEN V. COLONIAL GOVERNMENT.

Dr. Greer asked leave to mention a matter of urgency in the case of Jack Fein and Rebecca Cohen, who had been deported by the respondents under the Immigration Laws of the Colony. Counsel said notice had been given to the Attorney-General's office.

[Hopley, J.: Is it a case of undesirables wanting to land?]

Mr. Howel Jones: I am not ready to go on with the case. The affidavits have only just been put into my hands. There can be no urgency about the matter, as the applicants are on the high seas, and the order of the Court could have no effect.

Dr. Greer: There is a very important principle involved in this matter. Persons domiciled in this country, one for six years and the other for seven years,

were arrested yesterday morning, taken before the Magistrate, refused the advantage of any professional advice, and the inquiry was conducted in secret.

[Hopley, J.: But all these allegations may possibly have an answer. What order do you want?]

Dr. Greer: In the first place, the authorities had notice of this motion before these people were deported.

[Hopley, J.: Supposing they did wrong, what is the practical thing you have before the Court?]

Dr. Greer: We did not know they had been taken out of the country. It may be gross contempt of Court on the part of the officials.

[Hopley, J.: Meantime, is there any urgency in the matter?]

Dr. Greer: I would ask that it be set down for Friday.

[Hopley, J.: Calling on them to do what?]

Dr. Greer: To restore these people.

[Hopley, J.: We have not got a fleet to follow them.]

Dr. Greer: Here are persons—

[Hopley, J.: Where are the persons?]

Dr. Greer: They are not here at present, but they have been illegally seized and sent away, while warning had been sent not to do so. Is it to be said that the rights of citizens are to be done away with in this manner?

[Hopley, J.: Of course this is not a political meeting. I want to know what good I can do to meet you. We do not own the seas beyond the three miles limit. Where are we now if the people are on the high seas? I do not see the urgency in the matter.]

Dr. Greer: I would like to ask that the notice of motion be allowed to stand, calling on the respondents to show cause why an order should not issue from the Court for the release and discharge from custody of the applicants.

[Hopley, J.: Supposing they were to confess judgment, and say, let them be released?]

Dr. Greer: They are in custody on board.

[Hopley, J.: Seeing the names, I must confess I am not enthusiastic about getting them back into this country.]

Dr. Greer: It is rather the principle one wants to assert. I take it that the persons who are responsible would see that these people are returned if the Court were to make the order.

[Hopley, J.: Put it down in the ordinary course. It is not a matter of urgency.]

Dr. Greer: Speaking from memory, there was a similar application in Pretoria, and the Court ordered the officials who were concerned in the removal to have the people returned to the jurisdiction of the Court, and I think in that case there was a punishment inflicted for contempt of Court.

[Hopley, J.: It would be just as well to produce that case. If Mr. Jones



is correct that these people are on the high seas, I do not see the urgency.]

Dr. Greer: I would ask that the notice of motion stand.

Mr. Jones: I have no objection to this application being heard. I may say that the Government has a complete answer to the allegations made by my learned friend. The only objection I have is that there is no urgency in the matter at all.

[Hopley, J.: As there is really no urgency, and Mr. Jones complains that he is not ready, the matter can stand over until it can be properly heard and determined. Put it down for Thursday.]

Dr. Greer said that he might explain his position by stating that when he came into court he was under the impression it was a matter of urgency.

#### LEPORT V. LEPORT.

Mr. Sutton, for the plaintiff, said that this case came before the Chief Justice on the 16th October last, and as there was an informality in the service, his lordship took the evidence *de bene esse*, and ordered a further process to be served, which had now been done. The action was for restitution of conjugal rights.

Hopley, J., said the matter had better be postponed *sine die*, to be heard by the Chief Justice.

#### VAN DER MERWE V. KRAMER AND ANOTHER.

This was an action for the return of a cart, harness, and mules, or their value, £75, and £30 damages for wrongful seizure by the second defendant, at the instance of the first defendant.

The declaration set out that the plaintiff resided in the division of Sutherland, the first defendant was a merchant of Cape Town, and the second defendant was sued in his capacity as Deputy Sheriff for the district of Sutherland. On the 12th July the first defendant obtained judgment in the Supreme Court against one Moritz Braude for £73 15s. 6d., with costs. About the 17th July the first defendant took out a writ in execution of a judgment, and the second defendant proceeded to levy execution, and unlawfully seized a cart, harness, and mules, the property of the plaintiff. The plaintiff demanded restoration, but the second defendant, acting on the authority of the first defendant, refused to restore the same. Plaintiff had sustained damages in the sum of £30, and claimed the return of the cart, harness, and mules, or their value, £75. The plea set out that the defendant was not aware of the place of residence of the plaintiff. He denied that the attachment by the second defendant was un-

lawful, and that the cart, harness, and mules were the property of the plaintiff. They were the property of Braude.

Mr. Gardiner (with him Mr. J. E. R. de Villiers) was for the plaintiff, and Mr. Upington (with him Mr. Lewis) was for the first defendant, and the second defendant did not plead.

Carl A. van der Merwe, plaintiff, stated he had known Moritz Braude for some time, and had dealings with him in feathers. In September last year he met Braude, who asked witness to lend £50 on interest. At that time witness was surety to the Standard Bank for £100. Witness lent him the £50, and Braude gave his cart and mules as security. Braude failed to settle the debt on the day fixed, and asked an extension. Witness insisted on a settlement, and Braude said he must take the cart and mules according to the contract. Subsequently witness hired the cart and harness to Braude. If the Sheriff had not seized the cart, harness, and mules he would have allowed Braude to continue hiring them.

Jacobus Nel Louw, in the employment of the plaintiff, stated that he saw Braude's cart and mules in the yard of the plaintiff.

Moritz Braude, a hawker, of Sutherland, stated that he gave the plaintiff the cart and mules as security for the £50. Witness subsequently hired the mules from the plaintiff. He did not enter into a pledge with the plaintiff at the time Cramer was pressing him. He never had receipts for the hire of the cart and mules.

Mr. Gardiner closed his case.

Jacobus A. van der Merwe, brother of the plaintiff, stated that he saw Braude hand the mules over to the plaintiff.

Mr. Upington said he did not know of a single case where such a contract had been upheld. Over and over again attempts had been made to set up a contract of this description. There was no distinction in law between the position of a man who subsequently went insolvent on a transaction of this kind and a man who was attempting to evade the claim of a judgment creditor. On the face of it, it was a most suspicious transaction. Had the Court received clear and convincing proof of the *bona fides*? Who were the persons who produced that proof? Everyone of them were interested parties. If agreements of this kind could be entered into to the detriment of a third party seeking justice, then a most inequitable state of affairs would exist.

Without calling upon Mr. Gardiner,

Hopley, J.: In this case the plaintiff claims mules, a cart, and harness, which he says were his property, and which he has been deprived of by the defendant, acting through the second defendant, the Deputy Sheriff in the district of Sutherland. This property used to be-



long to a man called Braude, who is a witness in this case. He was a trader in the Sutherland district, a hawker, and a purchaser of feathers, and no doubt other produce. He has been there a good many years, and he has got to know the plaintiff and his family. They seem to be substantial farmers in the district. He has bought not only the plaintiff's feathers, but those of his brother, and of the rest of the family. They have accommodated him with money from time to time, and they have had considerable dealings in a small way with him. It would appear before September, 1905, Mr. Kramer, the first defendant had a claim, and I presume it was for goods supplied. He is a merchant in this town, and the claim was for a considerable sum of money against Braude. He filed a declaration, and sued him on the 19th September. It is in evidence they had actually written for the pleadings to be filed on pain of bar, and one does not know on the 19th September if this news got to Braude or not. He was at that time up at Sutherland, but he said—I think, under a misapprehension—he was in Cape Town. He clearly explained that he had not reached Cape Town until ten days after that. On the 19th September he probably wanted money. He certainly wanted to plead to this action, and I understand on that date he entered into the transaction which it is thought to impeach by the defence. The transaction was reduced to writing by an attorney of this Court, and witnessed by a clerk in his office. It purports to be an agreement to sell all these goods through Braude to the plaintiff for the sum of £50, and Braude acknowledges by the document to have received the sum of £50, and then there is the further agreement: "If Braude repay to Van der Merwe the sum of £50 before, or not later, than the 19th November next Van der Merwe shall give back the aforesaid goods. If not they will be regarded as his lawful property." Of course, this is a sort of transaction which, as Mr. Upington rightly says, is always narrowly scrutinised and looked at with a suspicious eye by anyone who has got to look at it. It clearly was only up to the 19th November, a document which could have been construed as a pledge for the repayment of £50 in the course of two months. But the transaction does not stop there. Before I go further, I am asked to believe that the whole thing was a sham and was invented by Braude simply for the purpose of defeating Mr. Kramer. I cannot hold anything of the sort was the case. It is true that Mr. Kramer had summoned Braude, and he (Braude) was by no means on his last legs. The mere fact that he came to Cape Town and got Kramer to withdraw the proceedings

shows he was not at his wit's ends, and ever since then he has been carrying on business in a fairly considerable way, and seems to have no difficulty in getting bills discounted. What really took place, in my opinion, was that he wanted £50, and he had to get it somewhere, and I believe the money was paid over in Louw's office to him in cash, as he acknowledges in this document. One cannot suppose these substantial farmers are lowering themselves to this extent simply to defeat the claims of a man they have never seen. I believe they did give the £50, and I think this document given to Mr. Van der Merwe is no more than a pledge for the mules, cart, and harness. His Lordship, after reviewing the evidence, said there was nothing in the transaction which made it impossible for the Court to find it was a genuine one, and there would be judgment for the plaintiff, the defendant to return the cart, mules, and harness, or £50, with and £3 as damages and costs, and costs of the interdict proceedings to follow the result.

[Plaintiff's Attorneys: Michau and De Villiers. Defendants' Attorneys: Perl and Kramer.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

LE PORT V. LE PORT. { 1906.  
Nov. 7th.

This was an action for restitution of conjugal rights brought by Catharina Le Port, who resides at Oudtshoorn, against her husband, Hendrik Le Port, whose whereabouts are unknown.

Mr. Sutton (for plaintiff) said that an informality which had occurred in the service originally had been cured, and that due service had now been given.

Evidence had previously been taken.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th January, failing which to show cause on the 1st February why a decree of divorce should not be granted, and plaintiff declared entitled to custody of the child, same service as directed in regard to service of citation.

RUMSEY V. RUMSEY.

This was an action brought by Constance E. Rumsey, lately of Johannesburg, against her husband, Raymond Lenox Rumsey, of Graaff-Reinet, for restitution of conjugal rights, failing which a decree of divorce. Defendant claimed in reconvention an order of restitution, or, in the alternative, a divorce.

Mr. P. S. T. Jones appeared for the defendant (plaintiff in reconvention), and informed the Court that the plaintiff in convention had withdrawn from the action.

Formal evidence having been given, a decree of restitution was granted, plaintiff in convention to return to defendant on or before the 30th November, failing which, to show cause on the 12th December why a decree of divorce should not be granted, and plaintiff be declared to have forfeited benefits under the ante-nuptial contract, personal service to be effected.

DUNDAS V. BEUKES.

This was an action brought by Henry Dundas, of Christiana, Transvaal, against Jacobus Beukes, A. son, late of Rietfontein, British Bechuanaland for transfer of certain farm.

Mr. M. Bisset (for plaintiff) said that defendant had been sued by edictal citation, and had been duly barred.

Henry Dundas (the plaintiff) said that he bought the farm Kyky on the Nossop River from defendant in 1894, while he was trading, and paid for it in kind, the purchase price being £200. Defendant had failed to give him transfer of the farm. The present proceedings had been delayed for various reasons. He believed defendant was at present in German South-west Africa. Witness had paid over £200 to the Government on account of quitrent arrears, stamps, etc., and a case commenced by the Government against Beukes in respect of the farm.

Order granted as prayed, with costs.

BELL V. ESTATE DOUGLASS. } 1906.  
Nov. 7th.  
" 12th.

Declaration — Exceptions — Non-joinder — Partners.

*The declaration alleged that B. and C. were partners in a joint venture, that under a written agreement D. acquired a share in the joint venture, that B. disbursed certain amounts on behalf of C. and D. and claimed on the death*

*of D. that his executors should pay to B. one-third share of such disbursements.*

*Held, that as the death of D. put an end to the partnership, the executors of D. were entitled to claim a final settlement of all partnership accounts, and that, as no reason appeared on the face of the declaration why C. was not joined either as plaintiff or defendant, the suit at the instance of B. alone should be stayed until C. was joined.*

This was an argument upon certain exceptions taken by the defendants in the action, the executors of the estate of the late Hon. Arthur Douglas (a former Commissioner of Works) to the declaration of the plaintiff.

Plaintiff in his declaration, said in paragraphs 2 and 3:

2. Prior to September, 1896, the plaintiff, and one John Linden, Bradfield, acquired certain rights to water and a site for electric power works on the farm Glen Grey Reserve, on the White Kei River, near Queenstown aforesaid, and had proceeded to establish works, construct buildings and acquire rights in furtherance of a scheme (known as the Glen Grey Power Works), for supplying electric lighting and energy and otherwise promoting industrial enterprise in the vicinity; and a sum exceeding £2,000 had been expended on the undertaking.

3. Thereafter the said Douglass purchased a third share in the said venture or undertaking, and the further prosecution thereof for £780 under an agreement dated 3rd September, 1896, to which plaintiff craves leave to refer at the trial. The said purchase included a share in a certain corn mill, the interest in which belonged to plaintiff alone prior to the said purchase by the said Douglass.

Plaintiff went on to say that, as manager of the undertaking, he personally paid out certain sums. In January, 1899, Mr. Douglass wished to have an account of expenses, and thereafter plaintiff rendered an account, and one H. O. Lloyd, authorised by power of attorney from Mr. Douglass, duly audited the accounts, which showed a balance of £610, excess of the amount advanced by plaintiff on behalf of the said Douglass over the sums paid in by the latter. This amount plaintiff claimed. Plaintiff further said that from September, 1896, to August, 1899, he acted as manager, on behalf of the said Douglass, Bradfield, and himself, and thought £1000 was a fair and reasonable remuneration for his services. The said Douglass had been, and the defendants

now were, liable to him for one-third portion of the said sum, viz., £333 6s. 8d., which amount also plaintiff claimed.

Mr. Schreiner, K.C. (with him Mr. Gardiner), was for the excipients; Mr. McGregor was for respondent (plaintiff in the action).

Mr. Schreiner said the defendants took the exception that, as a written agreement was referred to in the declaration and not annexed thereto, the declaration was vague and embarrassing; and they took the further exception that the transaction being a partnership one, the other partners should have been joined. In support of the first exception, he quoted *Houlder Bros. v. Colonial Government* (22 S.C., 211). The defendants were embarrassed by not knowing the terms of the written agreement. In support of the second exception counsel quoted *Picnaar v. Rattray* (12 S.C., 38). Dicey's "Parties to Actions," Lindley on Partnership (page 462). The case was a partnership account one, and all the partners should be joined.

Mr. McGregor said he should leave the question of practice raised in the first exception to the Court, but pointed out the case quoted was distinguishable from the present one. The document was not so material that the plaintiff was obliged to annex it to his declaration. He quoted Odgers on Pleading. As to the second exception, the plaintiff's claim was not based on partnership but on specific allegations *dehors* the partnership, and the plaintiff had to stand or fall by his declaration. This exception was really a plea in abatement, and, in such a case, the defendants should move to have Bradfield joined as a partner. He quoted *French v. Stirring* (2 C.B.N.S., 357) and also Lindley on Partnership.

Mr. Schreiner, in reply, said that a partner could only be sued alone if the cause of action was so distinct from the partnership as not to involve the consideration of partnership accounts. No distinction had been laid down between English and Roman-Dutch Law in such a case as this, and it was clear that in English law all the partners would have to be joined.

[De Villiers, C.J.: But cannot a partner be sued alone, as in this case, for his *pro rata* share of a partnership debt?]

That point has not been decided there, but it is just and equitable that the English rule should prevail.

[De Villiers, C.J.: I don't see what prejudice one partner would suffer, under such circumstances, if sued alone.]

The other partner may in a separate action avail himself of a defence of which the defendants may not have known, and it may be a good defence.

[De Villiers, C.J.: I can understand

that in a final settlement of accounts much may be said for the English rule.]

*Cur. Adv. Vult.*

Mr. McGregor applied for the case to be set down for hearing this term, on the ground that the plaintiff was about to proceed to East Africa.

After hearing Mr. Schreiner, the Chief Justice said that he would set down the case for hearing after delivering judgment on the exceptions.

*Postea* (November 12th).

De Villiers, C.J.: In this case the declaration alleges that prior to September, 1896, the plaintiff and one John Linden Bradfield acquired certain rights to water and a site for electric power works on the farm Glen Grey Reserve, on the White Kei River, near Queen's Town aforesaid, and had proceeded to establish works, construct buildings, and acquire rights in furtherance of a scheme (known as the Glen Grey Power Works) for supplying electric lighting and energy, and otherwise promoting industrial enterprise in the vicinity; and a sum exceeding £2,000 had been expended on the undertaking. Thereafter the said Douglass purchased a third share in the said venture or undertaking, and the further prosecution thereof for £780, under an agreement dated 3rd September, 1896, to which plaintiff craves leave to refer at the trial. Thereafter the said undertaking was proceeded with for account, among others, of the said Douglass, and rights were acquired, works constructed, and moneys duly expended for the above purposes, and in furtherance of the said undertaking and the prosecution thereof. There are further allegations which need not be referred to. The final allegation is that during a certain period mentioned in the declaration the plaintiff acted as manager of the undertaking on behalf of the said Douglass, the said Bradfield and himself, and expended much time and labour thereon, and that the sum of £1,000 is a fair and reasonable remuneration, and that the said Douglass and the defendants (the executors of his estate) are now liable to pay one-third share. To this declaration the defendants have excepted as follows: "(1) That no copy of the agreement dated 3rd September, 1896, referred to in paragraph 3 of the declaration, was annexed thereto, which document would disclose the nature of the undertaking and the contract between plaintiff and the said Douglass and one J. L. Bradfield." I may at once dispose of this exception by saying that, in my opinion, it is not a valid exception. If the allegation as to Douglass purchasing a third share of the undertaking had been one relied upon by the plaintiff in this case, as material, then, no doubt, it would have been necessary for the plaintiff to set out the agree-

ment, which is mentioned incidentally as an unimportant part of the transaction, and it does not appear to me that anything depends upon the terms of that agreement. The case of *Houlder Bros. v. Colonial Government* (22 S.C.R., 211) has been relied upon, but that case was very different. In that case the defendant relied upon the construction of a particular agreement as his defence to the action, and the Court, on exception, held that it was necessary that that agreement should be set out, seeing that it formed a material portion of the defendant's plea. It does not appear from the declaration in the present case that the agreement mentioned here is a material part of the case, and, therefore, the first exception, in my opinion, should not be allowed. Then the second exception is as follows: "The said Bradfield was a partner with the plaintiff and the late Arthur Douglass in the undertaking, the subject of this action, which partnership is not alleged in the declaration to be terminated, yet the said Bradfield has not been joined as a party to this action." In my opinion this is a much more substantial exception than the first. It is clear from the declaration itself that a partnership did exist between the three—Bradford, plaintiff, and Douglass. Douglass has died. The consequence is that there is a dissolution, the plaintiff alone sues in respect of payments made by him on behalf of the partnership, and as it appears to me that there had been a practical dissolution of the partnership by the death of Douglass, it was necessary that all the accounts of the partnership should be entered into, and if one of the partners sues another for payment, it is in the interests of all concerned that all the partners should be before the Court for the purpose of stating a final account between them. Without deciding, however, what the practice of the Court would be under circumstances where there has been no dissolution of partnership, I certainly am of opinion that where there is a death of one of the partners and a dissolution of partnership, as a matter of practice it is necessary where all the partners are within the jurisdiction that they should all be before the Court for the purpose of a final settlement of all the accounts between the parties. It appears to me, therefore, that the last exception is a good one, and that the action must be stayed until Bradfield is joined either as co-plaintiff or co-defendant in this suit. As to the costs of this exception, I have arrived at the conclusion which I have stated merely because, *prima facie*, it appeared to me that it is necessary that the parties should all be joined. It is possible, however, that at the trial it may appear that the joinder is not necessary, that the account could be fairly stated be-

tween the plaintiff and the executors of Douglass without drawing Bradfield into the case, and it may well appear, therefore, at the final result that costs should not be allowed to the defendant. The Court will, therefore, allow the second exception, and stay further proceedings until Bradfield is joined either as co-plaintiff or co-defendant, but the costs of the exception will stand over.

Mr. McGregor (for plaintiff in the action) said that, pursuant to the judgment on the second exception, he would ask now that the plaintiff have leave to amend the summons and join Bradfield.

[De Villiers, C.J.: As co-plaintiff or co-defendant?]

Mr. McGregor: That I am unable to say.

[De Villiers, C.J.: You can have your choice.]

Mr. McGregor said he thought that if plaintiff had leave to amend the summons by joining Bradfield as a co-defendant that would be sufficient.

[De Villiers, C.J.: You can get a general leave to join him as co-plaintiff or co-defendant.]

[Excipient's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

BURCHELL V. ESTATE } 1906.  
BURCHELL. } Nov. 7th.

This was an application for leave to an executor to purge his default, and for an order on a trust company in Port Elizabeth to pay £350 out of the estate to defend the action.

The application arose out of a will which had been filed. The question was as to whether the will was formally executed. One of the applicants wished the will to be set aside. Mrs. Watson was one of the executors, and was prepared to admit that the will was not formally executed as required by law.

The plaintiff's declaration set out that James E. L. Burchell, attained full age, and was the eldest son of the deceased testator. The defendants were appointed executors under a certain document purporting to be will of the testator in April, 1889. The applicant had been administering the will, with Mrs. Watson, for 17 years. Now the present plaintiff, one of the respondents, had brought the action to have the will set aside on the ground of improper execution. Applicant now applied for leave to purge the default. There were a great many witnesses at Johannesburg and other distant places.



Maasdorp, J.: In this case the applicant is defendant in an action as executor in the estate. He is sued as executor, and he has to consider whether there is a good defence to the action. He has to act upon his own good judgment and upon advice which he received from his legal advisers, and if upon that he is of opinion that he has a good defence, he is entitled to defend, and he is entitled to use the funds of the estate for the purpose of defence. If, ultimately, it should appear that he has taken up an untenable position, and that he is defending an action where he ought to have known there was no defence, then, when that stage of the case arrives, the Court will decide whether the funds he has used out of the estate shall be paid out of his own pocket. It is quite true in certain cases an executor, as a defendant, may be in such a position that the Court may conclude that ultimately such an order would be futile, because he is a man of straw. The Court should protect the estate in some way, but there is no such position in this case. There is no attempt to show he is a man of straw. As executor, he is entitled to the funds of the estate, together with the co-executors. For some reason or other the co-executor is of opinion that there is no defence, and the applicant, in this case, has alleged, through his counsel, that there is a good ground of defence. Now, the applicant has to consider whether, after inquiry, he cannot discover that the defence would be untenable, and in that case, of course, he would find it to his

One L. had received from the German Government 41 oxen and two wagons, having subscribed the following undertaking: "I am prepared to buy from the Government 40 oxen and two wagons to ride transport with the same for the Government. I am prepared to pay the purchase price to the Government. This purchase price, which is to be exactly computed by the Controller of the Dépôt at K., I bind myself to pay within two years in this way, that each time one-half at least of the transport I earn shall be retained from me in liquidation." With the consent of the German authorities, L. crossed the border on the road to Uppington to ride transport from thence to a certain place in German territory. He carried with him a letter addressed to certain agents of the German Government, stating, *inter alia*, that the wagons, &c., were coming back with loads and still remained the property of



that Government. When he had crossed into the Colony and was on his way to U., he met plaintiff, to whom he showed this letter, but who, nevertheless, purchased the oxen, &c., from L. at about half their real value, in spite of the warnings of others. The cattle were afterwards seized by the defendants.

Held in an action for spoliation against them, that the contract between the German Government and L. not having been a completed contract of sale and no property in the oxen, &c., having passed to L., he could not pass property in them to plaintiff, more especially as the latter did not appear to have been a bona fide purchaser.

This was an action brought by Hermann Hirschhorn, a speculator, of Geelboschdraai, division of Gordonia, against Ernest Schoder and Jan Willem van Copenhagen, attorneys and auctioneers, of Upington, for the restoration of certain cattle, or payment of £455, their value, and for £420, damages for alleged wrongful seizure and detention of the said cattle.

Plaintiff, in his declaration, said that on or about the 13th January, 1906, and at Upington, defendants, or their servants, acting under their authority, wrongfully and unlawfully deprived plaintiff of the possession of certain 35 oxen, the lawful property of the plaintiff, and at the time in his lawful and peaceful possession, and in spite of the plaintiff's protest, the defendants had refused to restore the said cattle to the plaintiff, and still detained the same. Wherefore plaintiff claimed (a) the restoration of the said cattle, or payment of the sum of £455, their value; (b) the sum of £420 as damages sustained by the plaintiff by reason of the wrongful and unlawful seizure and detention of the said cattle as aforesaid; (c) interest *a tempore morae*; (d) alternative relief, and (e) costs of the suit.

Defendants, in their plea, said that plaintiff had no fixed abode. They were and had been at all times material to this suit the duly authorised agents at Upington of the Imperial German Government. In or about October, 1905, one Pieter Johannes Louw, a transport rider, obtained certain 40 oxen, with wagon and gear, from the said Government, under an agreement providing that he should pay the purchase price within two years, that he should during that period ride transport for the Government with

them, and the said Government should, during that period, deduct from time to time in discharge of the purchase price at least half of the freight earned by him; 35 of the said oxen, or oxen which he had been allowed to substitute for some of the 35, with the wagons and gear were brought by the said Louw to Upington, and on or about the 10th January, 1906, the said Louw, acting wrongfully and unlawfully, and in breach of the agreement, purported to enter into an agreement of sale of the said oxen to the plaintiff. Defendants went on to allege that when plaintiff took delivery of the oxen, he knew that the same were claimed as being the property of the German Government, and that he did not act *bona fide* in and arrest the said transaction. They further said that the transaction between plaintiff and Louw was entered into in order to defraud the Government, and that plaintiff was not entitled to any benefits arising from the fraud. Defendants admitted that on or about the 12th January, acting for the German Government, they took possession of certain oxen then running on the Upington commonage, but said that six of the said oxen were afterwards taken possession of by one H. Sarzin, acting for plaintiff. They claimed that they were justified in refusing to give up the cattle, of which they had had possession, and prayed that the claim be dismissed, with costs.

Plaintiff, in his replication, admitted that he purchased the said oxen from Louw who had obtained them from the German Government. He said that the six oxen taken possession of by Sarzin were not included in the number in respect of which the present suit was instituted. Otherwise he joined issue.

Mr. Burton (with him Mr. Van Zyl) for plaintiff. Mr. Searle, K.C. (with him Dr. Greer) for defendants.

Victor Johannes Louw said that from October to December last year he rode transport for the German Government. Before the 3rd October, 1905, he was in the employ of the German Government. He took over certain two wagons with oxen and gear complete from the German authorities, and got a document from them. He did not know what the purchase price worked out at. He paid over some money on the wagons and oxen, in all about £32. He regarded the wagons and oxen as his own. Subsequently he met Hirschhorn at Swartputs about December, and he came to an agreement with the latter for the purchase of the wagons and oxen, the price being £425. Plaintiff paid him a little over £200 on account. Later on criminal proceedings were instituted against witness, and a preparatory examination was taken, but the Crown Prosecutor decided not to proceed. In all his dealings with the plaintiff witness had represented the wagons, oxen, and gear as his own property. There

was no fraud about the transaction. Witness had received the full purchase price from plaintiff, except for one promissory note, for about £80.

Herrmann Hirschhorn (the plaintiff) said that he was a trader and speculator residing at Springputs. He met Louw at Swartputs in December last, and entered into an agreement to purchase the property. He denied the allegation of fraud, and said that he bought the property *bona fide* from Louw. After the purchase he heard from Hugo and Stern that the wagons and oxen belonged to the German Government, but Louw told witness that he need not be afraid, as the oxen, wagons, and gear were his own *bona fide* property.

Witness was cross-examined at some length.

Re-examined: Witness only received a warning at the time from Hugo and Stern that the property belonged to the German Government. He did not know then that defendants were the agents of the German Government.

[Hopley, J.: How many warnings would you like?]

Witness said that he received no warnings from Schroder and Van Copenhagen. He had simply regarded Hugo and Stern as persons who wanted to buy the property.

Gertrude Flathers, a sworn translator, gave evidence as to the meaning of a certain portion of the document, handed to Louw, by the German authorities.

Richard F. W. Steyn, formerly an articled clerk with Mr. Tilney, at Upington, spoke to a transaction which he had in January last with Hirschhorn in reference to a promissory note which witness discounted.

Albert van Wyk, a labourer, formerly employed by the plaintiff, also gave evidence.

Mr. Van Zyl closed his case.

Ernest Schroder (one of the defendants) said that on the 1st December, 1905, his firm received written authority from the German Government to take possession of live-stock belonging to the Government. A certain amount of stock had been found within the Colonial borders in the possession of different people, and there had been considerable trouble in connection therewith. On the 10th January witness learnt that Louw had come to Upington with his wagons. In consequence of a report made to him by Mr. Stern, witness went to Louw's wagons on the Market-square. He saw Louw on the following day, and asked him why he was not loading up and returning to German territory. Louw said that his oxen were too poor. The oxen were, Louw added, in the veld. Witness told him that he had heard that he (Louw) was attempting to sell the wagons and oxen. Louw said that he was not. Witness told him that he must be very careful, or he would get into trouble, as the

wagons and oxen were the property of the German Government. The document given by the authorities to Louw was produced, and a translation was obtained. Louw said that he knew all about it. The man was in a bad state. He had a black eye, and his face was swollen, and he seemed to be recovering from the effects of drink. Ultimately Louw said he was sorry he had sold the wagons and oxen. Witness informed him that he would report the matter to the German Government. Witness sent out a herd, who took possession of the oxen, 30 in all. Witness had never had more than 30 of these oxen in his possession. Notices were posted all about the district that witness's firm were the agents of the German Government for the purpose of looking after stray cattle. When he was getting the oxen away from somebody else's premises, six of them were recaptured. He afterwards got one back. The 25 oxen with which he was left had to be very closely herded, because attempts were constantly being made to re-take the cattle. Witness could not obtain the wagons as the hind wheels had been removed. A number of the oxen died, and he eventually sent the balance of 16 over the border. Later on Louw called at his office, and made a statement, in which he said that he was approached by Hirschhorn, who asked him to sell the wagons and oxen, and said that he had nothing to fear from the German Government. He (Louw) got under the influence of drink, and parted with the property to Hirschhorn. Witness wrote out the statement at Louw's dictation.

Cross-examined: Witness did not get Louw to sign the statement, because he thought nothing of it. Witness had heard Louw say to-day that the statement he made was all lies. He had not taken legal steps in regard to the wagons and other oxen, but that was not because he was not sure that the German Government had the right to recover the property. Witness thought he had done quite enough on behalf of his clients in recovering what he had done.

Wilhelm Stern, merchant, Upington, said that after Louw's wagons had come in he met Hirschhorn on the 9th January. Hirschhorn told him that he wanted to buy the wagons and oxen. Witness told Hirschhorn that he should not buy the property, as it belonged to the German Government. Plaintiff said that he would not buy the oxen and wagons under the circumstances. He was sure that Hirschhorn told him that he wanted to buy the oxen, and not that he had bought the oxen. Witness informed Mr. Van Copenhagen the same day of the conversation he had had with Hirschhorn.

Stephanus Malan, of Upington, stated he was there last January when

the wagons came in. Witness was present when Hischhorn came to the office to speak to Mr. Hugo. Mr. Hugo told Mr. Hischhorn that he believed the wagons belonged to the German Government. Hischhorn's attention was drawn to the notice when he asked Mr. Hugo's advice as to the purchase of the wagons.

Cross-examined by Mr. Burton: Hugo told Hischhorn that the wagons were the property of the German Government. Witness believed that there was a written notice sent from one of the German officials that the wagons belonged to the German Government.

Kurt Kramm, who represented the contractors to the German Government, and who had held a commission in the German army, stated that he acted as a sort of intermediary between the German authorities and the transport riders. He was perfectly convinced the wagons did not belong to the transport riders. He was certain a letter was sent to Stern and Hugo warning them as to the ownership of the property. The wagons were all of one pattern. The system of exchange within German territory was, if a rider came to a Government depot and convinced an officer that the oxen were too poor, he would give him new ones.

Cross-examined by Mr. Burton: If a driver exchanged poor oxen for new ones outside German territory and reported it, he did not think there would be any objection. This was the first time the oxen were sent into British territory. In the course of the operations the Hottentots captured cattle from the German Government, and probably the Hottentots sold them, but not to the German Government. The cattle, of course, got into circulation, but he regarded them as stolen, although taken in war.

Richard Engst, lieutenant in the employ of the German Government, stated he had charge of the commissariat department in October last year. Louw was first of all a driver in the employ of the German Government. Under the contract two wagons and teams were handed over to Louw in October. A record was kept in the books of what was paid off. At each depot where the driver called he drew half the money for the trip, and the remaining half went towards paying off the wagon. Louw signed the contract in witness's presence, and witness explained the meaning of it, and he was convinced Louw understood the terms of the contract. If a driver's wagon broke down he could have it repaired at the Government's depots, and if he chose to exchange it for a better one he would be debited with the difference. He could not say whether Louw's oxen were branded or not.

Further evidence having been given for the defendant, and counsel heard in argument,

Hopley, J.: The plaintiff comes into court as the owner of 35 oxen, which, he says, he has been deprived of by the defendant, and claims their restoration and damages for their spoliation, which he says he has suffered at the hands of the defendants. It lies, therefore, upon the plaintiff to clearly make out his title to this property, and his whole case rests upon an alleged contract of sale between him and one Louw, which he says was *bona fide*, at all events, upon his part, Louw having at that time possession of these animals at the town of Upington.

Louw had received these animals and some others, 41 of them in all, from the German Government, together with two wagons and gear complete, under a certain contract. It is contended in the first place on behalf of the plaintiff that that contract, followed by the delivery of the goods to Louw, at once invested him with full dominium over this property. The plaintiff, in fact, must go as far as that, and must make out that portion of the case, otherwise his own title is defective, for he can hold no larger rights in the matter than Louw himself held. As between Louw and the Imperial German Government, their rights must be determined by the wording of this document. The law, as proved by Baron von Humboldt, prevailing in German South-West Africa, where the contract was made, and by the light of which it should be interpreted, is, so far as I can see, precisely the same as the law of this country, and therefore we are not in any difficulty in regard to the construction of a foreign law. The whole difficulty really arises in this case as to the construction of this document, which is drawn in a foreign language, and evidently by somebody who was not very much conversant with legal terms or the effect of legal phraseology. It is quite possible that the person who drew the contract may have thought that he clearly conveyed that the property did not pass (as it would have been perfectly legal for him to stipulate in such a contract) until the last payment had been made. Unfortunately it is not clearly to that effect, and one has to gather whether it is, in fact, an out-and-out sale on credit, or whether it is a contract of such a nature that such an effect cannot be given to it. It is, I think, clear in this case that we must take, not only the wording of the contract, but also all the circumstances of the parties thereto, into consideration, and that we should construe the contract by the light of such circumstances in so far as they will assist in arriving at its true meaning. The first question that one has to consider about the contract is whether it is a final contract of sale or

whether it is—as it is worded—merely an inchoate running agreement which was never completed or never reached the final point which it was intended to attain. It must be observed that the words at the beginning of the contract are not: "I hereby purchase from the Government," but "I am prepared" (the word used is "bereit") "to buy from the Government 40 oxen and two wagons." Possibly these words might have been construed to mean "I hereby buy," in view of the fact that the property was delivered to Louw at the time; but they are not the only words in the first sentence of the contract. Not only does he profess his willingness to buy from the Government 40 oxen and two wagons, but the contract immediately goes on to say what he has to do with them—"to ride transport with the same for the Government." Therefore, in this contract, which must govern the rights of the plaintiff, a contract which he saw without a possibility of being deceived by Louw, because, being a German subject, he could read it in the original—there is a profession of willingness to purchase these oxen and wagons from the Government, and to ride transport with them for that Government. The contract then goes on to fix the purchase price. Louw agrees that he is prepared to pay—because the word "bereit" must govern the whole of the contract—"the original purchase price of the Government—that is, the amount charged by Messrs. Hesselmann and Company for these two wagons, together with team, which were delivered here on the 28th September, 1905." At that time Louw did not know the purchase price exactly, but it was ascertainable, and so, to that extent, the requirements of the contract of sale would be met. The purchase price which was ascertainable had been fixed, though Louw himself was absolutely ignorant of the matter—he did not know whether he was paying £500 or £1,000 for the wagons and oxen. He, however, agreed to pay the cost price to the Imperial German Government. The contract then goes on: "This purchase price, which is to be exactly computed by the Controller of the Southern Military Depot at Keetmanshoop, I bind myself to pay" (the translation has it "repay," but the original word is "bezahlen," to pay) "within two years in this way, that each time at least one-half of the transport I earn shall be retained from me in liquidation."

It is impossible to say that this contract is purely a contract of sale on credit. It is a sale with a stipulation that certain things shall be done with the articles proposed to be sold, which cannot be done without those articles. The whole of the contract taken together does not simply mean, "I hereby sell to you two wagons and 40 oxen," but "I

hereby sell to you two wagons and 40 oxen on the condition that you shall ride transport with them for me, and that you will pay me a certain amount, which will be hereafter ascertained, by the earnings with these very oxen and wagons."

His having received these oxen and wagons does not make Louw's title any stronger, because it is obvious that under that portion of the contract which deals with the services to be rendered, it was necessary that he should receive them, and all that the note or receipt at the foot of the contract means is that he has received them—as anyone reading the whole of the contract must find—for the purpose of carrying out the contract of transport-riding, which he had agreed to perform.

This contract is dated October 3, 1905, and less than three months after that, when three trips had been made by Louw, and when he had paid the amount of £32 towards the purchase price of the oxen and wagons, he and other transport riders lying at their station of Davignab, idle for lack of work, in the German territory were offered the work of going to Upington to fetch loads for Davignab. Louw was, therefore, going outside the German territory. Whilst he was within the German borders he admits that it would never have occurred to him to sell, or try to sell, or dare to suggest that he was in a position to sell these oxen and wagons to anybody.

When he was sent across the border the people who sent him sent a letter to the firm to whom he was going, which contained a statement to the effect that the wagons and oxen had not passed to Louw. A similar letter, which has not been produced, is said to have been sent to their agent at Upington. I quite agree with Mr. Burton in his argument that if the property had actually passed the opinions of these people need not be taken into consideration. Still, it is a fact, which is material, that they did tell their agent that the wagons were coming back with loads, and that the property remained in the Government. It is material because this was pointed out to the plaintiff, and thereafter he acted with his eyes open.

About half-way to Upington, at a place called Zwartputs, the plaintiff foregathered with Louw, and the other carriers, and eventually, having a spare horse, he lent it to Louw to ride with him to Upington. Louw says that on the way they did not talk in the least about the ownership of the wagons, or anything of that sort, but it is impossible to believe that a man like the plaintiff, who was a speculator, who would be always looking out for a means of making money, and who took such a curious and prominent action in regard to these matters so shortly afterwards, did not have an eye upon the possi-



bilities which might arise from the fact that Louw had these oxen and wagons outside the German territory, where he might feel free to deal with them without fear of immediate consequences.

They went to Upington, and for the first few days Louw was sober enough, but just before the wagons arrived, on or about the 9th January, the hotel-keeper noticed that the plaintiff was very often with Louw, and was plying him with liquor. On the day of the arrival of the wagons, or perhaps the day before, they were closeted together in the sitting-room at the hotel, with the door closed, and the plaintiff was ordering liquor very freely.

The plaintiff seems to have had his doubts as to whether it would be safe to trade with Louw in the matter of this property, and he consulted two or three people in Upington as to whether it would be prudent to purchase these wagons and oxen. It is argued on his behalf that because he did this it conclusively shows his *bona fides*. I do not think that this conduct of his bears that construction in the least. If he bought these things from Louw it would, of course, in a little place like Upington, become an open secret at once. Everyone would know about it, and the fact of having spoken about it beforehand would strengthen his position rather than the reverse. If he had tried to conceal the matter it would have been an exceedingly suspicious circumstance, and, therefore, it was his policy to be as open as possible about it.

I find, as a fact, that in the course of taking such advice, and before he purchased, it was clearly put to the plaintiff that the German authorities still considered that these oxen and wagons were their property. Stern, Hugo, and Malan each warned him. He was told that they had letters with regard to those oxen and wagons from the German authorities to the effect that they considered them their property. The plaintiff spoke to the hotel-keeper, who used somewhat strong language about the transaction, and said that it was a well-known fact as to how those carriers held their oxen, and that if he bought he would be buying stolen goods.

In spite of this, he took the document which had been shown to him—written in a language which he understood—and went to consult his attorney. He could see from this document, together with the receipts for £32, the double nature of the contract, expressing, as it does, a willingness to purchase at a price to be fixed some time or other, and to work for as much as two years with these cattle, riding transport for the German Government. He could see that the payments had to be made in a certain manner within these two years as one of the conditions of the contract.

In spite of the knowledge that this was

not properly a contract of sale, but rather one of service with these very oxen and wagons, and in spite of the warnings that these were looked upon by the German Government as their property, and in spite of the good advice which he had received on the subject, he preferred to get an affidavit from the man whom he was plying with liquor at the time, declaring, as no doubt he might be expected to declare under the circumstances, if he was ready to fall in with this colourable transaction, that the property was his own.

Upon these documents a jury might find that Louw was not really guilty of theft when he sold to the plaintiff, but when it comes to a civil matter it is right for the Judge to look into all the circumstances, and say whether such a document as I have before me can support such a transaction. In my opinion that document does not possess such strength and does not support the sale, and for that reason alone the plaintiff's action must fail.

But supposing that I were wrong in that view, and that this case were to go further, the question arises as to whether this was a *bona fide* transaction, or whether it was not either a bogus one or of such a colourable nature that the Court ought not to give effect to it. I take the latter view. I think that the plaintiff got hold of Louw—a dishonest carrier who had been trusted by the German Government out of their sight for a few days, so dishonest that he took the first opportunity of turning this property into money. It may be that the idea was put into his head by the plaintiff, which is quite likely, or it may have been his own original idea. At any rate, they put their heads together as to how to make money out of this property. Then something, which is called a sale, took place between them, and a certain amount of money passed from one to the other. Louw professes to have sold for £425, and the plaintiff professes to have bought for that sum from Louw. If the matter rested on their evidence alone I certainly would not have believed a word of the whole transaction, because I do not think that their evidence is worthy of any credence whatever, but they bring documents to prove the matter. There is this thing, called a receipt for £425. I believe that of that amount an order for £100 worth of goods was handed by plaintiff to Louw, and also that there was a promissory note, which was afterwards converted into a cheque for £110, which was received by Louw. Something is said about a horse having passed to Louw, but of that I have had no clear proof. Still, we will assume that £220 in money and goods was received by Louw. That is just about one-half of the amount at which these goods were valued for the purposes of the sale. I certainly am



not convinced that the promissory note for £80 was a *bona fide* part of the transaction. It never has been paid, and still remains with the plaintiff. As to the £115, I am not in the least satisfied that more than a very few pounds at the outside ever reached Louw's pocket.

The result is that although this is sworn to as a transaction of sale, and supported by documents, the transaction may very well have been brought to pass in words to this effect: "Hand me over these oxen and wagons; they are worth about £425; give me a receipt for £425, and I will pay you about half, and take the property and make what I can out of it." That is my view of what really did happen—at any rate, it is quite possible.

I find that these two men put their heads together fraudulently to get this property and, to use a strong word, swindle the German Government out of it. Louw was to get a couple of hundred pounds, or perhaps a little more, whilst the other man was to get the wagons and oxen, out of which he expected to make a very handsome profit. I am convinced that some transaction of this nature was arranged, and that there was no *bona fide* transaction of sale. There is, in my opinion, nothing to support the plaintiff's claim to *dominium* in the property, and his action must fail. Judgment for the defendants, with costs.

[Plaintiff's Attorneys: Dempers and Van Ryneveld. Defendants' Attorneys: C. and A. Friedlander.]

## SUPREME COURT

### FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS { 1906.  
Nov. 8th.

Mr. Roux moved for the admission of Stephen Herbert Osler as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Aliwal North.

Dr. Greer moved for the admission of Jacob Daniel Krige as an attorney and notary.

Application granted, and oath administered.

### PROVISIONAL ROLL

#### PRETORIA HYPOTHECK MAATSCHAPPY V. MOTAN AND OSMAN.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £1,050, with interest from January 1, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable. Counsel stated that the estate of the first defendant had been sequestered in the Transvaal, and the trustees had obtained formal recognition in this colony. It appeared, however, that the trustees had decided not to interfere in any way with the assets in the Cape Colony.

Order granted.

#### ULRICH V. JACOB (AS EXECUTOR OF WILLIAM JACOBS).

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £150, with interest from July 1, 1906, bond due by reason of notice having been given; counsel also applied for the property hypothecated to be declared executable.

Order granted, subject to production of proof that defendant is executor.

#### PRINCE, VINTCENT AND CO. V. OAKLEY.

Mr. Towns moved for the final adjudication of the defendant's estate as insolvent.

Maasdorp, J., said there was some question as to whether proper service had been given. The matter would stand over.

Later in the day an order was granted as prayed.

#### MILLS AND SONS V. ABRAMSOHN.

Mr. W. Porter Buchanan moved for provisional sentence on a dishonoured cheque for £56 19s. 3d., with interest and costs.

Order granted.

#### COSMELLI, MEYER AND CO. V. TAYLOR AND MYLES.

Mr. Gardiner moved for provisional sentence on certain four bills of exchange for £316 13s. 8d., £243 1s. 8d., £265 13s. 2d., and £274 0s. 1d., drawn by the plaintiffs and accepted by the defendants.

Order granted.

LITHMAN AND CO. V. CAWCUTT AND CO.

Mr. Alexander moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

PRICE V. KENNEDY.

Mr. J. E. R. de Villiers moved for the compulsory sequestration of the defendant's estate.

Order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V { 1906.  
UITKYK SYNDICATE. { Nov. 8th.

Mr. Howel Jones moved for judgment, under Rule 329d, for £33 13s., one year's mineral lease rent on ground at Eerste River.

Order granted.

COLONIAL GOVERNMENT V. BOEZAK.

Mr. Howel Jones moved for judgment, under Rule 32d, for £6 odd, in respect of quitrent and stamp duty due on a certain building.

Order granted.

DEMPERS AND VAN BYNEVELD V. BOWERS.

Mr. De Waal moved for judgment, under Rule 329d, for £48, less £5 paid since issue of summons, for professional services.

Order granted.

INSOLVENT ESTATE KRUSKOL V. ROGALSKY.

Mr. Douglas Buchanan moved for judgment, under Rule 319, in default of plea, in terms of the plaintiff's declaration, praying for certain payments of £10 and £30 made by insolvent to defendant to be declared null and void as undue preference, for judgment for the said sums, and also an order declaring defendant not entitled to prove as a creditor in the said estate in the said sums, and to have wholly forfeited these sums under the provisions of section 23 of the Ordinance.

[Maasdorp, J.: Should there not be some evidence? This is a definite claim for damages.]

Mr. Buchanan said that he had not had time to look up the authorities, but he submitted that this was a liquidated demand for the return of specific sums.

[Maasdorp, J.: You are entitled to judgment, but the question is as to the

forfeiture, which surely is a matter of damages?]

Mr. Buchanan said he understood that the forfeiture of an executor's commission had been granted without evidence being led. Under the circumstances he should simply apply for judgment for the sum of £40.

Judgment entered for £40, with costs.

REHABILITATIONS.

Mr. De Waal moved for the rehabilitation of Albertus Petrus Myburgh.

Granted.

Mr. W. Porter Buchanan moved for the rehabilitation of Francis Edward Caulfield.

Granted.

GENERAL MOTIONS.

CRAFFORD V. LE ROUX. { 1906.  
Nov. 8th.

Discovery order—Sufficiency of affidavit of discovery.

This was an application for an order calling upon respondent to file and deliver a better and more sufficient affidavit, of discovery of all books, documents, etc., relating to a suit between the parties for rent of a farm at Elands' Vlei, in the Ladismith district, and, failing his compliance, an attachment of his person.

Applicant's affidavit stated that two affidavits had been made by the respondent and his attorneys, of discovery of an agreement between respondent and one Nel, and a letter written by the attorneys. Applicant said that there were numerous other documents undisclosed on affidavit.

Respondent's answering affidavit stated that the whole of the documents, etc., in his possession, custody, or power relating to the matter in question had been discovered. There might, it was said, be certain documents in the possession of one H. W. Becker, but he was not acting for either party.

Replying affidavits were read on behalf of applicant, to the effect that Becker was now acting, or had acted since the suit was commenced, for the respondent, and that he had a number of documents.

Dr. Greer was for applicant (plaintiff in the action); Mr. J. E. R. de Villiers was for respondent.

Dr. Greer explained that the applicant was suing the respondent for rent of a certain farm. The defence was that respondent was sub-lessee of one Nel, and that he was liable only to Nel, to whom he had paid the rent.

Mr. De Villiers said that Becker was really the "bone of contention." He had formerly been acting for Nel.

Dr. Greer said their allegation was that there were cheques in existence which showed the defendant had paid the rent direct to the plaintiff, and that he had never been treated by plaintiff as sub-lessee of Nel. It was, therefore, most material to plaintiff's case that she should have discovery of these cheques.

Maasdorp, J., asked Dr. Greer if he could give him any authority for the practice of the Court in an application of this kind.

Dr. Greer said he was not aware that there had been a case in which this particular point was raised.

Mr. De Villiers submitted that there was no authority for such an application as this. He cited *Jones v. Monte Video Gas Co.* (35 Q.B. Div., 556). It could not be shown on a contentious affidavit that an affidavit of discovery was insufficient. He cited *Mylchreest v. European Diamond Mining Co.* (2 Appeal Cases, 78).

Dr. Greer submitted that the case of *Mylchreest v. European Diamond Mining Company* was clearly distinguishable from the present case. The respondent, he contended, had not met the allegations in the applicant's affidavits, and the applicant was entitled to relief.

Maasdorp, J.: The applicant has not succeeded in showing that the affidavit filed by the respondent is incorrect. It is stated that certain documents were written. That may be absolutely true, but those documents may never have been in possession of the defendant. It is said that certain cheques were drawn by the respondent. Those cheques may never have been returned to the respondent. So, upon the merits of the case, there is nothing now absolutely to prove to the Court that the statements contained in the respondent's affidavits are incorrect. Consequently, those affidavits, for the present, stand, and the application will be refused on that ground. But it seems to me that there is authority for saying that this is not the proper course to adopt, when an order for discovery has been made, in order to enable the applicant to obtain relief. It has been held upon a similar application that an affidavit of discovery must be regarded as conclusive, and there seems to be no reason why the Court should regard the rule there laid down as inapplicable to the present case. The application must, therefore, be refused. Some difficulty exists as to the question of costs, for although the respondent may be entitled to costs on the ground that the applicant has adopted the wrong procedure in the matter, still it might ultimately appear at the trial that the respondent was really in possession of further documents. But it

seems to me that in that case the Court might deal with the question in awarding costs at the trial. However that may be, the application must be refused with costs.

#### *Ex parte* ESTATE STUMKE.

Mr. Gutsche moved, on the petition of the executors, for the amendment of a certain deed of transfer of land at Uitenhage. The errors in the description of the property had gone on for a considerable number of years. The Registrar of Deeds, in his report, said he thought relief should be given, but not in the form asked for. He suggested that applicants should proceed by way of transfer of the remaining extent under the Derelict Lands Act, and have the existing deed declared of no effect and rescinded.

Maasdorp, J., in refusing the application, said that applicants should apply to a judge in chambers for a rule nisi under the Derelict Lands Act.

#### *Ex parte* VILJOEN.

Mr. Douglas Buchanan moved for a certain rule to be made absolute, recognising the appointment of respondent, who is resident in the Orange River Colony, as sole trustee in the estate of D. G. van der Walt.

Rule absolute.

#### *Ex parte* GRANT.

Mr. Toms moved for leave to petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights, failing which, a decree of divorce. Petitioner stated that her husband had been in Johannesburg, but she had been unable to learn his address. Counsel said that he was prepared to certify in favour of the application, and he, therefore, applied for a rule nisi to issue.

Rule framed calling upon respondent to show cause on the 1st February, personal service, failing which one publication in the "Star" (Johannesburg).

#### *Ex parte* INSOLVENT ESTATE JOHNSON.

Mr. Gardiner moved for amendment of the name of insolvent in the insolvency records in the Master's Office. The estate was sequestrated in the name by which insolvent was commonly known, viz., Pieter Johnson, and land had been transferred to him in his correct name, Pieter Hendrik Johnson. The present application was necessary to facilitate transfer of the ground in the insolvent estate.

Order granted.

*Ex parte* HENNESSY AND OTHERS.

Mr. Gardiner moved for an order authorising the apportionment by the Civil Commissioner of certain quit rent land at Retreat, in the Cape Division, in terms of Act 7 of 1856. The quit rent payable on the ground was stated to be £7 0s. 6d. per annum. Certain of the co-owners of the lot could not be found, and others would not interest themselves in an apportionment, which should be made by the Civil Commissioner. Counsel said that the matter really came under the Act 10 of 1875, it was there directed that notice should be given to the various co-owners, and that was impossible, inasmuch as certain of the co-owners could not be found.

Maasdorp, J., said that the Civil Commissioner would proceed in the ordinary way, and the only thing for this court to do was to order the usual proceedings. The Civil Commissioner would be authorised to proceed to the apportionment upon proof that personal notice had been served, or notice by one publication the "Gazette" and the "Cape Times," on such parties as could not personally be served, as required by terms of section 1 of Act 10, 1875. The other proceedings would be in the ordinary course.

*Ex parte* HUMAN.

Mr. Gutsche moved for amendment of petitioner's name in certain bonds.

Order in terms of recommendation of Registrar of Deeds.

WATKINS V. MATHEW AND ANOTHER.

This was an application for an order calling upon respondent to hand over certain property attached under an order of Court.

Mr. Benjamin (for respondent) said that the parties had come to an arrangement, and he had to apply for an order in terms of consent paper.

Order in terms of consent.

*Ex parte* LEZARD AND WIFE.

Mr. Gutsche moved for an order authorising the petitioners to register a certain ante-nuptial contract, excluding community of goods. The matter had previously been before the Chief Justice, who had ordered the application to stand over pending a further affidavit as to the intention of the parties before the marriage. Counsel now read a further affidavit by petitioners, in which they said that their intention was to enter into a contract excluding community, their belief being that a post-nuptial contract would have

the same effect as a contract entered into before the marriage.

Leave granted to register as an ante-nuptial contract, the contract executed between the parties excluding community of goods, the rights of creditors prior to the registration being reserved.

Maasdorp, J., observed that it might be necessary to make a further application to the Court in regard to the form of the contract.

WEIGHT AND ANOTHER V. KELLY (N.O.) AND OTHERS.

This was an application calling upon respondent to restore certain property.

Mr. McGregor applied for a postponement of the matter until the last day of term. Applicants were connected with the Somerset West Lodge of the Royal Antediluvian Order of Buffaloes, under the Grand Surrey Banner, and one of the respondents was president of the Grand Council of the R.A.O.B., under the South African Banner. Applicants said that negotiations for a settlement had been futile, and a postponement was necessary in order to file replying affidavits.

Mr. Upington (for respondents) opposed the postponement, and said that already the matter had been repeatedly postponed at the request of the applicants.

Maasdorp, J.: I think the matter certainly has been dragging on for some little while, but there does not seem to be any urgency in it even now, and, as it stated that the affidavits are absolutely material, and reasons are given why they do not put them in sooner—and that is that negotiations were pending between the parties—I think the Court will allow the case to stand over, question of costs caused by postponement to be mentioned again. The application will stand over until the last day of term. Applicants must file their affidavits on or before Tuesday next.

On the application of Mr. Upington, respondent was given leave to formally annex to his affidavit the rules of the Order.

ATTWELL V. BOTHA.

Insolvent Ordinance (6 of 1843),  
Sec. 127—Deficiency in estate  
—Assets of insolvent—Execution.

This was an application brought by Robert George Attwell, of Lady Grey, division of Aliwal North, upon notice to Jacobus Nicholas Botha to show cause why an execution should not issue in respect of £300 to satisfy in part a deficiency in respondent's insolvent estate amounting to £1,191 7s. 3d.

Mr. De Villiers said that Becker was really the "bone of contention." He had formerly been acting for Nel.

Dr. Greer said their allegation was that there were cheques in existence which showed the defendant had paid the rent direct to the plaintiff, and that he had never been treated by plaintiff as sub-lessee of Nel. It was, therefore, most material to plaintiff's case that she should have discovery of these cheques.

Maasdorp, J., asked Dr. Greer if he could give him any authority for the practice of the Court in an application of this kind.

Dr. Greer said he was not aware that there had been a case in which this particular point was raised.

Mr. De Villiers submitted that there was no authority for such an application as this. He cited *Jones v. Monte Video Gas Co.* (35 Q.B. Div., 556). It could not be shown on a contentious affidavit that an affidavit of discovery was insufficient. He cited *Mylchreest v. European Diamond Mining Co.* (2 Appeal Cases, 78).

Dr. Greer submitted that the case of *Mylchreest v. European Diamond Mining Company* was clearly distinguishable from the present case. The respondent, he contended, had not met the allegations in the applicant's affidavits, and the applicant was entitled to relief.

Maasdorp, J.: The applicant has not succeeded in showing that the affidavit filed by the respondent is incorrect. It is stated that certain documents were written. That may be absolutely true, but those documents may never have been in possession of the defendant. It is said that certain cheques were drawn by the respondent. Those cheques may never have been returned to the respondent. So, upon the merits of the case, there is nothing now absolutely to prove to the Court that the statements contained in the respondent's affidavits are incorrect. Consequently, those affidavits, for the present, stand, and the application will be refused on that ground. But it seems to me that there is authority for saying that this is not the proper course to adopt, when an order for discovery has been made, in order to enable the applicant to obtain relief. It has been held upon a similar application that an affidavit of discovery must be regarded as conclusive, and there seems to be no reason why the Court should regard the rule there laid down as inapplicable to the present case. The application must, therefore, be refused. Some difficulty exists as to the question of costs, for although the respondent may be entitled to costs on the ground that the applicant has adopted the wrong procedure in the matter, still it might ultimately appear at the trial that the respondent was really in possession of further documents. But it

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Order granted.



cant once a month. Respondent, who resides at Wynberg, is brother-in-law to Mrs. Field. Applicant said that on going to the house of Field to see the children, he found that the mother had gone away to Port Elizabeth, and left the children in the charge of respondent. Mrs. Bentley denied that she had ever parted with custody of the children, and said that she only left them temporarily under the charge of Mr. and Mrs. Field. Applicant said that the children were not being properly looked after, and that he found them in a "dilapidated and careless state." This Mrs. Field denied. The respondent denied that he had been given, or had had, custody of the children.

Mr. W. P. Buchanan for applicant; Dr. Greer for respondent.

Mr. Buchanan said that the mother got custody of the children, and then she went away to Port Elizabeth. When she got wind of this application, apparently, she immediately came back. The whole idea of the deed of separation was that she was to look after these two young children, but, instead of that, she placed them under somebody else's care, and went off holiday-making. It was in the interests of the children that they should be handed over and placed in a boarding establishment, where applicant was prepared to pay for their maintenance and education.

Without calling upon Dr. Greer, Maasdorp, J.: It is quite clear in this case that the children are in the custody of the mother, and if the father wishes to recover that custody, he must take proceedings against the mother, and in those proceedings the respective rights of father and mother will be considered. The children are not at all in the custody of Field, and consequently Field has not the disposal of the children. The custody is in the mother, and she has a perfect right, having control of the children, to place them temporarily where she may think proper, and if she should be in the wrong, then proceedings can be taken against her. Any person who takes these children from her possession simply holds the custody for her. Under the circumstances, the application must be refused, with costs.

CUNDILL V. PICKERING AND CO. AND ANOTHER.

Mr. Russell moved, on the application of Thomas George Cundill, of the Barkly West Division, for an order upon respondents for delivery of certain consignment of furniture to Kimberley Railway Station. There was no appearance for the respondents, though an affidavit had been filed by the first-named respondent (Edward Pickering, of Port

Elizabeth), who said that he was simply acting as the agent in the matter of Davis, Turner and Co., of London.

From the affidavits, it appeared that there was outstanding between the applicant and the second-named respondents a claim for £147 odd, for what were described as "London charges." The furniture was contained in about sixteen packing-cases, and had arrived from England per the Cluny Castle, and had since been stored at Port Elizabeth. There the property was kept, it was alleged, in protection of Davis, Turner and Co.'s lien. Applicant was willing to pay about £50 in settlement of the "London charges," but he said he had not been supplied with details, and he was not in a position to scrutinise the claim of Davis, Turner and Co. A further question was raised as to the charges for storage at Port Elizabeth since the early part of the year.

An order was granted directing Pickering to deliver the furniture to the applicant, upon applicant depositing in court a sum of £150, pending settlement of the disputes between the parties by proceedings to be instituted by the second-named respondents before the end of April, question of costs to stand over.

*In re* CLARK AND CO. (IN LIQUIDATION).

Mr. Schreiner, K.C., presented the liquidators' report, and applied for the usual order as to the same lying for inspection. Counsel suggested that the report should lie for a period of six weeks, in view of the fact that there were liquidations of the company both in Natal and the Transvaal, as well as in this colony, and that publication should be ordered in the same manner as when the previous order was made by the Court in this matter.

An order was made accordingly, report to lie for a period of six weeks, and publication to be made in the same manner as previously.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* ISAACS. { 1906.  
Nov. 8th.

Dr. Greer moved as a matter of urgency for an order to attach certain goods belonging to Ahmed Behkoomia, who, it was alleged, had removed them with a view of defeating his creditors.

Hopley, J., granted an order for the Sheriff to attach the goods, and hold them pending a further order of Court,

Applicant's case was that the respondent surrendered his estate on the 31st July, 1904, and that he (Mr. Attwell) was appointed sole trustee. Petitioner himself was a creditor against the estate to the amount of £311 9s. 10d. The claims against the estate were £1,676 2s. 9d., and there was a deficiency of £1,191 7s. 3d. The account and plan of distribution had been filed and confirmed. Respondent had not obtained his certificate from his trustee, and he had not been rehabilitated. He had assets valued at about £300, consisting of sheep, goats, cattle, and horses and cart.

Respondent stated that he had acquired certain property out of his own earnings since his insolvency. He had applied to the trustee for a certificate, but Mr. Attwell informed him that it was not necessary, and that he could do any work he liked. He had acquired a quantity of stock, etc., from work, or from proceeds which he had earned as a result of a road-repairing contract that he had had under the Divisional Council, and certain building operations that he had carried out. Respondent, however, said that he was now without a good deal of the stock that he had held, and that he now had a very small amount of property.

Applicant, in a replying affidavit, said that insolvent had not received a certificate, nor had he (Mr. Attwell) given him verbal permission to transact business in his own name, or acquire property. Reliable information had come to his notice that a quantity of stock had been disposed of since the present proceedings were commenced.

Respondent filed further affidavits denying this allegation.

Mr. W. Porter Buchanan was for applicant; Mr. Van der Byl was for respondent.

Mr. Buchanan said that the application was brought under section 127 of the Insolvent Ordinance, by means of which any assets acquired after the account in the insolvent estate had been confirmed and before the rehabilitation may, upon notice to the insolvent, be placed under execution. The question in this case was whether respondent had assets capable of satisfying in whole or in part the deficiency in the estate. The mistake which appeared to have been made by the other side seemed to be that section 49 of the Ordinance would protect any personal earnings of insolvent after the account had been filed, and before rehabilitation of insolvent. In *Bartholomew v. Stableford* (17, Supreme Court Reports, 84), it was clearly laid down that protection only applied to any earnings of insolvent or property purchased therewith between the time of surrender and the confirmation of the account, but did not extend beyond. According to his own showing, respon-

dent seemed to have property of the value of about £212.

Mr. Van der Byl said that the matter seemed to narrow itself down to a question of what means respondent possessed. The Court, he submitted, would not grant an order unless there were reasonable grounds for believing that there were assets belonging to respondent sufficient to pay an appreciable dividend to creditors. It was unfortunate that he was not able to read certain affidavits made by respondent, in consequence of his learned friend objecting that copies had not been served upon applicant. He submitted that applicant had not shown that respondent was in possession of assets of a value of more than £45. He cited *Greeff's Trustee v. Fourie's Exor. and Greeff* (16 S.C.R. 576.)

Maasdorp, J.: It appears that under section 127 of the Insolvent Ordinance, it is provided that the Court shall order a writ of execution to be issued upon being satisfied that a certain deficiency does exist, and there are reasonable grounds for believing that there are assets belonging to the insolvent capable of satisfying the same, wholly or in part. Now, it is apparent that a deficiency does exist, and, although there is some conflict upon the affidavits that have been put in as to whether the respondent actually possesses certain assets, I am satisfied that there are reasonable grounds for believing that he does. Upon his own showing, although these assets may not be as valuable as they are stated by the applicant to be, still, he does possess some property, and I am satisfied that there are good reasons for believing that the assets are more valuable than the respondent is prepared to admit. The order will, therefore, be granted with costs, and, as it also appears that there are certain moneys in the possession of George F. Botha due to the respondent, the Court will declare such moneys as are now in his possession owing to the respondent to be executable. It may be that he has not got all the moneys that he had at the time he made the affidavit, but whatever he may have is declared executable.

#### BENTLEY V. FIELD.

This was an application, upon notice to respondent, to show cause why he should not be ordered forthwith to deliver and hand over to the applicant certain two boys, aged eight and five years respectively, of whom the applicant is the father and lawful guardian.

It appeared from the affidavits that the applicant and his wife had entered into a deed of separation, in which it was provided *inter alia* that the mother should have the custody of the two boys, with right of access to the appli-

by the plaintiff, as is shown upon the aforesaid certificates.

6. In terms of the said contract, the work in connection with the sewage pump well at the power station, according to the specifications, plans, drawings, etc., amounted to £200, as shown in the schedule of quantities, but difficulties have arisen in carrying out the said work in accordance with the contract the defendant and his Engineer altered the plans of the said work, and instructed the construction of a screening chamber, and of further piping connecting the same to the pump well and adjacent manhole, thereby materially increasing the amount of work to be done and causing delay, and thereupon they agreed with the plaintiff that for the execution and performance of the said work in accordance with the new plans, he should be paid upon the prices contained in the said schedule of labour prices.

7. In terms of the said contract the work in connection with the syphon across the mouth of the Muizenberg Vlei, according to the specifications, plans, drawings, etc., amounted to £161, as shown in the schedule of quantities, but after the plaintiff had executed a portion of the said work in accordance therewith, for which he was allowed £50 in the said certificates, the execution thereof, in accordance with the contract, was found by the defendant and his Engineer to be impracticable and thereupon they did during the progress of the said works cause new plans for the said syphon to be prepared, thereby materially increasing the amount of work to be done and causing delay, and thereupon it was agreed between the parties that the plaintiff should execute the work in accordance with the new plans at the labour schedule prices.

8. In terms of the said contract the work in connection with the storm-water manholes and retaining walls according to the specifications, plans, drawings, etc., amounted to £386 7s. 7d. as shown in the schedule of quantities, but after the commencement of the said work the defendant and his engineer caused amended plans to be prepared, thereby materially increasing the said work and causing delay, and thereupon it was agreed between the parties that the plaintiff should execute the work in accordance with the amended plans at the said labour schedule prices.

9. At the same time that the new plans for the syphon, in paragraph 7 set forth, were being framed, the defendant caused plans to be prepared for the construction of a bridge and weir at the mouth of the said vlei, and on the 26th of May, 1905, it was agreed between the parties that the plaintiff should execute and perform the said work upon certain conditions in accordance with the labour schedule

prices. The said contract formed no part of the contract in paragraph 2 thereof set forth, and of the matters and things set out in paragraphs 2 to 8 hereof.

10. On the 15th of May, 1905, in accordance with a resolution of the defendant Council, a contract was entered into between the parties by which it was agreed that the plaintiff should complete the house drainage connections as from the main sewer to the kerb, the charges to be in accordance with the said priced schedule of quantities, and that the connections at the rear of the work already done, i.e., on the line of the main sewers then constructed, were to be charged at the same schedule prices plus 10 per cent. for extra work. This said contract formed no part of the contract in paragraph 2 hereof set forth, or of the matters and things set out in paragraphs 2 to 8 hereof.

11. On the 6th of October, 1905, it was agreed between the parties that the plaintiff should execute certain branch mains work in accordance with a schedule of prices then agreed upon. The plaintiff made all preparations for executing the said work at certain cost, but received notice from the defendant not to start work under this contract until he received notice from defendant. The said contract formed no part of the contract in paragraph 2 hereof set forth, or of the matters and things set out in paragraphs 2 to 8 hereof. The plaintiff has always been ready and willing to perform his contract, and was so in the month of January, 1906.

12. For the purpose of carrying out the three contracts in paragraphs 9, 10, and 11 hereof set forth, the plaintiff procured certain plant and material in addition to the plant and material procured for carrying out the matters and things in paragraphs 2 to 7 hereof set forth.

13. In accordance with paragraphs 2, 3, 4, and 5, certificates were issued by the said engineer to the plaintiff for £16,144 11s. 4d., less £1,000 for retention money, and the plaintiff was paid accordingly, and the defendant still holds the £1,000. The last certificate granted by the said Bennett was granted in October, 1905, and shortly thereafter the said engineer obtained leave of absence, and one W. Olive was appointed acting engineer. Subsequent to the execution of the work allowed for in the said certificate of October, the plaintiff has done work and labour and supplied materials to the value of £1,974 15s. 10d., in accordance with the said contract, which sum has not been paid to him.

14. The work done and materials supplied by the plaintiff (a) in terms of paragraph 6 hereof amounts to £2,680 1s. 4d., of which defendant has paid £1,006 19s. 6d., leaving a balance

and a rule nisi calling on the respondent to show cause why the said goods should not be included in his schedules and handed over for the benefit of his creditors, should he surrender his estate as insolvent, and to show cause why the applicant should not have his costs, the rule returnable on the 14th inst.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

COLLIE V. KALK BAY  
MUNICIPALITY.

1906.  
Nov. 13th.  
" 14th.  
" 15th.  
" 16th.  
" 19th.  
" 20th.  
" 21st.  
" 22nd.  
" 23rd.

Municipal Council—Drainage contractor—Disputed quantities—Variation of contract prices by Municipal engineer.

This was an action brought by James Collie, contractor, Cape Town, against the Kalk Bay Municipality to recover certain sums alleged to be due upon the main drainage contract, and damages for breach of contract.

### PLAINTIFF'S DECLARATION.

1 The plaintiff is a contractor residing at Cape Town; the defendant is the Kalk Bay Municipality.

2. On October 5, 1904, a contract was entered into between the parties whereby the plaintiff, for the sum of £13,156 6s. 4d., undertook to execute certain drainage works for the defendant at Kalk Bay and Muizenberg, upon and subject to certain conditions and schedule of quantities, as shown upon certain plans, sections, and drawings, and described in certain specifications, and it was agreed thereby that the engineer of the defendant did not guarantee the quantities of the several works to be correct, that the contract was based upon the said schedule of quantities, and that any difference there might be in actual work would either be added to the contract amount or deducted therefrom, and that the prices contained in the priced schedule of quantities (which is distinct

from the schedule of quantities, and forms part of the said contract) would be the basis for calculating the cost of any extras or deductions which might occur in carrying out the contract, and by section 77 of the specification it was provided that in the case of extra work beyond that included in the specification any increase or diminution in the quantity of work or material therein specified or provided should be added to or deducted from the amount of the contract agreeably to the said schedule of prices or as otherwise specified. The said contract also contained a schedule of labour prices, hereinafter referred to, and in the interpretation clause the engineer was stated to mean Thomas Bennett. The work was to be completed within 12 months from the date of the order of the Engineer to commence work, and the plaintiff was to be paid for his work in monthly instalments upon the certificate of the Engineer at the rate of 80 per cent. upon the gross value of the work executed until the retention money amounted to £1,000, after which the certificates were to be paid in full.

3. On October 4, 1904, the said Engineer gave the plaintiff notice to begin on October 11, 1904, and the plaintiff then commenced work, and thereafter duly proceeded with the said work until the defendant broke the said contract, and certain other contracts hereinafter set forth, and took possession of the works thereunder with all materials and plant, and ejected the plaintiff and his workmen as hereinafter set forth.

4. The progress of the works was delayed by reason of certain causes for which the plaintiff was not responsible, but which arose through the acts or defaults of the defendant or his Engineer, by which it became and was wholly impossible to complete the said works within the aforesaid 12 months, as is hereinafter set forth.

5. Shortly after the plaintiff began the said works, the measurements, depths, size of pipes, etc., as contained in the schedule of quantities, were found to be incorrect, and they were found to be so from time to time during all the progress of the works, the actual work being found to be very much greater and entailing a large amount of extra and additional work, all of which was recognised and admitted by the defendant and his Engineer, and certificates for the said larger amount of work were granted from time to time to the plaintiff by the said Engineer in accordance with the said contract, and the said priced schedule of quantities, and paid by the defendant. From time to time the progress of the works, the plans, and drawings were altered, varied, or amended by the defendant and his Engineer, and large quantities of extra and additional work was, in consequence thereof, directed to be performed



trary, he greatly delayed the said work, and broke the conditions of the said contract, and in consequence thereof the defendants on or about January 19, 1906, took possession of the works thereunder, as they were entitled to do under Nos. 18, 20, 31, and 33 of the conditions, and obtained an order from this Honourable Court on January 17, 1906, restraining the plaintiff from removing any of his plant, and the said rule was made absolute on February 2. The defendants crave leave to refer to the records of this Honourable Court for the circumstances of the said taking over. Save as above, they deny paragraph 3.

4. As to paragraph 4, they deny that the delay in the completion of the work was due to any cause for which they are responsible, but they admit that the plaintiff was unable with the workmen employed by him to complete the said work within the time he had agreed to do, and they admit that they did not take steps, as in terms of the conditions they were empowered to do, to enforce penalties against him for delay, but they allowed him to go on with the work after the expiry of the contract time. Save as above, they deny paragraph 4.

5. As to paragraph 5, the defendants deny that the measurements as contained in the schedule of quantities were incorrect or were from time to time found to be so, or that they recognised and admitted this. They refer to No. 32 of the conditions, under which they have power to authorise the construction of additional works, and to alter the method of the construction of works if found desirable. They admit that a certain amount of additional work was done by the plaintiff as directed, and especially with regard to house drainage connections from the main sewer to the curb, but for all such work the plaintiff has been fully paid, as hereinafter set forth. They admit that the section from (a) to (b) (on plan) on the main road was slightly altered, and that one manhole was omitted and the work commenced from man-hole No. 2 (on plan). They admit that the plans were altered in order to readjust the lines and provide for extensions from manholes, where branches were carried to the curb. They admit that from time to time certificates for larger amounts were granted by the said Bennett, engineer to the Council, than plaintiff was legally entitled to under the said contract, and they say that the said Bennett, in violation of his duties and acting beyond his authority without the knowledge or consent of the defendants, granted certificates for work done under the contract, and not according to the schedule of prices provided for in the contract, and also granted certificates for work not done at all. The said certificates were not, and are not, binding on the defendants; in

any event, the said certificates are only payments on account, and there has been no final settlement of accounts between the parties, and the defendants are entitled to have a true and proper account taken of the work done by the plaintiff and of the value thereof, as provided by the contract and conditions and schedule of quantities. Save as above, they deny paragraph 5.

6. As to paragraph 6, they refer to page 15 of the annexure C for the schedule of prices in connection with this work. They admit that some additional work was done, but they say that the plaintiff has been paid for the same, and that he admitted and agreed on or about the 19th October, 1905, that any claim for work in connection with the above was settled. The whole of the said work was done under the contract A, and not otherwise, and payment had to be made therefor in accordance with the conditions B of the contract and the schedule of quantities C. Save as above, they deny all the allegations in paragraph 6, and say that the engineer, if he purported to make such an agreement as is alleged, had no power to make an agreement for payment at prices other than those provided for in the conditions, and in the schedule of quantities which could bind defendants; that he acted in violation of his duty and without defendants' knowledge or consent.

7. As to paragraph 7, they refer to page 7 of the annexure C for the schedule of prices in connection with this work. They admit that portion of the work was constructed by plaintiff prior to June 10, 1905, and at the said date the works constructed were carried away owing to a heavy fall of rain and consequent flooding, and it was decided not to proceed with it further. For the work done by plaintiff it was agreed to allow him a sum of £272 15s. 8d. in full settlement, and on or about October 19, 1905, he agreed to accept this in full and final settlement, and he has been paid this in account with defendants. Save as above, they deny all the allegations in paragraph 7, and say that the engineer, if he purported to make such an agreement as is alleged, had no power to make an agreement for payment at prices other than those provided in the conditions and schedule of quantities which could bind the defendants; that he acted in violation of his duty, and without defendants' knowledge or consent.

8. As to paragraph 8, they admit that provision was made for the sum of £386 7s. 1d., but save as above, they deny the said paragraph, and say that if the engineer made the agreement alleged he acted in violation of his duties, *ultra vires*, and without the defendants' knowledge or consent, and that such agreement is not binding on defendants.

9. As to paragraph 9, they admit that plans were caused to be prepared as



due of £1,673 17s.; (b) in terms of paragraphs 7 and 9 amounts to £1,383 9s. 4d., of which the defendant has paid £272 15s. 8d., leaving a balance due of £1,111 3s. 8d.; (c) in terms of paragraph 8 amounts to £827 18s. 6d., which remains due; and (d) in terms of paragraph 10 amounts to £1,653 7s. 7d., of which defendant has paid £1,309 16s., leaving a balance due of £343 11s. 7d., or £3,956 10s. 9d. in all, which, together with the aforesaid amount of £1,974 15s. 10d., leaves a balance of £5,931 6s. 7d. still due and unpaid.

15. After the appointment of the said Olive, the defendant wrongfully and unlawfully broke the aforesaid contracts and refused to pay the plaintiff any part of the sums of money which were due to him on the various said contracts and to which he was entitled, and in or about January, 1906, the defendant wrongfully and unlawfully broke the contract and agreements referred to in paragraphs 2 to 8 inclusive hereof, and took possession of the said works and the material and plant thereon and used in connection therewith, and refused to allow the plaintiff to complete the same, and ordered the plaintiff and his workmen to leave the said works and refused to allow them to return, and the defendant did on or about the same date wrongfully and unlawfully break the contract in paragraph 10 hereof set forth and refused to pay the plaintiff what was due and refused and still refuses to allow him to complete the said house connections although the plaintiff was ready and willing to perform his part of the said contract, and took possession of the said works and the plant and material procured and used in connection therewith and ejected the plaintiff and his workmen from the said work, and has been and still is executing the work through himself or others and the defendant did on or about the same date wrongfully and unlawfully break the contracts in paragraphs 9 and 11 hereof set forth, and has refused and still refuses to allow the plaintiff to construct the said branch mains work and the said bridge and weir, although the plaintiff was and is ready and willing to perform his part of the said contracts, and took possession of the plant and material procured and used in connection therewith, by reason of all of which the plaintiff has sustained damage.

16. There is due to the plaintiff the aforesaid sum of £5,931 6s. 7d., and the plaintiff has by reason of the aforesaid breaches of the said contracts sustained damage by way of loss of profit of £2,750, and the plaintiff is entitled further to the aforesaid sum of £1,000, originally retained as retention money, and still in the possession of the defendant, and the plaintiff has suffered loss and damage in the sum of £300 by the wrongful and unlawful seizure and

retention of his plant and material, all of which is still held by the defendant, and which the defendant refused and still refuses to deliver up.

17. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to payment of the said sums, but the defendant refuses to make such payment.

Wherefore plaintiff claims judgment for: (a) The sum of £5,931 6s. 7d. and the sum of £1,000; (b) the sums of £2,750 and £300 as and for damages; (c) interest *a tempore morae*; (d) costs of suit.

#### DEFENDANTS' PLEA AND CLAIM IN RECONVENTION.

1. The defendants admit paragraph 1. and say that the Municipality is constituted under Act 4 of 1882, and that additional powers were granted under Act 26 of 1897.

2. As to paragraph 2, they admit that on October 5, 1904, a contract with the plaintiff was entered into, and they crave leave to refer to the contract itself, the specification of works and conditions, and to the schedule of quantities signed on the said date, and to the plans, sections, and drawings described therein, which were initialled by the plaintiff and defendants. They admit that they did not guarantee the correctness of the quantities for the several works specified, but say that it was the duty of the plaintiff to verify same, if he thought fit to do so, before commencing operations, and they annex hereto copies of: (a) the contract; (b) the specification and conditions; (c) the schedule of quantities. They refer to No. 1 of the conditions, as to the meaning of "Engineer," and to No. 11 as to quantities; they also refer to No. 36 of the conditions as to payment and to No. 28. In terms of No. 12 of the conditions, the contractor agreed to deliver to the engineer a true-priced copy of the schedule of quantities, similar to those upon which the estimate is based, and the annexure "C" is a copy thereof. It was provided in No. 12 that the prices so given were to provide for every contingency which might be met with. They admit that the work had to be completed within twelve months from notice to commence, and they refer to No. 7 of the conditions. Save as above, they deny paragraph 2, and they say that the said annexures constitute the contract existing between the plaintiff and the Municipality, which was duly entered into in accordance with the provisions of paragraph 104 of Act 45 of 1882.

3. As to paragraph 3, they admit that notice was given on the 4th October, and work commenced on the 11th October. They admit that plaintiff proceeded thereafter with the work, but deny that he did so duly; on the con-

trary, he greatly delayed the said work, and broke the conditions of the said contract, and in consequence thereof the defendants on or about January 19, 1906, took possession of the works thereunder, as they were entitled to do under Nos. 18, 20, 31, and 33 of the conditions, and obtained an order from this Honourable Court on January 17, 1906, restraining the plaintiff from removing any of his plant, and the said rule was made absolute on February 2. The defendants crave leave to refer to the records of this Honourable Court for the circumstances of the said taking over. Save as above, they deny paragraph 3.

4. As to paragraph 4, they deny that the delay in the completion of the work was due to any cause for which they are responsible, but they admit that the plaintiff was unable with the workmen employed by him to complete the said work within the time he had agreed to do, and they admit that they did not take steps, as in terms of the conditions they were empowered to do, to enforce penalties against him for delay, but they allowed him to go on with the work after the expiry of the contract time. Save as above, they deny paragraph 4.

5. As to paragraph 5, the defendants deny that the measurements as contained in the schedule of quantities were incorrect or were from time to time found to be so, or that they recognised and admitted this. They refer to No. 32 of the conditions, under which they have power to authorise the construction of additional works, and to alter the method of the construction of works if found desirable. They admit that a certain amount of additional work was done by the plaintiff as directed, and especially with regard to house drainage connections from the main sewer to the curb, but for all such work the plaintiff has been fully paid, as hereinafter set forth. They admit that the section from (a) to (b) (on plan) on the main road was slightly altered, and that one manhole was omitted and the work commenced from man-hole No. 2 (on plan). They admit that the plans were altered in order to readjust the lines and provide for extensions from manholes, where branches were carried to the curb. They admit that from time to time certificates for larger amounts were granted by the said Bennett, engineer to the Council, than plaintiff was legally entitled to under the said contract, and they say that the said Bennett, in violation of his duties and acting beyond his authority without the knowledge or consent of the defendants, granted certificates for work done under the contract, and not according to the schedule of prices provided for in the contract, and also granted certificates for work not done at all. The said certificates were not, and are not, binding on the defendants; in

any event, the said certificates are only payments on account, and there has been no final settlement of accounts between the parties, and the defendants are entitled to have a true and proper account taken of the work done by the plaintiff and of the value thereof, as provided by the contract and conditions and schedule of quantities. Save as above, they deny paragraph 5.

6. As to paragraph 6, they refer to page 15 of the annexure C for the schedule of prices in connection with this work. They admit that some additional work was done, but they say that the plaintiff has been paid for the same, and that he admitted and agreed on or about the 19th October, 1905, that any claim for work in connection with the above was settled. The whole of the said work was done under the contract A, and not otherwise, and payment had to be made therefor in accordance with the conditions B of the contract and the schedule of quantities C. Save as above, they deny all the allegations in paragraph 6, and say that the engineer, if he purported to make such an agreement as is alleged, had no power to make an agreement for payment at prices other than those provided for in the conditions, and in the schedule of quantities which could bind defendants; that he acted in violation of his duty and without defendants' knowledge or consent.

7. As to paragraph 7, they refer to page 7 of the annexure C for the schedule of prices in connection with this work. They admit that portion of the work was constructed by plaintiff prior to June 10, 1905, and at the said date the works constructed were carried away owing to a heavy fall of rain and consequent flooding, and it was decided not to proceed with it further. For the work done by plaintiff it was agreed to allow him a sum of £272 15s. 8d. in full settlement, and on or about October 19, 1905, he agreed to accept this in full and final settlement, and he has been paid this in account with defendants. Save as above, they deny all the allegations in paragraph 7, and say that the engineer, if he purported to make such an agreement as is alleged, had no power to make an agreement for payment at prices other than those provided in the conditions and schedule of quantities which could bind the defendants; that he acted in violation of his duty, and without defendants' knowledge or consent.

8. As to paragraph 8, they admit that provision was made for the sum of £386 7s. 1d., but save as above, they deny the said paragraph, and say that if the engineer made the agreement alleged he acted in violation of his duties, *ultra vires*, and without the defendants' knowledge or consent, and that such agreement is not binding on defendants.

9. As to paragraph 9, they admit that plans were caused to be prepared as

alleged, but they deny that any contract was entered into as alleged, and refer to section 104 of Act 45, 1882, whereunder all contracts with the defendants must be in writing signed by the chairman or by councillors acting under a resolution; no such contract was ever executed. They deny that any work upon the bridge or weir was executed by plaintiff, and say that after the aforementioned flooding of June 13, 1905, it was decided that this work should not be constructed, but that they have paid plaintiff a sum of £149 6s. for a weir-gate purchased by him; the said payment was made as additional work under contract A.

10. As to paragraph 10, they deny that any contract was entered into as alleged, and again refer to section 104 of Act 45, 1882. They admit that certain work has been done by the plaintiff in regard to house drainage connections, and say that plaintiff was instructed to do this as additional work under the contract A, and that he has been paid for all the said works. Save as above, they deny paragraph 10.

11. As to paragraph 11, they deny that any such agreement was entered into as alleged and again refer to section 104 of Act 45, 1882. No contract as therein provided was ever executed. No work on branch mains under any such agreement or otherwise has been executed by plaintiff; and they deny that in the month of January, 1906, plaintiff was ready and willing to perform the said work. Save as above, they deny paragraph 11.

12. As to paragraph 12, they have no knowledge of the allegations therein, and do not admit the same, but say that they are not responsible for any acts which plaintiff may have done as alleged.

13. As to paragraph 13, they admit that certificates to the amount of £16,144 11s. 4d. and more, less £1,000 retention money, have been issued by the said Bennett, and that plaintiff has been paid an amount of £18,263 16s. 2d. They deny that the said certificates represented the true sums due to plaintiff. They admit that the said Bennett obtained leave of absence and that one W. Olive was appointed acting engineer, and that the last certificate was granted in October, 1905. They admit that the plaintiff did some work after the granting of the last certificate, but deny that the value of work done or materials supplied is the sum of £1,974 15s. 10d., and they say that the aforesaid amount of £18,263 16s. 2d. which has been paid to plaintiff is far more than he is entitled to claim from defendants, and far exceeds the value of the work done or materials supplied. All work which was done or materials which were supplied were under the contract "A," and as to the excess this was paid in error of the true facts. Save as above, they deny paragraph 13.

14. As to paragraph 14, they deny that

the sums set forth therein are the correct amounts due to plaintiff or that any amounts are now due to him, and they crave leave to refer to a schedule marked "D" hereunto annexed which correctly sets forth the position of the accounts between the parties, and shows that the plaintiff is indebted to the defendants in the sum of £11,236 4s. 6d.

15. As to paragraph 15, they deny that they wrongfully and unlawfully broke the contract between themselves and plaintiff and withheld from him any sum of money due to him. They admit that they refused to allow plaintiff to continue the work, and ordered him to leave the works, and took possession thereof, and are now completing the works themselves. They say that they were justified in taking the steps that they did owing to the continuous breaches of the conditions of the contract by plaintiff and his neglect and refusal to carry on the work in a proper and efficient manner, without delay, and with a sufficient number of workmen; and they crave leave to refer to the particulars set forth in the aforesaid application to this Honourable Court in February, 1906. Save as above, they deny paragraph 15.

16. As to paragraph 16, they deny all the allegations therein save that they refuse to deliver up the said plant and materials, which they are entitled to retain in accordance with the conditions of the contract until the completion of the work. They admit that they refuse to pay the £1,000 retention money on the ground that the plaintiff has been already overpaid by a large sum in respect of work done by him upon the said contract. The defendants did not discover until after the departure of the said Bennett on leave of absence that the payments made were in excess of what plaintiff was legally entitled to, and that the said Bennett had been acting illegally, in violation of his duty, and *ultra vires* as aforesaid.

17. They deny all the allegations in paragraph 17.

Wherefore they pray that plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendants (now plaintiffs in reconvention) say:

18. They crave leave to refer to the matters above pleaded.

19. They refer to schedule "D," showing that the amount of £3,250 has been overpaid to the plaintiff.

20. The plaintiff in reconvention supplied material to the defendant in reconvention from October up to December 31, 1905, to an amount of £349 15s. 2d. for the purposes of the contract, and to an amount of £185 8s. 10d. for house connections from May 17 to October 31, 1905, and these sums they are now entitled to recover from him.

21. Since the date when the plaintiffe in reconvention took over the work

themselves in January, 1906, they have expended on work and labour under the said contract the sum of £1,839 13s. 6d., and this sum they are entitled in accordance with condition No. 33 to recover from the defendant in reconvention. In order to complete the said work the plaintiffs in reconvention will have to expend an additional sum of £3,000, which they are entitled to recover from defendant in reconvention.

22. In addition, the plaintiffs in reconvention have paid up to the present certain sums amounting in all to £111 6s. 6d. as and for damages sustained owing to the negligent and imperfect manner in which the defendant in reconvention carried out the said work, which they are entitled to recover in terms of clause 70 of the specification.

23. The plaintiffs in reconvention are further entitled to recover the sum of £2,500 as and for damages sustained owing to the negligent and improper manner in which the defendant in reconvention carried out the said work, and owing to his breach of contract in not carrying out the same to completion within the specified time.

24. The total claim of the plaintiff in reconvention amounts to the sum of £11,236 4s. 6d., as will more fully appear from the schedule "D" annexed.

25. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiffs in reconvention to recover the sum of £11,236 4s. 6d. from the defendant in reconvention.

The plaintiffs in reconvention claim:  
(a) The sum of £11,236 4s. 6d. (b) Interest *a tempore morae*. (c) Alternative relief. (d) Costs of suit.

Mr. Upington (with him Mr. Watermeyer) for plaintiff; Mr. Searle, K.C. (with him Mr. Burton and Mr. D. Buchanan) for defendants.

Mr. Upington opened the case in an address, in the course of which he said that the execution of the contract proceeded amicably until the Municipal Engineer (Mr. Bennett) went to England in November, 1905, and Mr. Olive, who acted during his absence, came upon the scene. Mr. Olive did not seem to be so much concerned with the inspection of the work that the contractor was doing, as in going over work that had been passed by Mr. Bennett, and the result was that a series of disagreements occurred between the contractor and Mr. Olive. Certificates were not granted, and in the end the plaintiff was placed in such an awkward position through lack of funds that he could not continue the operations at anything like a good rate, and eventually he was turned off the work, and he was also interdicted from removing his plant from the site.

James Collie (the plaintiff) said that in August, 1904, he read notices for tenders for the main drainage scheme, ex-

tending from the south side of Kalk Bay through St. James's to Muizenberg, across the vley mouth to the sandhills. For the purpose of tendering, witness was furnished with a copy of the quantities annexed to the plea in this case. His tender of £13,000 odd, which was based on those quantities, was accepted by the Council. The quantities purported to show one as he walked along the road the amount of excavation to be done. Witness had some knowledge of the condition of things at Muizenberg from an experience extending over ten or eleven years. The work was commenced under his supervision about the 11th October, 1904, and they proceeded towards Fish Hoek. The depths of excavation that had to be done were totally different from those shown in the quantities. Witness, from the first, claimed on account of the discrepancies to be paid according to the schedule of prices. Mr. Bennett recognised his claim, and up to the time of his departure for Home he granted certificates to witness.

[Hopley, J.: Then Bennett must have been admitting that he was quite wrong in his survey?]

Witness: He could not do anything else. Continuing, witness said that the further they went the greater the variations seemed to be. The quantities again did not agree with the plans. He instanced certain discrepancies on sections 24 to 31. What was shown at 4 ft. had to be excavated down to 14 ft., 4 ft. 5 in. to 18 ft. 5 in., 5½ ft. to 19 ft. 5 in., and 6 ft. 5 in. to 15 ft.

[Hopley, J.: Then Bennett could not have been very good at taking levels?]

Witness: I do not know whether it is the fault of taking levels or arranging the data from the levels taken. Proceeding, witness said that after he had tendered on the quantities, plans were supplied to him, from which he had to work showing that he had to go to different depths from those shown in the quantities. Sections 24 to 32 occupied about seven or eight months, owing to the exceptional nature of the work. Near St. James's Station they had to tunnel through solid rock for some distance to the hill. It was the worst rock he had ever had to contend with. In the schedule increased prices were shown for rock work, and these prices he was prepared to accept for tunnelling. Witness had lost money on the work he had done in those sections even on the schedule prices. The work for which he had been paid under Bennett's certificates had been done under his (witness's) own personal supervision. It was the most conscientious job that he had ever had in his fingers. The work was passed and approved by the engineer, and also by the Councillors. Certificates were granted by the officials of the Council upon their measurements, but never upon any measurement made by wit-



ness. Before the work was commenced, Mr. Bennett decided to alter the direction of the sewer, and instead of having it on the seaside, and crossing the road here and there, to keep it entirely on the land side. Witness did not make any additional charge, except for variations from the figures laid down in the quantities. He had considered that if the figures given in the quantities were inaccurate, then he could fall back upon the schedule of prices. A sewage well was to be constructed near the vley mouth on the Muizenberg beach, at the Power Station. It was specified that the depth should be 15 feet. His tender was £200. The plan originally furnished to him showed a cylinder 16 feet deep. Mr. Evans, the assistant engineer, supplied him with the levels. They began to put the cylinder down in sections. They observed, however, that they had to excavate 3 feet 6 inches deeper than originally intended. Down to 16 feet they had no difficulty. Then they began to get lots of water. At 17 feet they were stopped. They had a great deal of trouble. Mr. Bennett instructed them to continue the excavation. They had to build a gantry in order to raise the cast iron cylinder that they had put down, but then the timbers gave way, and they had to adopt other methods. The inside of the cylinder was sheet piled, making a sort of coffer dam. Next morning the piles were shot into the air, and the cylinder was a complete wreck. It was supposed that some underground water drained into the well. The well was eventually made 1 foot 2 inches below the original depth, and the work was completed in ten days. The cylinder was piled on the outside. The work was done under the instructions of the engineer. While engaged on the well, he was instructed to build a screening chamber. Witness's claim for these works was £2,680, and he had been paid £1,006. The first foundation of concrete that they laid down in the screening chamber disappeared in the quicksands. Eventually they got a foundation that managed to stay. The only thing to have done would, in his opinion, have been to pile over the whole area. In the original quantities it was provided that a syphon should be built to carry the sewage across the vley mouth. The syphon, according to the plan, was to be supported on a concrete base. After some correspondence, it was arranged that witness should be paid the schedule of labour prices for carrying out the work. Witness procured plant, and did an enormous amount of work. Alterations of the plan were necessary, and a coffer dam had to be built, with the result that the Muizenberg vley dammed up, and in the end the temporary works were washed away. After this, nothing further was done, except in the way of

making the bridge passable. In regard to the syphon bridge and weir, witness claimed £1,382, and had been paid £272 towards this sum. In connection with the drainage scheme, he carried out certain stormwater sewers. The intake was removed further up the mountain, and certain additional work had to be done. He charged £827 18s. 6d. in respect of the extra work he had to do. He was stopped from completing this work, a letter being received from Mr. Olive. As to the house connections, there had been trouble over the condition of the road, and the Council, he believed, approached him in regard to making up the house connections, the idea being to get the Divisional Council to make up the road as far as possible. The engineer, in a letter to witness, said that the charges were to be according to the schedule of prices. Witness's account for making the house connections was £1,653, and there was still a balance due to him of £343 11s. 7d. In regard to the laying of the branch mains, witness agreed to do the work in accordance with the engineer's prices. He purchased additional plant and took on extra labour. He estimated that he would have made a profit of £2,000 on this work. No effective work was done on his contract. Witness was given a schedule by the Municipal Engineer. The Council offered the work to him on this schedule, and he accepted it. As indicating the discrepancies in the particulars furnished to him, witness stated that on sections 49-72 the length of pipe line was shown in the quantities to be 167 yards, whilst the actual line was 2,000 feet, thus showing an error of 500 yards. In August, 1905, witness wrote to the Council pointing out the difficulties he had had under contract No. 1, Fish Hoek to St. James's, and asking for an indemnity against further losses. In this letter he said that he had had to encounter what was apparently an almost interminable reef. Correspondence ensued, and witness supplied particulars as requested by the Council. The Council failed to pay certain certificates granted by the engineer, and placed him in some difficulty in carrying on the work. Witness had asked for a special allowance over and above the schedule prices. The Council in September, 1905, said that they were not prepared to depart from the terms of the contract, but on the completion of the work they would consider his proposition as to an allowance on account of the special difficulties he had had to contend with. Witness attended a meeting of the Drainage Committee on the 12th October, and a further meeting on the 19th. He agreed at the latter meeting to accept £3,117 6s. 2d. in settlement of his claims, on the understanding that they would assist him as they promised, later on. Being a



public body, the Council were not prepared to put the matter in writing. In November Mr. Bennett went to England, the last certificate which he granted being dated the 31st October. Mr. Olive took over from the Municipal Engineer early in November. Witness spoke to certificates having been given for all the work which he had done up to the 31st October, except as to certain extras. On November 10th he obtained an amended certificate from Mr. Olive for £2,250 for work done in Mr. Bennett's time. Mr. Olive wrote asking him to clean out certain of the sewers, so that he could inspect them. Witness had constructed those sewers under the direction of Mr. Bennett, who had passed the work. He also had some difficulty in getting plans to work by, and he had to write to Mr. Olive. On the 22nd November, witness received a letter from the Council directing him for the present not to do any work apart from contract No. 1. Early in December he was stopped from doing work in connection with the intake, which was an extra under contract No. 1. Witness became much pressed for funds, having had no payment for over a month, and eventually on the 19th December he wrote saying that he would be compelled to close down for lack of funds. However, he had a conversation with the Mayor, and he went on with the work, but on the 21st December he received a letter from the Municipal Clerk stating that the Acting Engineer had informed the Council that he (plaintiff) was already overpaid for the work done. On the 22nd December Mr. Olive wrote complaining of the rate of progress. Time after time witness wrote asking for details of the alleged over-payment, but not a single detail was supplied until about a fortnight ago. It became impossible for him to carry on the work at anything like a good rate, and on January 19, 1906, the contract was taken out of his hands on the ground that he was not proceeding at a proper rate with the work. Had he received the monthly payments he would have been able to complete the contract. He had done the worst part of the work. His plant was seized. He had no other plant, and he had been unable to do any work since he was ejected. Witness had prepared a statement showing the amount of work done since the Council had taken over the contract. Mr. Scowen was Mayor during the execution of the contract.

Cross-examined by Mr. Searle: Witness had carried out several other contracts. He had not done any large works of this kind in Cape Town. Witness had done plumbing work in Cape Town. Prior to this contract he had not carried out any large drainage contract. He had carried out waterworks at Caledon. Prior to entering into the

contract no trial holes were made under his instructions, but he understood that trial holes had been made. Trial holes were also made afterwards under his instructions. From the quantities witness understood that the whole of the section was of the average depth mentioned, not that certain portions of the section only were of the depth mentioned.

Witness said that the quantities showed the depths in rotation.

Mr. Searle: Anyone acquainted with such contracts will tell you that the way to read the quantities is the one I am explaining to you. The other way would be perfectly hopeless, and it would be perfectly impossible to lay any sewer on the suggestion you make.

Witness: Oh, no; not in the least.

Further cross-examined: There were greater depths to which the excavation had to be taken than the maximum depths shown in the quantities. The readings on the quantities, he took it, were consecutive, and hence he said that he had gone down to a greater depth than was shown on the quantities. If they took the schedules entirely for the work he had done, then he would admit that he had received some thousands of pounds more than he was entitled to. He had received on sections £7,513 17s. 3d., against his own valuation of £8,206 16s. 6d. He admitted that in the certificates there were two allowances for work which he had not done, but he added that he had pointed out these errors to Mr. Bennett. There were errors both for and against witness; in one case £170 against him. He had not had an opportunity of pointing out the errors to the Council. Witness had found errors in the addition in certain of the certificates, due to copying from the original notes. On certificate No. 9, there was an error of £100 in his favour. His estimate of the value of the work was nearly £700 more than he had been paid, and this would be sufficient to cover any errors in his favour. Witness had on no occasion supplied Mr. Bennett with particulars of the measurement for the purposes of his certificates.

Plaintiff stated that he measured up and formed an estimate of what he was entitled to, and the engineer would measure afterwards. Witness's measurements generally corresponded with those of the engineer. In the June certificate there was between £500 and £600 for a section which he had never touched. In framing his estimate he adopted both schedules, although to a great extent he had worked on the second schedule. The Municipality had certainly not the hardest part of the work, only the easiest sections remained to be done.

At this stage it was agreed to refer several of the disputed accounts to Mr. Close or Mr. Gibson.

Continuing under cross-examination, the plaintiff said he had been paid £163 for the manhole. The time sheets and the vouchers were handed by witness to Mr. Bennett. All the vouchers in connection with the vlei were given to Mr. Bennett. Witness did not have duplicates, but intended to get the vouchers back. It would be impossible to prove that the vouchers had been destroyed. The Municipality, he believed, still held the time sheets and original notes. With the exception of a little he got all the cement from the Municipality. He was not anxious to keep the work quiet at the pumping well. It was not his idea to make up a big bill in connection with the matter. Pinner was the man employed by witness. He had drawn more money from witness than he was entitled to, and witness wrote to him to keep his mouth shut about the work. Witness warned Pinner in these terms, because he was a man inclined to talk about his business. Up to September 8 everything was included in the account, which he furnished the Council. The Municipality pointed out that they could not bargain with witness, because they were a public body.

Mr. Upington said that he had considered the position in reference to the settlement which was arrived at between Mr. Collie and the Council, and he was not now prepared to put it to the Court that the settlement was not binding. He felt that in view of Mr. Collie's evidence he could not insist that the settlement was conditional.

[Hopley, J.: Where would that leave the case?]

Mr. Upington said that in paragraph 14 of the declaration claim (a) would disappear, (b) would go out with the exception of £556 2s. for work at the vlei mouth, and (c) and (d) would remain. The claims for damages for breach of contract and loss, and seizure of plant and material would, of course, still remain.

Plaintiff again went into the witness-box and was further cross-examined by Mr. Searle. Many of the questions related to the accounts between the parties, Mr. Searle seeking to show that items which plaintiff was now claiming were already disposed of under other headings. There was an item of £556 2s., charged by plaintiff for materials at the vlei mouth. Witness admitted that he had received an advance of £900 under certificate from Mr. Bennett, and that this amount had not been repaid by him.

Mr. Searle put it that these materials were included in the inventory taken when the Council had turned plaintiff off the work.

Witness said that he was not aware that these materials were included in the inventory. In further cross-examin-

ation witness said that on the first contract he did not make a profit, because he had so much hard cutting to carry out. He calculated, however, that he could have made a profit on the other contract for the construction of branch mains, because the excavations were shallow. On the 11th October, 1905, he received a letter from the clerk to the Council stating that he should not proceed with the work. In the meantime he had made preparations for commencing the work, and he wrote asking for final instructions. Witness would rather do the work to-day than receive £2,000 damages. The work had not been carried out yet.

Mr. Searle: The Council's estimate of the cost of the branch mains was only £1,700.

Witness: Then it must have been as far out as their original scheme.

[Hopley, J. (to witness): Your estimate must have been about £6,000 or £7,000?]

Witness: It was an exceedingly good one—about £6,000.

Cross-examination continued: Witness claimed £750 damages in respect of the house connections and the bridge at the vlei mouth. He had sustained a loss on the amount of work that he had done on the bridge, but he estimated that if he were allowed to complete the bridge he would make a profit of £400 to £450. He estimated the profit he would have made on the house connections at £150 to £200. For the bridge he should have been paid on the labour schedule prices, and he would have had to pay out considerably less. He reckoned his profit from the cartage and other labour at £10 a day. He calculated that the work would have occupied about six weeks.

[Hopley, J.: This might go until further orders. It is very interesting; it is like the case of Houlder Brothers, where it is said that they were to charge 4d. a day for demurrage, and they paid 3d. a day. It seems almost immoral making £10 a day on this basis.]

Further cross-examined: The Council, in their letter, agreed to pay him schedule prices. He was allowed under the schedule 5s. a day for "boys," and he would pay 3s. to 3s. 6d. For artisans, bricklayers, etc., he was allowed 25s. a day, and he would have paid 12s. His profit on the house connections would have been from 15s. to £1 per house.

Mr. Searle said that as showing the way the contract was made up, he might mention an item in regard to a municipal mule lent to the plaintiff. Plaintiff had charged £11 10s. for having the use of that mule.

Witness said that counsel forgot that he had to pay for a man to attend the mule.

Re-examined: There had been nothing that he was ashamed of in connection with this contract. There had never been any collusion with Bennett and

himself, so that he should receive certificates from the municipal engineer in excess of what he was entitled to. He had covered in no portion of the work he had done until he had had the approval of the municipal engineer.

Mr. Upington (in reply to the foreman) said that the plaintiff's claim had now been reduced by £2,328, leaving £3,593 claimed for work and labour done and £1,000 retention money under section (a) and £2,750 and £300 damages under section (b).

Thomas Pitts, of Mowbray, formerly in the employ of plaintiff as general foreman of the Kalk Bay contract, said he supervised the work from Fish Hoek to St. James's. He spoke as to the difficult character of the ground that they had to excavate, and said that the work was done as carefully and expeditiously as possible. Witness stated that certain sections which had been criticised by the Government engineers had actually been constructed by the municipality.

Cross-examined: Witness would receive a commission from Mr. Collie if he won this case. His terms of employment with Mr. Collie were £25 a month, and 15 per cent. commission on the profits. He had not yet received any commission. He admitted that the tests made by the Government engineers revealed a leak at each of the places tested. One of the pipes near the Fisheries had been broken, and the hole had been patched up with pieces of tin. Witness was unable to say who was responsible for this bit of work. He did not see work of that kind put in.

By the Court: The section in question must have been inspected by Bennett.

Witness went into details of the accounts and time sheets in connection with the work.

Hopley, J., remarked that it seemed to him if all these details were to be gone into the case would not be finished before Christmas. He was sure that the jury would not sit with any degree of patience until that time. Could not these matters be referred to an expert?

Mr. Searle said he had no objection to that course.

It was agreed that the matter of the stormwater sewage and all other questions of quantities be referred to a quantity surveyor.

Mr. Upington said his other evidence was on the question of accounts, but as that matter had been referred there would be no necessity now to call the evidence.

Mr. Searle said he would call evidence to show that the account submitted to the defendants was wholly incorrect.

Mr. Upington submitted, if evidence was going to be called to show fraud or collusion, he should be allowed to call evidence to disprove the charge.

Hopley, J., said he would decide the point when the time arrived.

Mr. Upington closed his case.

Thomas William Stainthorpe, A.M., I.C.E., M.R.S.I., said towards the end of June he was appointed by the Government to make an inquiry into the drainage work at Kalk Bay and Muizenberg. Witness made a plan of the whole work for the Government. He had no interest whatever as between the plaintiff and defendant. There was no doubt that between manholes 28 and 29 the gradient was the wrong way. There were several other variations. He went into the Government investigation, and he could not get the payments to correspond. A higher scale had been applied than the scale on page 18. The payments had not been made on the basis suggested by the plaintiff.

Cross-examined by Mr. Upington: The proper way to have drawn up quantities of this kind would have been to have taken the average depth of the manholes, and have the manholes pegged out for the contractor. The plans might have given a little more information to the contractor. The Secretary for Public Works appointed him to make the investigation. The general administration of the Municipality, in his opinion, was lax. From a municipal point of view, the general administration of Muizenberg during the time of this contract was not what it should have been. Instances had come to his notice where documents which should have been filed were lost, principally in the Engineer's department.

Dr. Mitchell, who, with Mr. Stainthorpe formed the Commission of Inquiry appointed by the Government, gave evidence as to the quantity of stagnant water found in the manholes. It was possible that the system as it was would work for a time with the aid of flushing chambers, but the worst of the sections sooner or later would have to be taken up. From the point of view of his department, considerable expenditure would have to be incurred to make the sewers reasonably satisfactory. After his report the Municipality would be neglectful if it worked the system.

W. T. Olive, engineer, stated that his letter of the 11th November requesting that the manholes should be uncovered for the purpose of inspection, had not been complied with. About 110 men were on the work at the commencement, but towards the finish there were only 10 men on the work. Witness wrote several letters requesting the plaintiff to get on with the work, but nothing was done. Towards the end of January the Municipality continued the work. The original plans were sufficiently accurate for the contractor.

Cross-examined by Mr. Watermeyer: Some of the lengths on the sections did not tally with the quantities. The

plaintiff was turned off the work because the time had expired, and because he had been overpaid. The contract, to his mind, was one in which rock would have to be encountered. Witness would have put 120 men on the work, and done it entirely different.

M. T. Cowan, architect and quantity surveyor, and formerly a member of the Council, stated that the total value of the work done, including extras, was £14,116 13s. 6d. The net over-payment was £4,137 2s. 8d. The Council never passed a resolution that the work of the branch mains should be undertaken, for which the plaintiff was to be paid £2,100. The suggestion was that the work should be done when the Council had funds. There was no authority given to enter into a contract for branch mains. No work, as far as witness was aware, had been done on the branch mains.

Cross-examined by Mr. Watermeyer: The quantities were prepared two or three months before he came into the Council, and he only saw them when the tender was accepted. The matter of the branch mains came up before the Council pretty often, and a schedule was prepared on a resolution of the Council.

M. T. Cowan, architect and quantity surveyor, continuing his evidence, stated, in answer to a juror, that in March he discovered that there was one set of reports to the Council and one to Mr. Collie, and he was then aware that the Council was getting different statements to those which were supplied to the contractor. Witness would have no hesitation in accepting the engineer's interim certificate; it would be impossible to question the certificate without going fully into the whole matter. In this case a certificate was given to Mr. Collie by Mr. Bennett without the Council knowing anything about it.

Dr. Mitchell, recalled, submitted statements showing the different rates paid, and their comparisons with the various schedules.

W. D. Gourlay, Mayor of the Kalk Bay Municipality, stated that there was no contract for branch mains. The question only came up when Mr. Collie wrote to the Council saying that he was in difficulties, owing to his having encountered so much rock, and was working at a loss. No plans were placed before the Council to show what branch mains were to be constructed. As a matter of fact, the Council was never in a position to conclude a contract for the branch mains, the main drainage being regarded as the important thing to complete. Witness protested against the honouring of certificates by the Council after the contract price had been exceeded.

Cross-examined by Mr. Upington: He understood that the certificates were handed to Collie, and that the latter handed them to the Town Treasurer.

Witness was Mayor when the settlement was arrived at in October, the idea being to settle and define the position of the Council up to date. When Mr. Bennett was going home witness begged the Council to let him go, for the purpose of having another man in to report on the condition of affairs. It was acknowledged, however, that the contractor had to contend with very great difficulties. He was not aware that the contract price had been exceeded, although certain extra payments had been made. The first the Council knew of overpayments was when Mr. Olive came. The branch drainage was never to be given to any contractor until permission to raise the money had been obtained from the ratepayers.

Re-examined: The drainage scheme which had been referred to included the electric lighting scheme, and other contracts had been entered into in respect of other portions of the general scheme. The settlement in October was in reference to extras, but had nothing to do with the ordinary payments on certificates.

Arthur Ford, superintendent of the drainage works at Kalk Bay, said that he entered the Council's employment at the beginning of this year. After Collie left he made a complete inventory of the plant and material, which was lying all along the line of work. The valuation of £938 was a fair valuation. Witness had carried out the work from the point at which Mr. Collie left it. Each section as it was completed was measured up, and the work carried out in strict accordance with the specifications. He had prepared a statement showing the amount of work done by the Council up to the end of October, the total expenditure by the Council being £2,850. The main contract was, however, not completed yet, and he estimated a further expenditure of £1,276 would be required to complete the contract. In June an obstruction occurred which it was found, on a shaft being sunk, was due to a broken pipe which had been patched up with tin and composition. Another pipe which had been similarly treated was also found close by, this being a portion of the work done by Mr. Collie.

Cross-examined by Mr. Upington: Witness had had considerable experience of drainage works, and had been assistant-general foreman of the main drainage works, Cape Town. He had also been engaged on drainage work in England. The work now in progress was expensive, but he did not see any difficulties about it. At present there were about twenty men employed.

By the Jury: The work which had been carried out by the Municipality was of a far more difficult character than that which had been carried out by the contractor.

William Jefferson, sub-foreman on the Kalk Bay drainage works, said he had



also had experience as a ganger on the Cape Town main drainage, and at Wynberg. The work at Kalk Bay had been pushed along as rapidly as possible, and there had been no accidents in connection with blasting. Witness proceeded to corroborate the evidence of the previous witness with regard to finding a damaged pipe which had been patched up with composition and a piece of paraffin-oil tin. The pipes were blocked owing to the composition running through, and water was oozing through the pipes.

John Scott, a foreman employed on the Kalk Bay drainage works, said he had had experience of drainage works at Cape Town, Wynberg and Claremont, and at Kalk Bay he was looking after the main sewer. Witness denied the assertions made by Mr. Collie in his letter as to witness's insobriety and as to time being lost on the work.

Henry Herbert Evans, an engineer practising in Cape Town, and formerly assistant engineer to the Kalk Bay Municipality, stated that he left the employ of the Municipality very shortly after the contract was commenced. Witness denied that he had given Mr. Collie to understand that the quantities in the schedule were consecutive.

Cross-examined: It was contemplated that the excavation for the greater part of the work would be in solid rock. Witness inspected all work whilst he was there, and before it was finally covered in. During the time that witness was there the whole of Mr. Collie's work was satisfactory. Witness measured up the work, but he had nothing to do with the pricing of the work.

By the Jury: He left the employment of the Council on account of a disagreement, but it had nothing whatever to do with the contract.

Charles Pinker, a builder and contractor, at Muizenberg, gave evidence as to the work done by him under a sub-contract with the plaintiff. Later he was engaged as foreman, and subsequently had been engaged by the Municipality. Witness gave evidence as to the value of the plant and material taken over at the Vlei Mouth. Witness kept full books of his work, and handed them to the plaintiff for the purpose of making out his accounts. Mr. Carroll, the plaintiff's book-keeper, told witness that plaintiff burnt the books, and when witness spoke to plaintiff about this he denied having done so. Carroll subsequently told witness that the plaintiff was shuffling, as he (plaintiff) had torn up the books, and handed them to Carroll to burn.

Cross-examined by Mr. Upington: He was not fond of going about talking freely of business matters. Witness sent the plaintiff a demand for £25, and the plaintiff asked him to let the matter stand over until the present case was decided. Since August he had

been in the employ of the Municipality. Witness had charge of the Muizenberg section, and no complaint was made by the Engineer. Witness had nothing to hide from anyone. The plaintiff advanced witness money on the work. Witness had paid wages to the men out of his own pocket, although at the time he was very hard pressed for cash; in fact, he was unable to pay a small instalment on a debt.

Wilhelm Westhoven, who had been in the Public Works Department up to the beginning of this year, and who had forty-three years' experience of engineering, including the Forth Bridge, stated he had prepared a report of the work in question. At the present time he was acting as consultant engineer to the Municipality. Prior to taking this position he made the investigations. He was simply asked to arrive at the actual work done by the contractor. Witness then proceeded to give evidence on the different items.

Mr. Searle closed his case, and counsel proceeded to quote to his lordship the different items in the accounts in dispute to be referred to experts for reports.

Mr. Upington said, in view of the fact that the plan of Mr. Westhoven was not submitted to the plaintiff, he should be allowed to give some evidence on that point. Counsel did not think it would be fair that Mr. Westhoven's plan should go before the jury without an opportunity given to Mr. Collie.

[Hopley, J.: Can he tell us anything which you cannot?]

Mr. Upington: He maintains it is possible to construct that sewer underground in accordance with the quantities, and he has prepared a plan.

[Hopley, J.: Why did he not do so?]

Mr. Upington: Because he had to go according to the instructions of the engineer.

Hopley, J., thought it fair that the plaintiff should be allowed to give evidence.

The plaintiff (recalled) then gave evidence on his plan.

Mr. Upington said the first question to be decided was, Was there any evidence of fraud and collusion? Not a shred of evidence had been called to substantiate the charge brought against Collie. If that charge failed then the certificates were binding on the municipality. There were clauses in the contract providing that Bennett's measurements and Bennett's interpretation of the schedules were to be binding on both parties and the work was to be done to Bennett's satisfaction. Bennett had interpreted the contract in the way contended for by the plaintiff. In those circumstances the Council could not go into the question of over-payment or bad workmanship. On this



point of law counsel referred to *Lock v. Claridge* (1 J., 356), *Hansen and Schraeder v. Deure* (3 E.D.C., 36), *Wilson v. Holt* (4 H.C., p. 220), *Hudson on Building Contracts*. Counsel held that the municipality broke the contract by failing to pay monthly and had no right to turn Collie off the works.

Mr. Searle said there were certain preliminary legal points to be decided before the questions of fact were submitted to the jury. They were (a) Disregarding the question of fraud, could the payments made on the architect's certificates be reviewed? (b) Upon what basis should the work be paid for? (c) Suppose the depth exceeded that given in the quantities at any particular place, did the second schedule apply? (d) Could Bennett apply whatever schedule he pleased? (e) Was there a legal contract for the branch mains?

On the last point counsel said no contract had been entered into in the form laid down by the Act of 1882 and so there was no legal contract; consequently on the authority of *Dibben v. Cape Divisional Council* (14 S.C.) the plaintiff could not claim damages for a breach.

On the first point, counsel contended that the certificates were only progress certificates and in no way binding on the Council. (*Hudson on Building Contracts*, Vol. I., second edition, pp. 276, 297; *McCarthy v. Visser*, (22 S.C., 122). Bennett had awarded his certificates on the wrong basis, so the municipality could go behind them. The case of *Hills v. The Colonial Government* (14 C.T.R., 39), decided that point.

He would draw their attention to the evidence given by Mr. Olive about that schedule, that peculiar schedule given to him by Mr. Bennett, the effect of which would be that the work upon which Mr. Collie was then engaged would be according to the main schedule paid on a very much higher rate than on the proper schedule, although on that schedule the beginning portion of the work was priced at a lower rate, and the latter portion of the work was priced at a higher rate. It seemed pretty clear that the plaintiff had been paid on the wrong schedule. On the matter of the stormwater sewer, the only question for the jury was upon what basis it had to be dealt with, whether on the basis of the schedule on page 18, or on the main schedule. He understood his learned friend to say that Mr. Collie said his claim to be paid on the higher schedule was admitted by the engineer, but counsel could not find that statement in the evidence. Damages were claimed by Mr. Collie for not being able to go on with the house connections, and he claimed from £150 to £200 on that item. Of course, if the Council was right in taking up the position that he was overpaid and saying to him, "You must go on with the contract," and he

was not able to do that, he could not claim any damages for the house connections. It was said there had been great laxity in the administration of the municipality, but counsel did not see what that had got to do with the case. The question was, what schedule Mr. Collie had to be paid upon? Was he paid on the right schedule? Counsel could not see there had been any laxity of administration except as regards the payments of these certificates, which might perhaps have been inquired into. He did not ask the jury to take any unfair or harsh view towards the plaintiff. It was admitted he had had all this money, and the system which was not completed was in a very unsatisfactory state, and a large amount of money would have to be spent by the Municipality to make it right. He asked the jury to take Mr. Westhofen's figures, which he submitted were true and reliable.

Mr. Upington, in reply on a point of law, submitted that certificates of work done granted before the final certificate were binding on the parties. In the absence of fraud and collusion, the Municipality, in face of these certificates, could not now say that Mr. Bennett had made a fool of himself, that he had been careless and did not know his business. A very great injustice would result, if upon a contract of this kind which clearly contemplated that each section of the work was to be inspected and approved before it was filled in, the Municipality, after their architect had certified and the full length of the sewer filled in from end to end, could come at the last moment and bring experts to say that the work was three-quarters of an inch out and that the work had been done in an unsatisfactory manner. The contractor based his tender upon the quantities. This was not one of those cases where the quantities were supplied to the contractor, and they were not made the basis of the contract. The outstanding feature of the law of the case was that the quantities were the basis of the contract. Addressing the jury on the facts of the case, counsel said that something had been made of the fact that, acting upon his advice, the plaintiff had withdrawn certain claims. Counsel thought he had made it quite clear that in so doing the plaintiff was acting upon his advice, that from a legal point of view the settlement of October 19 could not be assailed whatever he may have thought at the time. The plaintiff's own evidence was no legal proof. In regard to the fraud and collusion, the charge was based on the flimsiest foundation. A single atom of evidence had not been produced to justify any honest and fair-minded jury in coming to the conclusion that there was an attempt to defraud the Municipality by collusion with Bennett. What did his learned friend rely upon? He re-

ferred to that wonderful letter—a letter written hurriedly in pencil to Pinker. If one had two years afterwards to give an explanation of every hurried note written in pencil, suddenly thrown into one's hands—to give an explanation of a phrase used or something of that kind, it would be a very difficult thing for most of them. But what about Pinker? Counsel thought he was going to say something about fraud and collusion, but Pinker, to whom the letter was written, did not say a word to that effect. There was not the slightest evidence of fraud, and it might more easily be said of Mr. Cowan that there was a benevolent arrangement between him and the Municipality. Wallace and Harris were most important witnesses, and his learned friend's explanation of their absence was anything but satisfactory.

Hopley, J., in summing up, pointed out that as a question of law, the jury must take the whole of the plans, specifications, drawings, etc., as a whole. And if they did so, it followed that the contention of the plaintiff that the lineal yards shown must be taken to be consecutive must fall away. The work must be done according to the levels set forth on the plans, and on this point of law he ruled that the plaintiff's contention was absolutely wrong. The next point of law was as to the interpretation to be placed upon the meaning of the two schedules. Clearly, in his lordship's opinion, the work under the contract was to be governed under the main schedule, especially as a sum of £750 had been specially provided for extra work under the contract. Another point of law was whether Mr. Bennett had any power under the contract to vary the prices under the schedules. He had no such power, and if he had made such variation, he had gone beyond his powers. The only time he could vary the prices was when nothing was provided for in the schedule of quantities. Mr. Bennett was as much bound by the terms of the contract as anyone else, and it was a ridiculous proposition of law that he had the power to make variations when he chose. As to the point whether there was a branch main contract or not, it was obvious that Collie was losing money on the main contract, and the Municipality, sympathising with him, were desirous that he should have that subsidiary contract under a separate schedule. But when a person contracted with a Corporation, he was supposed to know the statutory limits of the powers of such Corporation. As a matter of law, his lordship must hold that no such contract was ever concluded. On this point, however, he would leave it to the jury to say what were the damages, supposing he were wrong in the point of law, and such a contract had been concluded. Proceed-

ing to the facts of the case, his lordship said it would be for the jury to say whether the plaintiff had been overpaid, and, if so, how much. He was not sure that they could come to a definite opinion on that point until the referee's report had been read, but they might determine upon which schedule, in their opinion, payment should have been made and that might, if necessary, be communicated to the referee. There was one piece of work of exceptional difficulty, and which seemed to be beyond the limit of the ordinary quantity prices, for that the jury might specially find for plaintiff. With regard to the stormwater contract and upon what basis payment should have been made, it did not appear to have been proved that the labour schedule applied. If, however, the jury found that the work was of such a mixed nature that the ordinary schedule did not apply, they might find that Mr. Bennett was justified in allowing labour prices. The assessment of damages with regard to the branch main contract would only be of use in case the ruling on the point of law that no such contract had been concluded, was appealed against. Then came the point whether the plaintiff had been wrongfully dismissed. If plaintiff had been overpaid they would have to consider as a matter of commonsense whether the municipality were not within their rights in withholding further advances and whether, notwithstanding this, the plaintiff should not have proceeded with the work. If they had wrongfully turned him off the works, the jury would say what amount of damages he had sustained; but if rightfully turned off no damages could arise. On the question of fraud and collusion Mr. Upington was quite right in saying that when such things were alleged they should be fully proved. It would be for the jury as commonsense men to say whether under all the circumstances there was sufficient to lead them to believe that there had been collusion between Collie and Bennett. As to the alleged defective work his lordship did not think the Council could go behind the engineer's certificate of approval, unless it were found that there had been collusion, otherwise as a matter of law the Council would not be entitled to recover damages.

The jury, after ninety minutes' deliberation, found a verdict for the defendants for £3,250, provided the amount of work done since the last certificate had been allowed for, otherwise it must be deducted, also less the excess amount charged on Bennett's figures over the amount allowed by Westhoven for the sixty-four yards allowed by Bennett at 270 shillings. Collusion not proved. The plaintiff was paid on a higher schedule and not on a lower. The labour schedule should be applied to the claim on stormwater contract.

On the branch mains, if damages, then £750. By a majority of six to three it was found that the plaintiff was rightly dismissed from the work. Unanimously it was found that the defendants have no claim for faulty work passed by Bennett. On the house connections, if damages, then £150. It was also found that this went with the main contract, which should be finished by the Council.

His Lordship said, when the referees handed in their report, counsel could move for judgment.

[Plaintiff's Attorneys: Wahl, Fuller, and De Klerck. Defendant's Attorney: D. Tennant.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

THERON V. ESTATE THERON. { 1906.  
GLYNN V. ESTATE THERON { Nov. 14th.  
AND ANOTHER.

Attachment of inheritance—Judgment debt—Right of debtor.

*A. obtained judgment against the applicant and an order for the attachment of the inheritance coming to him from the estate of his grandmother. B. obtained a judgment against the applicant and an order for the attachment of the inheritance coming to him from the estate of his father. It appeared that there was no inheritance coming to the applicant from his mother, who died before his father, and that on the death of his father there was no inheritance due from his estate to the applicant. Although the executor of the father had notice of the order at the suit of B., he paid the money over to A.*

*Held, that the applicant was entitled to an order on the executor to pay the money to*

*the Deputy Sheriff in execution of the judgment at the suit of B.*

The first matter was an application for an order upon W. B. Shaw, the executor dative in the estate of the late Petrus Nicholas Theron, to pay over to the Deputy Sheriff the amount of the inheritance due to applicant (Mr. Theron, junior), and for costs against respondent *de bonis propriis*.

The second matter was an application for an amendment of an order granted by Mr. Justice Buchanan on the 24th September, attaching for the benefit of applicant (J. A. Glynn) certain moneys falling due to P. N. Theron, junior, in the estate of Christina G. Theron. The amendment sought was to make the order applicable to the executor dative of the estate of P. N. Theron.

Mr. P. S. T. Jones appeared for Theron junior; Dr. Greer appeared for the executor dative and Glynn.

Mr. Jones said that in April, 1903, Theron, junior, became indebted to one Mrs. Goslett in the sum of £30, which apparently he was not able to pay. His grandmother died, and she left a will bequeathing some of her property to Theron's father. Theron's father died intestate, and as a share of his estate Theron (junior) was entitled to the sum of £29 7s. 11d. Theron (junior) ceded his right under the will, as Mr. Shaw said, in his letter to the petitioner's attorney, to Mrs. Goslett, and instructed Shaw on the 22nd August, 1906—a document which came out of the possession of Shaw—to pay over such sum as may be found due to him to Mrs. Goslett. Instead of doing so, Shaw paid the money to Glynn. He paid the other two heirs in intestacy of Theron's father. If his lordship held that it was a cession, and that as executor dative, Shaw was bound to pay out under the cession then that disposed of the whole of the matter. Young Theron said that the inheritance ought not to have been paid to Glynn in execution of the writ taken out by him, but that it should have been paid under the cession to Mrs. Goslett, and, if not under that cession, then under the original order of the Court, which, when Mrs. Goslett got judgment against him, declared that inheritance specifically executable to that judgment. Instead of doing that, Shaw, as executor dative, had handed over to Glynn on an order of this Court, which did not refer to him; he had paid over to Glynn on an order granted by Mr. Justice Buchanan on an application which asked that certain inheritance due to Theron out of his grandmother's estate should be declared executable, and an order on the executor in the grandmother's estate to pay the money in execution of that judgment. Counsel submitted that there

was no right on the part of Shaw to pay out this money, that he should be held liable for these amounts, and that he should pay costs.

Dr. Greer submitted that the executor was bound to act under the order of the Court, which, it was perfectly clear, was intended to interdict the money in his hands. He had not paid out to the other heirs their share in the estate, but had only made an advance. The executor had acted *bona fide* throughout, and has obeyed what was the intention of the order of the Court at the time.

De Villiers, C.J.: There is a somewhat extraordinary entanglement in this case. It seems clear that the order which was made by Mr. Justice Buchanan could not possibly affect any inheritance coming to Theron out of the estate of his father. It was an order upon the estate of his grandmother, but it appears that the grandmother died before the father. The father, therefore, became the heir of his mother, and upon the death of the father, any inheritance coming to Theron would be an inheritance coming to him from his father, and not from his grandmother, and, consequently, the order of Mr. Justice Buchanan could not be interpreted to apply to the money which is now in question. It seems, however, that Shaw, who was the executor of the father's estate, paid this money over to Glynn, upon the strength of the Judge's order, although Shaw ought really to have known that this order did not apply to that amount, more especially bearing in mind that he had in his possession at the time an order calling upon him as the executor to pay the money coming to him (Theron) out of his father's estate to Mrs. Goslett. There is a technical difficulty in this case as to whether Mrs. Goslett should not have been a party to the present application, but no objection has been raised on that ground, and certainly Theron himself has an interest in the matter to see that the money goes to the person to whom he originally intended it to go, and who under her writ of execution would be entitled to this property. She was the first to obtain a writ as against this particular inheritance, and she would have a preference in respect of it. At the time of the judgment an order was made that this particular inheritance was to be attached, so that the only legal attachment in existence now is an attachment at the suit of Mrs. Goslett, and it appears to me that Theron has sufficient interest in the matter to justify the Court now in granting an order upon his application that the money shall be paid over to the Deputy-Sheriff upon the writ which was granted at the suit of Mrs. Goslett. Then there is a further application to amend the order which had been previously made by Mr. Justice Buchanan, so as to extend that also to this estate. Well, I do not see

how I can well do that. That order was made to attach a particular inheritance which is in the estate of the grandmother, and at this stage, after an attachment has already taken place at the suit of Mrs. Goslett, I don't think the Court can amend the order which had previously been made by Mr. Justice Buchanan. That order must stand, and no amendment of it can be made. There is the further application that the costs be paid *de bonis propriis*, on which I should like to hear counsel.

Dr. Greer submitted that Shaw had acted *bona fide* throughout.

De Villiers, C.J.: There won't be much of the inheritance left if the costs are deducted. The Court will dismiss Glynn's petition, with costs. As to Theron's petition, an order must be made in terms of the first prayer, and as to costs, it is a very doubtful point whether Shaw should not pay costs personally *de bonis propriis*. It is just possible, it may be probable, that he honestly believed that the money was to be paid out of the estate of the father. I do not think it would be fair to make the estate liable for all costs, but to the extent of £10, costs will come out of the estate; for the rest, he must pay costs *de bonis propriis*.

Mr. Jones asked that £10 be applied preferably to the payment of the applicant's costs.

De Villiers, C.J.: I suppose Mr. Shaw would be good to pay the whole balance of the costs. Applicant's costs, to the extent of £10, will come out of the estate of P. N. Theron; beyond that amount to be paid *de bonis propriis* by Shaw.

#### *Ex parte MYBURGH.*

Acts 47 of 1899 and 40 of 1896—  
Villages—Communal allotments—Construction of Acts.

*In order to give an intelligible meaning to the expression "The several villages in the district of Elliot" used in the second section of Act 40 of 1896.*

*Held, that it was intended to refer to the "Communal allotments" in the district of Elliot mentioned in the first section of Act 47 of 1899.*

This was an application for an order compelling the Registrar of Deeds to register a mortgage bond by petitioner in favour of J. E. B. Aling for £200 over certain erf at Maxonga's Hoek, district Elliot. Petitioner stated that there were five villages in the district of Elliot and the original title deeds of



the erven in these villages contained the conditions that the land should not be alienated or hypothecated. By the Agricultural Further Amendment Extension Act (40 of 1906) these conditions had been eliminated from the title deeds of erven in the said several villages. The Registrar of Deeds had refused to register a bond by petitioner over his erf at Maxonga's Hoek.

The Registrar of Deeds reported that Act 40 of 1906 appeared to him merely to release "village" erven from the operation of the restrictive conditions regarding alienation and mortgage to which the grants were made subject. The erf in question was described as situate on the commonage of Maxonga's Hoek, although in the majority of cases in which he had refused registration the properties had been specifically described as agricultural erven. The grants of village erven proper did not contain any restrictive conditions, but it was possible that Parliament might not have been aware of that.

There was a supplementary report by the Assistant Registrar of Deeds, in which it was stated that petitioner also sought to mortgage land described as "Agricultural Erf No. 6 of the Maxonga's Hoek, European Communal Allotments." This was not a "village" erf nor was the annex a "village" erf, as there was only one village properly so-called in the district of Elliot, viz., Elliot. Maxonga's Hoek and the other European settlements of Gubenxa, Embokotwa Corinor and Noah's Ark were communal allotments and not villages.

Mr. McGregor appeared for the petitioner; Mr. Howel Jones appeared for the Registrar of Deeds, to submit to the judgment of the Court.

Mr. McGregor said that the leading principle would be to give such an interpretation to the Act as to give some meaning to the Act. The whole fight was to the word "village," and if Maxonga's Hoek and the other collocations of residences described by the Registrar of Deeds as "communal allotments" were not villages then there would be nothing for the Act to operate upon, as the erven in the admitted village of Elliot did not contain the restrictive conditions abolished by the Act. The Act said "several villages." Beal on the cardinal rules of legal interpretation (p. 153) said that an Act should not be construed so as to reduce it to an absurdity. Counsel cited the cases of the *Duke of Buccleuch* (62 L.T.R., 94) and *The Lion* (L.R. 2, P.C. 525), *Millar v. Salomons* (21 L.J., Ex. 91). The absurdity was that one would be making the Legislature make things null and void, which did not exist. As to their being agricultural erven, the title of the Act of 1906 referred to agricultural erven.

De Villiers, C.J.: According to the report of the Assistant Registrar, there is only one "village" properly so called in the district of Elliot, viz., the village of Elliot itself. The Act No. 40 of 1906 assumes that there are more villages than one. The words are: "Notwithstanding anything to the contrary contained in Act 47, 1899, or any other law, the following conditions appearing in the title deeds of erven in the several villages in the district of Elliot shall, from and after promulgation of this Act, cease to have effect, and shall be rendered null and void." An intelligible meaning must be given to this enactment. On reference to the Act 47 of 1899, I find that the word "villages" is not used, but the words "communal allotments." "Communal allotments" there mentioned are Gubenxa, Embokotwa, Cormor, Noah's Ark, and Maxonga's Hoek. Now, it appears to me that the word "villages" in the Act of 1906 was intended to refer to the "communal allotments" of the Act of 1899. But then the Registrar of Deeds further points out that the erven which are now in question are agricultural erven, and he assumes that if they are agricultural erven they cannot be treated as erven in the villages. But I confess I do not see the inconsistency. You may have erven in a village which are, to all intents and purposes, agricultural. We know, as a matter of history, that most of our villages have started with erven which would be large enough for purposes of agriculture on a small scale, but still they would be agricultural erven, and it seems to me that the fact that some of the erven here in question are agricultural does not prevent them from falling within the definition of the Act, viz., "erven within the several villages of the district of Elliot." As there would be no way of giving effect to the use of the words "several villages" unless these communal allotments are taken to be villages, I think the Court should give effect to the intention of the Legislature. The Registrar mentions, further, the fact that if you take his strict construction as to the meaning of the Act, then those village erven which he would seem to consider would fall within the Act would be wholly out of the question, because he admits that in regard to those erven the conditions mentioned in this Act do not appear at all. So in order to give this Act any intelligible meaning—and I suppose we must assume that the Legislature did have some meaning in passing the Act—the only course is to give that meaning which I have already stated—that the communal allotments of the Act of 1899 are the "villages" which the Act of 1906 was intended to refer to. For these reasons, I am of opinion that the order must be granted as prayed.



Mr. McGregor (in answer to the Court) said that they did not apply for costs, although there was a prayer to that effect in the petition.

De Villiers, C.J., said that an order would be granted as prayed, except as to costs.

### PROVISIONAL ROLL.

ROSENBLATT AND DE BEER ( 1906.  
V. HUTTON. ( Nov. 14th.

Mr. Payne moved for provisional sentence on a cheque for £376 6s. 9d., with interest.

Order granted.

### ESTATE JURGENS V. AREND AND OTHERS.

Mr. Gutsche moved for provisional sentence on certain two mortgage bonds for £550 and £200 respectively, with interest, bonds due by reason of non-payment of interest, and for £2 ls., premiums of insurance; counsel also applied for the property specially hypothecated and the rents to be declared executable.

Order granted.

### AFRICAN HOMES TRUST V. WHITE.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest, bond due by reason of non-payment of interest and instalments; counsel also applied for the property specially hypothecated to be declared executable.

Mr. Close read an affidavit by defendant's agent, and submitted that the case should be allowed to stand over *nine die*. Defendant was absent from the Colony. Plaintiffs were duly protected, and it was desirable that defendant should be supplied with further particulars of the account. It was necessary that Mr. White should be here to check the account.

De Villiers, C.J.: I do not think there is sufficient ground stated in the affidavit for a postponement. The bond, on the fact of it, is absolute, the money is due, and there is no allegation in the affidavit that any part has been paid off. On that the defendant's agent says it is desirable that a full settlement of accounts between plaintiff and defendant should be furnished, and says apparently the defendant's indebtedness on the bond is less than £1,000. "Apparently," it is said; it does not say what is his reason for saying that. There must be provisional sentence, and the property will be declared executable.

### HIRSCH AND CO. V. KRUGER.

Mr. De Waal moved for provisional sentence on a mortgage bond for £77, with interest from the 30th June, 1906, bond due by reason of notice having been given; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

### BLUMBERG AND SON V. VAN DER WALT.

Mr. P. S. J. Jones moved for provisional sentence upon a certain mortgage bond for £110, with interest, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

### ESTATE BATTISS AND ANOTHER V. MACKENZIE.

Mr. Inchbold moved for provisional sentence on a second mortgage bond for £208 10s., with interest from the 1st July, 1906, and for the property hypothecated to be declared executable; counsel also applied for execution to be leviable on defendant's movable property first.

Order granted.

### WEBER AND OTHERS V. VAN DER WESTHUIZEN.

Mr. Van Zyl moved for a provisional order of sequestration to be made final.

Order granted.

### HIDDINGH V. ESTATE MERRINGTON.

Mr. Gutsche moved for provisional sentence on a promissory note for £100, payable at the Standard Bank, Claremont, with interest.

Order granted.

### ISAACS V. KINSBERG.

Mr. Inchbold moved for provisional sentence upon a promissory note for £83 6s. 8d., payable at Cape Town.

Order granted.

### LAWRENCE AND CO. V. KOPELOWITZ AND BERMAN.

Mr. Bailey moved for provisional sentence on a promissory note for £198 10s. 9d., payable at the Standard Bank, Simon's Town, with interest, plus charges for noting expenses.

Order granted.

**FALK STADLEMAN AND CO. V. PIKETHLEY AND ANOTHER.**

Mr. Bailey moved for provisional sentence on certain four bills of exchange, three for £50 each and one for £54 15s. 2d., with interest and costs.

G. G. Pitkethley appeared, and said that the other defendant, his brother, was in the Transvaal. He offered to pay £30 a month towards the discharge of his obligations.

Mr. Bailey said that he was instructed by his attorneys that they had no directions from the bank as to accepting this offer.

Defendant said that he carried on business in Albert-road, Woodstock. He had made approaches to the plaintiff, but without coming to terms.

[De Villiers, C.J.: You must try and come to terms with the plaintiff. They are entitled to their judgment.]

Defendant said that meant that his estate would be sequestrated.

Mr. Bailey, in answer to the Court, said that the plaintiffs were a limited company carrying on business in England.

De Villiers, C.J. (to defendant): I must give judgment, but I hope the plaintiffs will see their way to give you consideration. It will be for their own interests to accept your £30 a month. Perhaps this expression of opinion from the Court may have some influence with the plaintiffs. Execution will be stayed for a fortnight, but leave reserved to plaintiffs to apply for an execution in the meantime if so advised.

**ROODEBLOEM ESTATES V. HORWITZ.**

Mr. De Waal moved for provisional sentence on a certain mortgage bond for £83, with interest from the 1st July, 1905, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**BERNARD V. VAN ROOYEN.**

Mr. Gardiner moved for a decree of civil imprisonment against defendant upon the balance of an unsatisfied judgment of this Court, and costs.

Defendant did not appear.

Order granted.

**WRENSCH V. FRYER.**

Mr. P. S. T. Jones mentioned this matter, which was an application for a decree of civil imprisonment. He said that the summons had, by mistake, been made returnable for to-morrow (Thursday), but he understood that defendant was now in court.

De Villiers, C.J., said that, as long as the defendant was in court, the case might be called.

Mr. Jones moved for a decree upon an unsatisfied judgment of this Court for £36 1s. 1d., and costs, a writ of *nulla bona* having been made.

Defendant went into the box, and said that he was quite unable to make any payments. He was carrying on business as an auctioneer, but his earnings were not sufficient to enable him to do more than pay expenses, and the instalments of 10s. a month which he was paying to other creditors.

Cross-examined: He would be prepared to make an offer of 10s. a month.

Decree granted, with costs, execution to be suspended upon payment of 10s. a month, with leave to plaintiff to apply for an increase of monthly payments on satisfactory proof that defendant has means.

**ILLIQUID ROLL.**

JOLLY V. JOLLY.

{ 1906.  
Nov. 14th.

Dr. Greer moved for judgment, under Rule 329e, for a certain notarial deed of separation to be made an order of Court. Consent paper had been filed.

Order granted.

**S.A. FISHERIES AND COLD STORAGE V. ZANKELOWITZ.**

Plaintiff in reconvention—Defendant in reconvention barred—Judgment by default.

*The defendant in a suit pleaded to the declaration and filed a claim in reconvention. The defendant in reconvention, not having filed his plea in time after demand, was barred from pleading.*

*Held, that the plaintiff in reconvention was entitled to judgment by default.*

Mr. Russell (for plaintiffs in reconvention) moved for judgment in terms of the claim in reconvention for £73 3s. 5d., goods sold and delivered, with interest and costs, defendant in reconvention (Zankelowitz) having been barred.

[De Villiers, C.J.: What has become the claim in convention?

Mr. Russell said that he did not know. The claim in reconvention was for a liquidated demand, while the claim in convention was for damages.

De Villiers, C.J.: If the defendant in this case had instituted a separate action

for the amount of the debt he would certainly have been entitled to take advantage of the rule, and the case could have been set down by default. I do not think he should now be penalised, because, instead of instituting a separate action, he has brought his action by way of a claim in reconvention. I think he ought to have the same rights as if he had been the plaintiff in convention. You may, therefore, take the order.

PARSONS V. BESSELL.

Mr. W. Porter Buchanan moved for judgment under Rule 329d for £33 11s. 6d., balance of account for work and labour done, and material supplied.  
Order granted

ETTMANN AND CO. V. JEPPE.

Dr. Rainsford moved for judgment under Rule 329d for £110 5s. 2d., balance of account for goods sold and cash advanced, with interest *a tempore morae*, and costs.  
Order granted.

BUNCIMAN V. BRITISH FREE RIGHTS BENEFIT SOCIETY.

Mr. Benjamin said that this was an application for leave to sign judgment against respondents for not proceeding with a certain action within the time prescribed by rules of Court. There was also an application for costs of a certain matter which had been heard by Mr. Justice Maasdorp. Under the circumstances it might perhaps be the desire of the Court that the matter should be mentioned to Mr. Justice Maasdorp.

Mr. Gutsche (for respondents) said he agreed with his learned friend.

The matter was ordered to stand over until it could be mentioned to Mr. Justice Maasdorp.

SMITH AND CO. V. SASSO AND CO.

Dr. Greer moved for judgment under Rule 319, in default of plea, in terms of plaintiff's declaration, for £387.  
Order granted.

JOSEPH AND CO. AND OTHERS V. FOURIE AND FOURIE.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), moved for judgment under Rule 319, in default of plea in terms of declaration for an order of ejectment against Louis J. Fourie from certain portion of a farm purchased by plaintiffs from the estate.

Order granted, defendant to quit within a fortnight.

STEER V. SHERWOOD.

Dr. Greer moved for judgment under Rule 329d for £124 9s. 9d., balance of account for professional services.  
Order granted.

REHABILITATIONS.

Mr. Toms applied for rehabilitation of Jan Jonathan de Lange.

Granted.

Mr. De Waal applied for the rehabilitation of Johannes Jacobus Snyders, jun.

Granted.

Mr. Toms applied for the rehabilitation of James Albert Marais.

Granted.

Mr. De Waal applied the rehabilitation of Jan Hendrik Lange.

Granted.

GENERAL MOTIONS.

*Ex parte* LEVY. { 1906.  
Nov. 14th.

Dr. Greer moved for leave to petitioner to sue her husband, Jacob Levy, by edictal citation for restitution of conjugal rights. Defendant was stated to be residing in London, England. The parties were married in England. Counsel submitted that the petitioner had acquired a domicile separate from her husband, and quoted a dictum of Mr. Justice Kotze in *Atkinson v. Atkinson* (2 Transvaal Reports, 212).

De Villiers, C.J., said that there was no *prima facie* proof of matrimonial domicile in this country. The parties had never lived together in this colony. The object of the application was to alter the status of the parties, and the country of domicile could only affect their status.

Dr. Greer said that the petitioner had been in this country since January, 1904.

[De Villiers, C.J.: How could she acquire a domicile, supposing she had been here? The husband has never been in this country.]

Dr. Greer said that he did not think he could carry the matter further.

De Villiers, C.J.: I do not think this is a case at all events in which the Court should grant leave to sue by edictal citation. According to the affidavit the parties were married in England. Then the petitioner came out to live here with her sister, and now, because she has lived here for some time, and acquired, as she says, a domicile here, she claims to be entitled to sue her husband, who has remained in England, and who never came out here, with a view ultimately of obtaining a divorce against him. Cer-

tainly, the Court has extended the principle very far in assisting people to get divorces, but this would be beyond any precedent as far as I can see. The application must be refused.

*Ex parte* ESTATE CRAWFORD.

Mr. Gutache moved for an order authorising the Master to pay out to petitioner, the surviving spouse, a sum of £8 a month from a balance of £496 10s. remaining to be invested.

Order in terms of Master's report.

*Ex parte* MOKOBOTUA AND ANOTHER.

Mr. Benjamin moved for a certain rule *nisi* to be made absolute, authorising the respondents, Rosenblatt and De Beer, attorneys, Vryburg, to pay over to applicants a sum of £135 6s. 8d.

Rule absolute, on condition that Mr. De Beer's taxed costs be paid.

FEDERAL COLD STORAGE, LTD. V.  
BUFFALO COLD STORAGE, LTD.

Sir H. Juta, K.C., moved for an order in terms of consent paper for the postponement of an action brought by the Buffalo Company against the Federal Company until February next, and a commission to be appointed to take evidence of certain witnesses, whom the parties may call before Mr. Mackarness, in London.

Order granted in terms of consent paper.

LINSCOTT V. LINSCOTT.

Mr. Van Zyl moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights, plaintiff to have custody of the child, and maintenance at the rate of £3 a month.

Order granted.

HIND V. HIND.

Mr. Howes moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights.

Order granted.

*Ex parte* ESTATE COUTTS.

Mr. Payne moved, on the petition of the executor of the late James Coutts and Jane Coutts, for leave to sue one Friedrich Vockerodt, whose whereabouts are unknown, by edictal citation upon a mortgage bond for £150.

Leave granted, citation returnable on the 12th December, one publication in an East London newspaper.

*Ex parte* BRINK AND OTHERS.

Mr. M. Bisset moved for an order authorising the S.A. Association to pay out a sum of £1,200 from the estate of the late J. A. Laubscher, sen. The petitioners were the grandchildren of the late Mr. Laubscher. The money was needed in consequence of a certain mortgage bond having been called up. The petitioner's mother waived her right to the said sum.

Order granted as prayed.

*Ex parte* DOMINGO.

Mr. Howes moved for leave to assume the death of petitioner's husband. Sidney Domingo, who was supposed to have perished, with nine other fishermen, in a motor-boat, which went out in Algoa Bay last May. After the boat had gone out a storm was experienced, and neither boat nor occupants had since been seen or heard of. Deceased was entitled to certain sums from benefit societies.

De Villiers, C.J.: I think the circumstances are sufficient to justify the Court in taking it that the man has died. An order will be granted.

*Ex parte* SUMMERFIELD.

Mr. Palmer moved for leave to petitioner to sue her husband Joseph J. Summerfield *in forma pauperis* for divorce, by reason of his alleged adultery at Somerset West. It was stated that respondent had been arrested on a charge of fraud, and was lodged in gaol at Parow. Counsel said that he was prepared to certify *probabilis causa*.

Rule granted on counsel's report, calling on defendant to show cause on the 12th December why plaintiff shall not be allowed to sue *in forma pauperis*.

IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. V. DISTRIBUTING SYNDICATE FOR COLD STORAGE.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.) was for applicants; Sir H. Juta, K.C. (with him Mr. McGregor) was for respondents.

This matter came before the Court on an application by the Imperial Cold Storage for removal of bar.

Mr. Schreiner said that he now had to apply for an order in terms of consent, which provided that the bar should be removed, that the defendants should furnish their affidavit of discovery

by the end of the month, and that Mr. Alfred Theodore Hennessy should be appointed official referee, with the powers under the Act No. 29 of 1898, costs to be costs in the cause.

Order in terms of consent paper.

*In re* INSOLVENT ESTATE DE BRUYN.

Mr. Roux moved, as a matter of urgency, on the petition of creditors representing claims for £1,800, for the appointment of Martin Sachs as provisional trustee of the estate of Jacob George de Bruyn, general dealer, Kenhardt.

Mr. Sachs was appointed provisional trustee, with power to carry on the business pending the election of trustee.

*Ex parte* TOWNSEND.

Dr. Rainsford moved for leave to petitioner to sue her husband, Samuel Robinson Paul Townsend *in forma pauperis*, and by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Petitioner said that she was married to respondent in Hull, England. They afterwards resided in Cape Town. Defendant left her for the purpose of joining Remington's Scouts.

Petitioner appeared in person, and said that she lived in Tamboer's Kloof. She had no information as to respondent's whereabouts. He was last heard of at Pretoria.

Dr. Rainsford said that he was prepared to certify *probabilis causa*.

Rule granted calling upon defendant to show cause on the 12th December why plaintiff shall not be granted leave to sue *in forma pauperis*, and leave granted to sue by edictal citation, personal service, failing which, one publication in the "Pretoria News," citation to be published at the same time as rule along with interdict and notice of trial, and to be returnable on the 1st February.

De Villiers, C.J., said the effect of the order was that although the rule was returnable on the 12th December, the petitioner would be allowed to serve the citation and the other notices by the same advertisement as the rule in case the defendant could not be served personally.

*Ex parte* GOLDEN MILE GOLD MINING AND DEVELOPING SYNDICATE, LTD.

Mr. Roux moved for an order for the winding up of the Syndicate, and the appointment of Frank H. Cook as liquidator.

Winding-up order granted, and Mr. Cook appointed liquidator, security to be given to the satisfaction of the Registrar of the Supreme Court.

*Ex parte* DOUALLIER.

Mr. M. Bisset moved on the petition of Johanna S. M. Douallier, who resides at Sutherland, for leave to mortgage certain property for the purpose of having necessary repairs carried out. The Master reported that he was not inclined to favour the application, for two reasons, viz., it was stipulated in the will that the erf should not be mortgaged, and it appeared that the parties had lived on the property for some years, during which they should have kept it in a state of repair. Counsel submitted that this was a case in which relief should be given by the Court, and he cited *ex parte Slabbert and others* (14 C.T. Reports, 62), *ex parte Kotze and another* (12 C.T. Reports, 718), and *In re Jansen's Estate* (3 C.T. Reports, 238).

De Villiers, C.J.: I think that the case must stand over for more information, especially upon the point as to why petitioner did not during the time she was living on the property see to the repairs. Cannot Douallier have the repairs done for the benefit of the children?

Mr. Bisset said that it did not appear that Douallier had means. He would obtain further information on that point also.

*Ex parte* GILLANDERS.

Mr. Van Zyl moved, on the petition of the widow of the late Dr. John Lyall Grant Gillanders, for leave to sue the Peiserton Diamond Mining and Estate Co., of Peiserton, district of Kimberley, *in forma pauperis*, for £5,000 damages for the loss of her husband, owing, it was alleged, to the negligence of respondents, or their servants. Dr. Gillanders had been in the employ of the company as medical officer, and it was alleged that he had met with his death owing to an abandoned mine having been left unfenced. Counsel added that Mr. Upington, for whom he was holding the brief, was prepared to certify *probabilis causa*.

Rule granted on Mr. Upington's report, returnable on December 12.



**FIRST DIVISION.**

*Ex parte* HAMMAN. } 1906.  
 } Nov. 16th.

Mr. Van Zyl said that that was so.  
Order granted as prayed.

**Held** in an action for the balance of the purchase price, *that the defendant was not entitled to deduct from the price as part of the "errors or omissions" the amount of bad debts and depreciation.*

Defendant, in his plea, admitted execution of the promissory notes described in paragraphs 2 and 3 of the declaration, but denied indebtedness to plaintiff in the sums of £1,800 and £127 6s. 9d., with interest as therein set out, and said that the said notes were made by him in favour of the plaintiff subject to the terms of the agreement of dissolution of partnership entered into between the parties on the 23rd December, 1905. In terms of clause 5 of the agreement, defendant had made an examination of the partnership books and accounts, as a result of which he had discovered errors and omissions amounting to £947 10s. 3d., which sum, together with £184 9s., admitted by the plaintiff, he had been and was entitled to bring into account against the amounts of the said promissory notes. He had rendered a statement to the plaintiff of the said amount of £947 10s. 3d. The amount of the promissory notes in which he was indebted to plaintiff was £1,838, with the interest thereon, £73 10s. 4d. Defendant said he was entitled to deduct the sum of £947 10s. 3d. as aforesaid, with interest thereon, amounting to £35 10s. 7d., and the sum of £184 9s., admitted by plaintiff, thereby leaving a balance due to plaintiff of

£743 14s. 6d., which amount was provided by defendant against presentation of the said notes.

Plaintiff, in his replication, admitted execution of the agreement of dissolution, but said that the sums claimed to be deducted by defendant did not arise by virtue of errors and omissions in the said partnership books and accounts, and that the defendant was not entitled under the said agreement to deduct the same or any portion thereof from his indebtedness upon the said promissory notes. The said sums appeared largely to represent alleged bad debts, for which the defendant himself was solely responsible, the partnership business having been taken over by him as a going concern, inclusive of out-standings.

Mr. Schreiner, K.C. (with him Dr. Greer) was for plaintiff; Mr. Gardiner (with him Mr. P. S. T. Jones) was for defendant.

Mr. Schreiner submitted that it lay upon the defendant to make good his account as against the plaintiffs' liquidated acknowledgment of debt.

Mr. Gardiner said that he accepted the onus.

Manuel Grey Holmes (the defendant) was called. He said that previous to entering into partnership with the plaintiff in 1901 he was a member of the police force. He had no knowledge of books. Balance-sheets were drawn up from time to time showing the position of the business. In September, 1905, he desired to discontinue the business, and he communicated with the plaintiff, on the basis that plaintiff should take over and buy out witness's share. Schwaner produced a statement in which bad debts and depreciation were shown. His share of the capital was shown at £6,397. Schwaner offered to buy him out on that basis, but he declined, and he made proposals with a view of buying out Schwaner on the same basis. Plaintiff took stock to the end of November, but he did not make an allowance for the bad debts. Witness agreed to pay plaintiff £5,500 less his share of an acetylene gas plant, making a net amount of £5,338. In this agreement no stipulation was made that plaintiff should not carry on business in or near Upington, and, as a matter of fact, he was carrying on a business at Upington. He believed at the time the balance-sheet was not correct, and his belief had since been confirmed. He did not have an examination of the statement made at the time. Since he had taken over he had employed Mr. Page, a bookkeeper from Cape Town, to go into the books, and it had been found that a number of bad debts and disputed accounts had been included in the balance-sheet, which he claimed could now be brought up under the heading of "errors." In the stock-sheet a quantity of German sausages had

been included which ought not to have appeared there. He had opened a tin before the statement in November was made up, and had found that the sausages were bad.

Continuing, witness gave evidence in regard to several other items, which he considered should be treated as "errors," instancing a charge made by Mr. Schwaner of £78 for a trip to Port Elizabeth and Cape Town, for which witness said the business should only be debited with £25. He had also charged £51 as salary of the bookkeeper, Mr. Page, for two months during which he had been engaged in going over the old books.

Alfred Newton Foot, incorporated accountant, said that in drawing up a balance-sheet in case of dissolution of partnership, it was usual to write off bad debts, and make provision for such as were doubtful. He would not, as auditor, sign a balance-sheet that did not include an allowance for bad debts and depreciation, unless he had the consent of his principal.

Cross-examined: Witness knew nothing about the present case, and if it were mutually agreed that no depreciation or allowance for bad debts should be included in the balance-sheet, then it would not be necessary to show these items.

[De Villiers, C.J.: Supposing a balance-sheet is made up, and is shown that there is a balance in favour of a partner for £8,000, and the business is bought for £5,000, would not you assume that it is upon the basis of something of that kind—depreciation or bad debts?]

Witness: You would assume that some allowance had been made for something.

Further evidence was given by Arthur Cecil Shore, bookkeeper, employed by defendant and Frederick James Page, of Cape Town, who had been employed by defendant to investigate the accounts. Both witnesses thought the amount of the discounts on Colonial goods bought by the firm should have been allowed for in the stocktaking in addition to having been allowed in the discount and interest account. The late firm got the benefit of the discounts, and the stock should be taken less the amount of the discount.

Mr. Gardiner closed his case.

De Villiers, C.J., said that he would like to hear counsel for defendant on the point as to bad debts.

Mr. Gardiner said that in the partnership agreement provision was made that accounts should be prepared each year. What the parties tried to arrive at in the dissolution was that each should pay the other his share, less due allowances. It was contemplated in the dissolution that these accounts might have to be corrected, clause 5 contemplating errors and omissions. It was clear that errors amounting to less

than £100 should not be reckoned in any settlement. A proper partnership account should have been drawn up between the parties, and the authorities were clear that such an account must show bad debts and depreciation. He quoted Pixley's "Duties of Auditors" (p.p. 283 and 320), and the "Encyclopædia of Accounting" (Vol. I., p. 211). He argued that this could not be said to be a true balance-sheet disclosing the real position of the parties.

[De Villiers, C.J.: But then he pays over £2,000 less than the amount appearing in the account.]

But we have no evidence that that was the reason why the less amount was taken.

[De Villiers, C.J.: There is no explanation why it should be otherwise.]

Mr. Gardiner pointed out that in Schwaner's offer Holmes would have had to go out of business in Upington, while under the agreement which had been made Schwaner was still carrying on business at Upington. When Schwaner wanted to buy he took into account the bad debts in his statement of September. When he was selling, however, he brought up a balance-sheet on quite a different basis. There was a bad debts account which had never been written up. The leaving out of the bad debts account was an omission from the books which the defendant was entitled to have rectified. Depreciation stood on the same footing. The figures taken by defendant were those which had previously been taken by Schwaner. Counsel also dealt with other aspects of the case.

Mr. Schreiner having been briefly heard,

The plaintiff was called, and gave evidence with regard to the item of £78 charged for a trip to Port Elizabeth and Cape Town, which he said he made on behalf of the business. As to an item of £6 5s. 9d. for his son's hotel expenses, witness considered that he was entitled to charge this to the business, as his son was coming down from the Transvaal to help the business.

De Villiers, C.J.: Plaintiff and defendant were partners. On the 23rd December, 1905, they entered into an agreement for the dissolution of the partnership. The main conditions of this agreement are these: The defendant agreed to purchase all the right, title, and interest of the plaintiff in and to the one-half part and share of the partnership and property, movable as well as immovable, for the sum of £5,338, with certain exceptions. The above amount of £5,338 is to be payable as follows: £3,500 sterling in cash, £838 on the 30th June, 1906, and £1,000 on the 30th June, 1906. I will leave out the unimportant parts which do not enter into the consideration of this case.

The important clause is the one before the last. It is there agreed that "should the said Holmes (the defendant) desire to make an examination of the partnership books and accounts, such examination shall be concluded within the period of six calendar months from date hereof, and in the event of any errors or omissions being discovered, any such shall be rectified at our joint costs and benefit, but none such under the total amount of £100 sterling shall be considered." Plaintiff now sues upon the promissory note of £838, less a certain sum paid on account, and the sum of £1,000 with interest. The defendant sets up the defence that errors and omissions have been discovered, and that if these errors and omissions be rectified in terms of the contract that there will be nothing owing by the defendant to the plaintiff. The most important of the alleged errors or omissions are bad debts and the depreciation of the property. It is said that the amount of the purchase price was arrived at by taking the bad debts which appeared in the account which was rendered in November as being good debts, and, if I understand the argument correctly, the contention is that if the bad debts had been deducted the balance would have appeared less in favour of Schwaner and that, consequently, the purchase price would also have been proportionately less. I could have understood that argument if there were anything to show that the defendant was not fully aware at the time when he entered into this contract of the existence of bad debts. He had complete control over the books. The bookkeeper who was there would have given him any information, and the accounts which had been furnished to him with a view to a purchase by the present plaintiff himself showed that the bad debts and the depreciation of property, to which I shall presently refer, were also specified there. The defendant, therefore, knew well that there were bad debts and that there had been considerable depreciation of the property. With that full knowledge, he enters into this contract for the payment of £5,338 for a share of a partnership which, according to the accounts, was worth more than £2,000 above that amount. The value was £8,230, according to the accounts, and he paid £5,338, therefore £2,892 less than the value. Then we must allow for certain items, but certainly it was £2,000 in round figures. Now, this was not a case of a bargain; it was not a case of one person trying to make a good bargain with another, but it was a case of a partnership account, a settlement upon a fair and equitable basis. I cannot see the reason for this agreement to give £5,338 for property worth £8,230, unless the defendant had fully borne in mind the bad debts of the existence of which he knew, and also

the depreciation. Now, in my opinion, the words "errors and omissions" cannot by any conceivable twist of language be held to include the bad debts or depreciation, which could not be looked upon in any sense either as an error or omission in the accounts, and, therefore, the main items upon which the defendant relies in reduction of his account fall to the ground. Then there is another item of some importance, and that is the discounts. But after a careful consideration of the matter I don't think that these ought to be allowed. Defendant says that if the accounts had been somewhat differently framed the margin of difference would have been less than it was. But there is nothing to show that the prices would have been different if the entries had been differently made. It appears to me that the form in which these entries took place was the correct form, and I cannot see that in the result there would have been any conceivable difference if discounts had been allowed by way of reduction of stock instead of in the way it was done, as it appeared in the profit and loss account. So that that item also, in my opinion, should not be allowed. Then we come to the remaining items. Admissions are made in regard to items of £15 odd, £19 odd, £18 odd, and £4 odd, but they would not amount to £100, which is stipulated for in the contract, and even if we add the somewhat doubtful one of Schalkwyk, £10, it would not come up to the amount of £100. There is another item of £78 18s. 6d., expenditure by the plaintiff in going to Cape Town and Port Elizabeth. The defendant claims that that should be reduced. Now, in my opinion, if the plaintiff did go to Cape Town and Port Elizabeth on business connected with the partnership, the amount is a fair and reasonable charge. If that charge is allowed, then the total amount of errors and omissions would not come up to £100. The words of the agreement are: "In the event of any errors or omissions being discovered, any such shall be rectified at our joint costs and benefit, but none such under the total amount of £100 sterling shall be considered." If, therefore, it is not shown that the errors and omissions reach the amount of £100, I do not think the defendant would be entitled to charge any part of his expenses in engaging a bookkeeper under this contract. The bookkeeper has not succeeded in showing that the errors and omissions amount to £100, and, therefore, I do not think that the expenses of the bookkeeper ought to be allowed in this case. Then I come to the last item in dispute, and that is the charges made by the plaintiff for work and labour done by him after December 1, 1905. The view which I take of this case is that, although the account made up to the 30th November, 1905, did not

form the basis of the contract, because it is not attached to the contract, yet I do consider that the parties intended that the state of things existing at that date should be the state of things regulating the accounts between themselves, and I do not think that it could have been intended that the plaintiff should be allowed after the 1st December, the date when all the accounts were made up, to draw any amounts in accordance with the previous contract from the partnership assets, and I consider, therefore, that the £33 12s. 7d., which he drew after the 1st December, should not be allowed, and that the defendant would fairly be entitled to deduct that amount from the total claim made against him. But that amount would not be deducted by way of errors or omissions, because it is a mistake made after the 1st December. I think it is an item that the plaintiff should not be allowed to retain, and that the amount of £33 12s. 7d. should be deducted from the total claim made by the plaintiff. However, the judgment as to the other items does not, as I say, reach the total of £100, and I am afraid I cannot allow part to defendant under the contract. Judgment must, therefore, be for plaintiff for the amount claimed as prayed, less £33 12s. 7d., with interest from the 1st January, 1906.

Mr. Schreiner applied for the plaintiff and his bookkeeper (Mr. Ledger) to be declared necessary witnesses.

De Villiers, C.J.: Judgment will be entered for the plaintiff for £909 5s. 2d., with interest as prayed from January 1, 1906, and with costs, including plaintiff's expenses as a witness, and the expenses of the witness Ledger, who was not called.

[Plaintiff's Attorneys: Dempers and Van Ryneveld. Defendant's Attorneys: Syfret, Godlonton and Low.]

## SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REX V. OPPELS.

{ 1906.  
{ Nov. 16th.

Act 27 of 1882, Sec. 8 (3).

Hopley, J., mentioned a case that had come before him as judge of the week. The accused, Oppels, was charged under the Police Offences Act, with being found without lawful excuse on enclosed premises. The section of the Act under which he was charged and convicted related entirely to people being found on enclosed premises at night. The accused pleaded guilty to being found



on the premises, but the evidence showed that he was found asleep on an out-house, in the afternoon. The conviction must be quashed.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* THE LIQUIDATORS  
OF THE REYNOLDS VEHICLE AND HARNESS FACTORY, LTD. { 1906.  
Nov. 19th.  
„ 26th.

Company — Winding up — Contributories — Fully paid-up shares—Companies Act (No. 25 of 1892), Sec. 97 — Estoppel.

*The owner of a manufactory sold his business to the promoters of a company, and one of the terms of the agreement was that he should receive a certain number of fully paid-up shares in the company. The company was floated, but the agreement was not filed with the Registrar in terms of the 97th section of Act 25 of 1892. Thereafter the company was ordered to be wound up.*

*Held, that as the company had issued the scrip for such vendor's shares as being fully paid up, the liquidators were not entitled to place the names of bona fide purchasers of such shares, without notice of any illegality, upon the list of contributories in respect of such shares.*

*Held further, that directors who had obtained such scrip without giving value for them, or purchasers who had notice*

*of the illegality, were liable to be placed on the list.*

This was an application to confirm the liquidator's report on the above company up to January, 1904, to order an inspection into the procedure of the company after that date, and for an order as to the costs of that inspection.

The following was the report of the liquidators:

This company was registered on November 21, 1902, with a share capital of £110,000 to acquire the business known as the Reynolds Vehicle and Harness Factory. Some time prior to this, a prospectus, undated, in which the capital was stated at 105,000 shares and 5,000 debenture stock, was issued, inviting applications from the public for 40,000 ordinary shares. Shortly after the registration of the company it was found desirable that there should be some modification in the original arrangements, and it was decided to reduce the capital from £110,000 to £60,000. This arrangement was sanctioned at the first general meeting of shareholders held on the 9th December, 1902, and was subsequently confirmed by the Court. From the start the business of the company was attended by many difficulties, and it appears to the liquidators that grave irregularities had occurred both in connection with the flotation of the company and the carrying on of its business. The vendor, Mr. Reynolds, who it may be mentioned, appears to have been entirely ignorant of the procedure in connection with the formation of a company or the carrying on of its business, left himself solely in the hands of others, unfortunately without taking independent legal advice. It was not until he found his difficulties gradually increasing that he thought fit to take such advice, and subsequently acting on it, took steps to apply for the appointment of an inspector. The second undersigned was appointed inspector in December, 1903, and made an exhaustive enquiry into all matters connected with the formation of the company and the carrying on of its business. His report, which for various reasons was not presented until September, 1905, is attached hereto (schedule A), as well as a verbatim report of the evidence on which it is based (schedule B). It is needless again to enter fully into the matters dealt with in it, but some reference is necessary as to the transactions in connection with the company after the date on which the enquiry was held. The vendor, realising the most unfortunate position in which he had placed himself, decided that he should make an attempt to settle with all shareholders and creditors. In order to do this he parted with all his private estate, and is now practically penniless. He succeeded in acquiring by



arrangement with shareholders 4,395 shares. He also considerably diminished the liabilities of the company, but, owing to the continued depression in trade, he was unable to carry all his arrangements through, and as the company was being pressed by certain of its creditors, application was made to place it under official liquidation. As far as your liquidators have been able to ascertain, the liabilities are as follows: Preferent claims: Mortgage to Netherlands Bank on all landed property, interest, taxed costs, etc., £9,378 12s. 6d.; second mortgage on above held by Mr. L. F. Zietsman, £700; claims for wages, £186; claims for Divisional Council rates, £30 2s.; concurrent claims due to sundry creditors, £858 10s. 1d. In connection with the second bond held by Mr. L. F. Zietsman, it may be mentioned that the bond was passed in favour of Mr. I. B. Reynolds, apparently in settlement of certain advances made by him. When Mr. Reynolds made his attempt to settle with all shareholders, he arranged with Mr. Zietsman to cede him this bond in payment of 700 shares, with a further stipulation that he (Mr. Zietsman) should become guarantor for an overdraft obtained by Reynolds from the Standard Bank. As far as your liquidators are aware, Zietsman has not yet had to pay up under his guarantee. The assets consist of the landed property at Claremont, which was valued in 1905 by sworn appraisers at £16,092, but will now hardly realise the amount for which it is mortgaged. In addition to this, there were certain movable assets of comparatively small value. These consisted principally of old and ill-assorted material, the dregs of the stock which had originally been acquired by the company. The liquidators received an offer for this from certain parties, who were prepared to assist Mr. Reynolds to start again in business. With the consent of the principal creditors, they accepted it, after having first ascertained by means of valuations that the offer was a fair one. The issued shares of the company amounted to 31,425, of which 26,395 are held by the vendor. The annexed schedules marked C and D will give full particulars. In framing the list of contributories specified in schedule E, attached hereto, it will be seen that a considerable amount is due by Mr. L. Zietsman, formerly chairman of the company. The inspector's report will furnish full details in connection with the claim against Mr. Zietsman. The large amount due by the vendor is accounted for by the fact that the agreement between himself and the company was never registered. A considerable number of the other contributories hold shares issued to the vendor under similar circumstances and transferred to them by

him. The causes of the failure of the company were, in the opinion of your liquidators: (a) Over capitalisation; (b) want of proper management; (c) depression in trade. The evidence furnished in the attached report will show that grave irregularities took place in connection with both the flotation and management of the company, and that the books and accounts were kept in an unsatisfactory manner. The evidence at the inquiry made is, in the opinion of your liquidators, sufficient to show fully all matters relating to the promotion, formation, and failure of the company, as well as the conduct of its business. Your liquidators are of opinion that while, as previously stated, there were grave irregularities, no actual fraud was committed by any director or other officer of the company in relation to the company since its formation. It is difficult to make the same statement with regard to the circumstances connected with the flotation of the company, but as far as can be judged, if a fraud was committed, no one actually benefited therefrom.

Mr. Schreiner, K.C. (with him Mr. Benjamin) for the liquidators. Mr. Close for L. F. Zietsman. Mr. Upington for W. Kidd. Mr. Bisset for F. L. St. Leger, M. Rawbone and G. Le Suer; and Mr. P. S. T. Jones for L. B. Smuts.

Mr. Schreiner, in outlining the case for the applicants, stated that the company was one which had had a short life. It was registered in November, 1902, and went into liquidation finally in 1903. At the instance of the vendors, a Government inspection, which was of great importance, took place. The record of that inquiry was very voluminous, and had, to save expense, not been copied. The report of the liquidators raised the three points which it was necessary for the Court to consider. The list of contributories had been settled by the liquidators, but they objected to being made contributory, and appeared by counsel. The applicants did not press for an inquiry into the procedure of the company after 1904, but, as it had been suggested by one of the respondents, they acquiesced.

De Villiers, C.J., inquired under what section the Government inspection was held.

Under section 116.

[De Villiers, C.J.: And what was it for?]

To inquire in to the affairs of the company and report.

[De Villiers, C.J.: But an inspection, to be of any use, must be carried out speedily, or else it is a farce. Two years was occupied in carrying out this inspection.]

The report was drawn up much before that time, but was not signed.

[De Villiers, C.J.: But what good is a report that bears no signature? Can we get more information by a further inquiry?]

I do not think so.

[De Villiers, C.J.: Was it at the wish of the Government that the inspector delayed the report?]

The delay arose through the attorney for Reynolds asking the inspector to hold over the report, as there was a probability of Reynolds buying back the shares. Then the Government gave intimation to Mr. Syfret that he need not proceed to present the report, and at yet a later stage asked that the report be presented.

[De Villiers, C.J.: I want to decide whether further inquiry is necessary. There has been an inquiry, and nothing has been done on it.]

Mr. Close read the affidavit of Mr. Louis Frederick Zietsman, who described in detail the transactions with reference to the shares. One thousand shares were voted to him for services rendered, but no share certificate was issued therefor. For another 1,000 shares he paid, and of these he sold 300 to one Cadby, while the balance of this thousand he transferred to Mr. Reynolds, and they formed consideration for the bond.

Mr. Upington read the affidavit of Mr. Wm. Kidd, of Port Elizabeth, who stated that he purchased 100 shares from the vendor. He was unaware that the agreement between the vendor and the company was not registered in respect of these vendor's shares.

[De Villiers, C.J. (to Mr. Upington): You say your client bought these as fully paid-up shares, and without any knowledge at all of irregularities?]

Yes, my lord.

[De Villiers, C.J. (to Mr. Schreiner): Do you say that, in such circumstances, a man is to be held liable?]

Mr. Schreiner: Yes, my lord, we say that is the position in law, though it is, of course, hard.

[De Villiers, C.J.: That would have a very far-reaching effect. Can anyone who buys shares in the market as fully paid up be sure that they are paid up?]

We say that in law the respondent Kidd is liable. The position of my learned friend's (Mr. Jones's) client is the same.

Mr. Upington said that the only question was whether or not the company, in liquidation, could go back on the share certificate and say it was not, as a fact, fully paid up, though they represented to the buyer that it was.

Mr. Jones read an affidavit by Mr. L. B. Smuts, stating that he had disposed in December, 1904, of the 100 shares in respect of which it was sought to make him a contributory. The certificate showed that the shares were fully paid up. The shares had, it appeared, been

granted to one Dominicus, a director of the company, and purchased from him by the deponent.

[De Villiers, C.J.: Was Mr. Smuts a director?]

Mr. Schreiner: Oh, no, my lord; he was quite an innocent shareholder.

Mr. Bisset read the affidavit of Mr. F. L. St. Leger, who said that he was not the registered holder of any shares, but Dominicus transferred to him certain shares which he (Mr. St. Leger) understood had been taken up and paid for by Dominicus in the ordinary way. Further affidavits were made by Mr. Rawbone, and on behalf of Mr. G. le Sueur, denying that they were the registered holders of shares. Shares were transferred to them by Dominicus, and it was understood that they were fully paid up. Deponents had no knowledge that they were vendor's shares.

Mr. Close submitted that the present procedure was not one which could, in safety or justice to Mr. Zietsman, be followed. There were many questions of fact to be decided, and he urged that the correct procedure was that followed in the case of *The Liquidators of the Mecca Cafe v. Webber* (14 C.T.R., 360), in which witnesses were heard by the Court.

The two points which he took were, that a shareholder to be liable (1) should have his name showing on the share register, and (2) should have consented to his so appearing. With the first point he had already dealt. On the second the cases laid down that the principles which applied to any contract applied to the taking of shares; there should be application, allotment and intimation to the applicant. He cited *Townsend's case* (13 Eq., 163) and *Pellatt's case* (2 Ch. App., 535). Had these three requirements been satisfied in the present case? No application for these 1,000 shares had been proved on the part of Mr. Zietsman. The necessary knowledge would be assumed on the part of a director of the contents of the books of the company (*Hallmark's case* 9, C.D., 333). For a similar decision see *in re Denham and Co.* (25 C.D., 752).

[De Villiers, C.J.: But in this case it is alleged that Mr. Zietsman saw the actual list sent to the Registrar.]

Mr. Close: But that is denied.

There was nothing, he proceeded, in the minutes to show that the fact of the allotment of the second thousand shares was specifically brought to Zietsman's knowledge. When Zietsman discovered his position in the books, he at once wrote the letter of repudiation.

[De Villiers, C.J.: Suppose that this venture had been a success, instead of a failure, could Mr. Zietsman have insisted on getting those second thousand shares at par?]

Mr. Close: I submit he could not.

In *ex parte Cumell* (1894 2 C.D., 392) it was held that where a name appeared on the allotment sheets, this was not conclusive. Mr. Zietsman might have applied for the expunging of his name, but as a matter of fact he never considered that his name appeared on the register of shares in respect of these shares. As to Dominicus' share in the transaction, Zietsman agreed to apply for the second thousand shares if he got a bonus of £250. Dominicus was acting either privately or as a director. If privately, Zietsman could not be taken to have applied for the shares. If as a director, then he was acting *ultra vires*, and there was no mutuality of contract, and it was consequently invalid. (*Richmond Hill Hotel Co.*, 2 C. App., 527.) If then the commission was a secret one, as was suggested, or if discount shares were to be issued, it was *ultra vires*, and not binding on the company or on the other property (*The Ooregum case*, 1892. A.C., 125). Section 58 of the Companies Act ought to be looked at in this connection. On the second question, as to whether Zietsman was liable for the 300 shares, the so-called bonus shares, this was now practically abandoned by the liquidators. Section 97 dealt with the issue of shares under a contract which had not been registered, and the principle laid down in *Silva's case* applied. Counsel further cited Buckley 8, ed. 32.

[De Villiers, C.J.: To escape liability, is it not necessary that there should be transfer?]

The shares can be transferred even if the company is *in extremis*.

[De Villiers, C.J. (to Mr. Schreiner): Your case is that these 500 shares are registered in the name of Zietsman, and as no contract is registered, he is fixed with knowledge that the shares were not fully paid up, and his action was not *bona fide*, and therefore he was held to be liable as a contributory.]

Mr. Schreiner: That is so. We go further, and contend that even those who took the shares innocently are liable.

Mr. Close, continuing, said that there was a *bona fide* agreement entered into and carried out. The agreement, whether registered or not, showed the intention of the parties. See *McGregor v. Silberbauer* (9 J., 36). Section 97 of our Act was taken over from section 25 of the English Act of 1867. Counsel cited *Blythe's case* (4 C.D., 140, *Burkenshaw v. Nicolls* (3 A.C., 1004). Zietsman was no party to the Act by which those shares were originally issued to Reynolds; consequently, the doctrine of estoppel could not apply. In *Barrow's case*, it was held that allottees subsequent to an allottee who took innocently for *bona fide* consideration took without liability.

Mr. Upington said that his client's position was very different from that of

Mr. Zietsman, in that he had no connection with the company, except as a purchaser in open market.

[De Villiers, C.J.: I must say at once that I should like to hear Mr. Schreiner on the point of your client's liability.]

Mr. Upington said that, inasmuch as Mr. Kidd was still interested, he had to press for some action to be taken to enquire into the manner in which this company had been floated and managed.

[De Villiers, C.J.: What is the form of the inquiry you suggest?]

Mr. Upington: Under sub-section 3 of section 154 of our Companies Act, the Court has the power to direct further inquiry.

Mr. Jones said that the position of Mr. Smuts was similar to that of Mr. Kidd.

De Villiers, C.J., intimated that he would postpone hearing Mr. Jones till he had heard Mr. Schreiner.

Mr. Bisset said that the three directors for whom he appeared were in a similar position to Mr. Zietsman, and he would adopt Mr. Close's argument. St. Leger was not liable, because (1) he was a transferee without notice, (2) the supplementary register was good, and on that Reynolds' name now appeared instead of that of St. Ledger, and (3) the original register was not conclusive against him. There was clear intention on the part of St. Ledger to divest himself of the ownership of the shares. Lo Sueur's position was slightly different, but he was in England, and if the Court was not prepared to take his brother Francis' word for the facts, then he should have an opportunity of being heard. Rawbone was sought to be placed on the list as owner of vendor's shares, and also as a subscriber to the memorandum of association. He objected on the ground that he was not a registered holder of all these shares. He got 250 shares from Dominicus for services rendered. The company could not now come down on him and insist that he should take the other 250 shares also.

Mr. Schreiner said that with regard to Zietman being on the list for £875, he was the holder of 2,000 shares, apart from the third thousand voted to him in March. There were two allotments of one thousand shares. He paid £1,125, and the £125 was a payment on account of the second thousand.

[De Villiers, C.J.: You needn't enter further into the question of the £875.]

Mr. Schreiner said that with regard to the 500 shares, they still stood in the name of Mr. Zietsman, against which was put up this so-called supplementary register. Neither the agreement under which Reynolds had to get fully paid up shares, nor the agreement under which Dominicus got 2,000 shares, of which the 500 against Zietsman's name formed part, was registered. Zietsman knew

that these agreements were not registered. The position of the three directors represented by Mr. Bisset was in law exactly similar to that of Mr. Zietsman. These gentlemen gave no consideration to the company for the shares. Mr. Rawbone said that he rendered services to Dominicus, but the liquidators knew nothing as to that, and were indifferent. There was no objection to Le Sueur being given time to substantiate the statements made by his brother as to Rawbone's position—

[De Villiers, C.J.: I have no doubt as to his position.]

Mr. Schreiner, continuing, said that as to the position of Kidd and Smuts, they were liable under section 97. The doctrine of estoppel could not apply in the face of this section. See *Ye Mecca Cafe v. Webner* (21 S.C., 227). A *bona fide* holder could not rely on the fact that it appeared on the shares that they had been fully paid up. Kidd could look to Reynolds and Smuts to Dominicus.

After hearing Mr. Upington, who distinguished the case of *Ye Mecca*, on behalf of Mr. Kidd; Mr. Jones, on behalf of Mr. Smuts; and Mr. Schreiner, in reply,

De Villiers, C.J.: I do not propose to say more about the management of this company than to make this remark—it is impossible to conceive of grosser mismanagement from the flotation of the company down to its liquidation than has been disclosed in this case. In dealing with the different respondents before the Court, I shall first consider the case of Smuts and Kidd. I think these two stand on exactly the same footing. There can be no doubt that they were *bona fide* purchasers of the shares in respect of which they are sought to be made contributories, and that they had no notice of any illegality or informality attached to these shares. That these shares form part of the vendors shares, which had been allotted to Reynolds, and that the contract with Reynolds never was registered is, in my opinion, clearly proved, and unless the two respondents I have named were *bona fide* purchasers, without notice they would be liable as contributories. The 97th section of Act 25 of 1892 enacts: "That every share in any company shall be deemed to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares." So far this section agrees with the 25th section of the English Act, which has been cited. The section proceeds: "and, further, unless such share in terms of such contract be issued in exchange for a

consideration of valuable services rendered to the company in furtherance of its objects, or in exchange for, or in consideration of, valuable property rights, or privileges acquired by the company in furtherance of its objects, in which case though not actually paid up, such share shall be considered to be fully paid up, and shall entail no further responsibility or liability upon the members to whom it has been, or shall be issued, or upon subsequent holders than would have been entailed upon them if the share had been actually fully paid up in money." If the section had stopped here there would have been no doubt in my opinion that the respondents, Smuts and Kidd, would not be liable.

They bought shares on the faith of the representation made by the directors of the company, who signed the certificates that the shares mentioned in those certificates had been fully paid up. In signing the certificates the directors acted within the scope of their apparent authority, and the company, if it had not been ordered to have been wound up, could not have denied payment from the purchasers. Under English law the company is said to be "estopped" from claiming such payment, and it is difficult to find another English word to express the operation of our own law in a case of this kind. Unfortunately the use of the English law term "estoppel" at once leads to the belief that the whole law of estoppel has been imported from England, just as the use of "valuable consideration" instead of "redelijke oorzaak" has led to the supposition that it was intended to introduce the whole of the English law relating to consideration. The equivalent of the civil law for estoppel, in its limited sense, is "*obstrictio ne quis contra suum factum renit.*" Instances of the use of the expression are continually found in Voet's Commentaries (e.g., Voet 6-1-17 and 19, and Voet 14, 3, 6). I am clearly of opinion that under our law also the company would be prevented, and therefore "estopped" from claiming payment for shares from persons whom the directors, acting within the apparent scope of their authority, have led into honestly buying the shares, by representing these shares to have been fully paid up. If the company would have been so estopped, there is no reason why the liquidators should not also be estopped. Mr. Schreiner, however, contends that the principle just enunciated could not have been intended by the Legislature to apply, in view of the succeeding part of the 97th section, which reads thus: "And every director, or other person who signs or issues, or connives at the signing, or issue of any document, entitling or purporting to entitle any person to a fully paid up share in any company under this



Act when, as a fact, the whole amount of such share has not been paid in cash, shall be liable to make good to the *bona fide* holder of such share any damage which he may suffer by reason of the said share not having been fully paid up." There is undoubtedly some force in the argument that this provision would seem to show that the legislature did not contemplate that the *bona fide* purchaser would be relieved, but then the section does not speak of the *bona fide* purchaser but of the *bona fide* holder. I can quite conceive that a distinction might also be raised in the present case between the case of the vendor of the shares, who probably would be liable under the Act, and the case of the other two respondents, who in my opinion would not be liable. It may well be that this provision was intended to meet the case of a *bona fide* holder like Reynolds. I do not say it is so, but it may have been the intention of the legislature. Anyhow, the difficulty of giving full effect to this part of the section would not justify the Court in holding that the Legislature intended the principle of *obstrictio* not to be applicable in the case of *bona fide* purchasers of shares such as these now in question. I am of opinion that Smuts and Kidd should not be placed in the list of contributories. I come next to the case of the three directors—St. Leger, Le Sueur, and Rawbone. To my mind, these three stand on exactly the same footing. They must have known that the shares which they received and for which they were really not giving valuable consideration form part of the original shares which had been allotted to Mr. Reynolds, under a contract which was never registered. As to Mr. Rawbone, he draws a distinction between the 250 shares which he had acquired from Dominicus and the 250 shares in respect of which he had signed the memorandum of association. He says that they were really the same 250, but I cannot agree with this view. They appear to me to be entirely separate transactions, and Mr. Rawbone appears to be liable on 250 as a signatory to the memorandum of association, and the other 250 as being the holder of shares purporting to be fully paid, but which had, in fact, never been paid up. As to Mr. Zietsman, I have no doubt whatever as to his liability. I consider that there is clear proof that the 2,000 shares were applied for by him. We have the books of the company, and we have the pregnant fact that in the list sent to the Registrar of Deeds his name appears as the allottee of the 2,000 shares. He had an opportunity of denying the statement that he saw the list before it was sent, but he did not deny it. He simply said he did not sanction it. I am satisfied also that if he had

intended to have only the 1,000 shares, he would not have paid the £125 for allotment, in addition to the £1,000 for the remaining 1,000 shares. I am satisfied in respect of the 2,000 shares, as he has paid only £1,125, he is still liable for the 875 shares which had been allotted to him, and stand in his name in the books of the company. Then, in regard to the other 500 shares, I am satisfied that he should be held liable in regard to them. He stands exactly on the same footing in regard to the 500 shares as the three other directors whom I have mentioned, but if there is any difference, all the difference is against Mr. Zietsman. He knew, and he had every opportunity of knowing, that these 500 shares formed part of the original number which had been awarded to Mr. Reynolds under an agreement which was never registered in terms of the 97th section of the Act of 1892. I think that disposes of the whole of the case, and the result will be as to Smuts and Kidd that they succeed in their contention that they should not be placed on the list of contributories, and they will be entitled to their costs out of the assets of the company. The order of the Court will be that Mr. Zietsman be placed on the list of contributories for 1,375 shares, Mr. St. Leger 150 shares, Mr. Rawbone 500 shares, and Mr. Le Sueur 250 shares, the costs of the opposition to be paid by them, with leave to Mr. Le Sueur to bring an action and come to trial within six months to have his name erased from the list of contributories and recover costs. It was further ordered that the unpaid costs of inspection be paid by the official liquidator at a rate to be hereafter fixed by the Court. It was formally ordered that Mr. Zietsman's name be erased from the list of contributories in respect of the 300 shares.

[Attorneys for the Liquidators: Syfret, Godlonton, and Low; Attorneys for Zietsman: Zietsman and Bosman; Attorneys for Smuts: Fairbridge, Arderne and Lawton; Attorneys for Kidd: Van Zyl and Buissinné; Attorneys for St. Leger, Rawbone, and Le Sueur: Reid and Nephew.]



# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CAPE TOWN TOWN COUNCIL. { 1906.  
V. ROYAL HOTEL CO., LTD. { Nov. 20th.  
(1906). { " 26th

Cape Town Municipality — Owner's rate—Act 26 of 1893—Legal title.

*The defendant bought certain premises in Cape Town from the official liquidators of a company, and the purchase was confirmed by the Court on the 19th February, 1906. On the 1st March, 1906, the defendant took occupation, and on the 15th March, 1906, the owner's rate for that year became payable. Through no wilful neglect the defendant had not obtained transfer on the 15th March, 1906.*

*Held, that the defendant was not liable under the last proviso of the 102nd section of Act 26 of 1893, to the payment of the rate which became due and payable on the 15th March, 1905.*

This was an action brought by the Town Council of Cape Town to recover £472 16s. 7d. for municipal rates, due and payable on the 15th March, 1905, in respect of ratable immovable property in Cape Town, constituting the Royal Hotel.

The declaration set forth that there still stood registered in the name of the Royal Hotel Company, now in liquidation, certain ratable immovable property in Plain-street (the Royal Hotel). On January 24, 1906, the liquidators of the Royal Hotel Co., by an agreement which was subsequently confirmed by the Supreme Court, sold this property to the trustee for the defendant company, and in February, 1906, defendants took possession of the property as owners, except as to a portion consisting of certain Arcade shops, which was retained by a contractor. The rates for the municipal service of 1905 amounted to £450 6s. 3d., which amount was not paid on March 15, 1905, and therefore increased to £472 16s. 7d. The

defendant therefore became and was on March 15, 1906, a "future owner" of the property, and as such liable under section 102 of the Cape Town Municipal Act (26 of 1893) for the rates levied for 1905. In case the Court found that defendant was not liable for as much of the rates as was attributable to the Arcade shops, of which defendant had not in fact possession before March 15, 1906, then the defendant company was liable for £372 19s. 5d., being the rates attributable to the property, not including the shops.

The defendant company pleaded that transfer had not yet been passed to it by the liquidators of the Royal Hotel Co., Ltd., and that, in accordance with the true constructions of sections 97 and 102 of the Cape Town Municipal Act, the only persons liable for rates for 1905 as owners, or future owners, were persons in whom legal title was vested on March 15, 1905, or within a year from such date, and that it was not liable to pay the amount of the rates or any portion thereof under the Act or any other law. No valuation of the property made for the purpose of this case was binding upon it, or was legal or could be taken advantage of by the plaintiff, wherefore it prayed that the claims might be dismissed, with costs.

Mr. Schreiner, K.C. (with him Mr. (lose) was for the plaintiffs, and Mr. Gardiner (with him Mr. Roux) was for the defendants.

Charles B. Martin, City Treasurer, gave evidence on the certified extract of the Valuation Roll, 1905. The notice of the assessment showed a rate of 2½d. in the £, and the amount on the two properties was £450 6s. 3d., due and payable on the 15th March, 1905. According to the Act there was an additional 5 per cent. if the rates were not paid by the 30th June.

Witness first of all wrote to the old company and then to the new company for the rates. The £36,000 in the Valuation Roll of 1905 really represented the whole of the ground site, plus the hotel buildings, and £3,300 the buildings and the shops. The rates for 1906 had been paid.

Cross-examined by Mr. Gardiner: The defendants did not state that they were paying the rates for 1906 as occupiers and not the owners.

Cecil Henry Wilmot, who made the valuations for 1905, stated that he valued the old Royal Hotel and the two shops at £36,000, and the incomplete shops at £3,300. The site was included in the £36,000. At a later date he apportioned the valuation of 1905.

Mr. Schreiner closed his case.

James Cecil Bateman, acting secretary to the company, stated that transfer had not yet been taken owing to a dispute with the Civil Commissioner as to the valuation which ought to be put on the property for the purpose of

transfer duty. The rates for 1906 were paid by the defendants as occupiers.

Cross-examined by Mr. Schreiner: They had exercised their rights of subletting a portion of the property. There was no notification to the plaintiffs that the rates were being paid by the defendants as occupiers.

Mr. Gardiner closed his case.

In argument, Mr. Schreiner said that it was very much a legal question of construction. If the Act did not bear the construction the Town Council put forward, then persons might have all the benefit of the town services without paying for them. The company in that case would not be bound to take transfer at all, and, as long as it had not taken transfer, it would not be necessary to pay rates.

[De Villiers, C.J.: But then they would come in as occupiers.]

Mr. Schreiner: Not of the shops they don't occupy.

Continuing, Mr. Schreiner cited *Kimberley Divisional Council v. London and S.A. Exploration Co.* (2 A.C. 23); *Indwe Municipality v. Indwe Collieries* (16 C.T., 279). On section 97 of the Act (26 of 1893), legal title was vested in various ways in persons, and not necessarily by registration. Future owner did not necessarily mean the person having registered title. A person having a limited interest under a will would have legal title. He cited *De Kock and Another v. Fincham* (19 S.C., 136), and *Krachmal's Trustee v. Epstein* (17 S.C., 317). On the power of the Court to determine the proportion to be paid by the owner, he quoted *Cradock Divisional Council v. Hattingh* (6 J., 260), which was a later case than the case of *Bett v. Kimberley Divisional Council* (4 H.C., 342), which could therefore be treated as a case that had not been followed. He also cited *Dreyer's Case* (B 1868, p. 246).

[De Villiers, C.J.: When, do you say, they did become owner?]

They became owner upon the sanction of the sale by the Court on February 19, 1906.

[De Villiers, C.J.: But this is a very different case to the Indwe case.]

Yes, as to the facts, but not as to the principle.

[De Villiers, C.J.: Your contention is that the person who has entered into a contract by which he is entitled to become the owner is the owner, but that would be an extension of the principle laid down in the Indwe case.]

Mr. Schreiner further cited the case of *Rainbridge v. the Wynberg Municipality* (7 J., 11), and said that defendant would not be liable to pay *qua* occupier, unless that occupation was an actual occupation.

Mr. Gardiner said that the word "owner" alone should have the same definition as when coupled with the word "future." Section 97 said that

the owner was the person in whom the legal title was vested.

De Villiers, C.J., said that he was inclined to agree with Mr. Gardiner that the legal title could only be proved by registration.

Continuing, Mr. Gardiner referred to Act 25 of 1897, where the meaning of owner was extended; this would not have been necessary if the contention of the Town Council as to the meaning of "owner" under the Act of 1893 was correct. In the case of *Van der Spuy v. Maddison* (B. 1877, p. 97), it was held that in this colony no person could be said to be the owner of land until he had obtained transfer. It was the transfer which gave the dominium. He also cited *MacDonald v. Port Elizabeth Town Council* (8 J., 37), *Grimbeek's Case* (17 S.C., 200), and *Van Breda v. Town Council of Cape Town* (6 J., 71). The point at issue in this case was not at issue in *Krachmal's case*, as in that case the future owner was not a party before the Court at all. In the *Kimberley case* the special circumstances were that there was no evidence to show that registration was necessary in the Free State. The circumstances of the *Indwe case* were entirely different. There a kind of emphyteusis had been created. The Court had always held that the first test of ownership of immovable property was registration (*Maasdorp's Institutes*, Vol. II., p. 69). If the defendant company went into liquidation, the liquidators could repudiate the purchase and refuse to take transfer.

On the question as to the proportion for which the defendant would be liable in case the Court found that it was not liable for the whole, the Court stopped Mr. Gardiner, the Chief Justice remarking that the defendant company was either liable for the whole amount or for nothing.

In reply, Mr. Schreiner said that the liquidators could not repudiate a sale that had been confirmed by the Court, which was a sale *ex decreto judicis*. Legal title was not always registered title.

*Cur. Adr. Vult.*

*Postea* (November 26th).

De Villiers, C.J.: The question whether the defendant company is liable to the payment of the rate levied by the plaintiff Council in respect of the Royal Hotel premises must be decided under the provisions of Act 26 of 1893. It is unfortunate that there is no general law defining what is meant by the "owner" or "proprietor" who is liable, as such, for the payment of municipal rates. The rule certainly is that only the person in whose name the land is registered is legally regarded as the owner, but it has been pointed out in previous cases that the intentions of

the Legislature would often be defeated if this rule were always rigidly adhered to in practice. In the *Indwe Municipality case* (16 C.T.R., p. 279), for instance, the only inhabitants of Indwe who elected the councillors and enjoyed the advantages, such as they were, of municipal government, were the occupiers under perpetual leases of the erven, and the Court held that for the purposes of the rating powers conferred on the Council under that Act these lessees were the owners. No tenants' rate had been imposed, the lessees enjoyed the privileges of owners, and the company in whose name the property was registered had parted with all control over the property so long as the nominal rent was paid. The Court held that the lessees were owners liable to be rated under the Act 45 of 1882, and in the course of the judgment illustrations were used which are now relied upon in support of the plaintiff Counsel's contention that the defendant company is the owner of the premises. One of these illustrations was the case of a person who has purchased land from a non-resident registered owner, and has paid for and occupied such land, but has neglected to secure transfer, and it was remarked that "it could not be successfully contended that he is entitled, by reason of such neglect, to be freed from the payment of the owner's rate." The case thus put differs from the present in two important respects, for it supposed that the occupier intentionally neglected registration for the purpose of evading the payment of rates as owner, and it raised the question of liability in a Municipality established under Act 45 of 1882. In the present case it has not been suggested that there had been any undue delay on the part of the defendant in obtaining transfer of the premises in question. These premises belonged to and were registered in the name of a company, and on the 24th of January, 1906, the liquidators of that company accepted a tender made on behalf of the defendant company, which was then about to be formed, for the purchase of the property. The purchase was confirmed by this Court on the 19th of February, 1906. On the 1st of March, 1906, the defendant company obtained possession of a portion of the premises, and on the 15th of March, 1906, the owners' rate levied by the Council of Cape Town became payable under Act 26 of 1893. The defendant company, although it has not yet obtained transfer of the property, has paid the rate payable on the 15th of March, 1906, but it refuses to pay the rate payable on the 15th of March, 1905. This rate, amounting to £472 16s. 7d., the plaintiff Council seeks by this action to recover from the defendant. It is clear that the owner of the property on the 15th of March, 1905, was

the company now in liquidation. The 97th section of Act 26 of 1893 enacts that "the person or persons in whom shall be vested on the 15th day of March in each year the legal title to any immovable property, shall be the person or persons primarily liable for the rates imposed during that year in respect of such property," and there can be no doubt, therefore, as to the primary liability of the company in liquidation for the payment of the rate now in question. In support, however, of the defendant company's liability, the plaintiff relies upon the two last provisos to the 102nd section of the Act, which read as follows: "Provided also, that any and every rate assessed under the provisions of this Act shall, in so far as the owner of any property is concerned, be and be deemed to be a charge upon the property rated and recoverable against the owner at the time such rate was levied, or any future owner; provided always that no future owner of property shall be liable for any rates which became due and payable at any period more than one year prior to the date upon which he became owner of the said property." The "owner" to whom these provisos refer is the person in whom, in terms of the 97th section, the legal title to the property is vested, and that is the registered owner, and the primary liability for the rates attaches to such owner as opposed to the secondary liability of the occupier under the first portion of the 102nd section. If the property on which any rates are unpaid is transferred to another, the transferee becomes liable for such unpaid rate as became due and payable within one year prior to the date upon which he obtained transfer. But no such liability attaches to a person who has purchased the property and has not received transfer thereof. As was pointed out, in *Van der Spuy v. Maddison* (Buch. Rep., 1877, p. 98), the purchaser has a personal right to obtain transfer, but the legal title to the land is not vested in him until he obtains transfer. If he neglected to obtain transfer with a view of evading the payment of rates, other considerations would arise which do not enter into the decision of the present case. On the 15th of March, 1906, the defendant company, without any default on its part, had not yet received legal title to the premises, and, consequently, it cannot be held liable for the rate which became due and payable on the 15th of March, 1905. The judgment of the Court must therefore be for the defendant, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderno and Lawton. Defendants' Attorneys: Van Zyl and Buissinne.]

# SUPREME COURT

## FIRST DIVISION.

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

FRAHM V. MANGIAGALLI. { 1906.  
Nov. 22nd.

Defamation of character—Words imputing unchastity to a widow.

*A statement that a man was seen coming out of a widow's bedroom through a window at night-time,*

*Held to be defamatory and actionable.*

This was an action for damages for slander.

The plaintiff is a widow residing at Parow, and the defendant lives at Glen Lily. It was alleged that on November 20, 1905, defendant said, in the hearing of Elizabeth Fernandez and Albert Canterbury Thorndike: "Now I will tell you something which will make you laugh. Berthold Frahm (meaning plaintiff's son) has told me that one night, as he returned home, he saw the German man getting out through his mother's bedroom window as he went in at the door." The damages were laid at £500.

Mr. J. E. R. de Villiers appeared for plaintiff and Mr. Gardiner for defendant.

The plaintiff stated that she heard of the alleged slander from two persons—Elizabeth Fernandez and Mr. Thorndike. Plaintiff's solicitor sent a letter to defendant, which the latter ignored. A second letter also failed to elicit a reply, but subsequently defendant, through her solicitor, denied that she had ever uttered the alleged slander. This letter was written after the writ had been issued. Plaintiff did not know the "German man," and could not imagine who he could be. She wished for an apology.

Cross-examined: She did not mind about the damages; she only wanted to clear her character. People did not believe the slander, which her son first told her of. Defendant came to see her, and denied that she had slandered plaintiff, but the latter did not forgive her. Plaintiff waited about a couple of months before re-opening the subject by approaching a solicitor.

Elizabeth Fernandez stated that she resided at Parow. On the afternoon of

November 20, 1905, defendant came to her and told her slanderous things about plaintiff's daughter, and also about plaintiff herself. Witness stated that defendant told her that plaintiff's son had told her that he had seen a German man coming out of the window of plaintiff's bedroom at night-time.

Cross-examined: Witness did not believe the defendant's statement. Although the incident happened a year ago, she well remembered all the incidents. There was a little ill-feeling between witness's husband and Mrs. Mangiagalli.

By the Court: Witness was certain that there was no mistake about what Mrs. Mangiagalli said on that occasion. Mrs. Mangiagalli was an Italian, but witness could understand her without difficulty.

Albert Thorndike stated that in November last year he delivered an account to defendant. Just as he was on the threshold of Mrs. Elizabeth Fernandez's house, he heard the defendant say that plaintiff's son told her that one night he saw a German jump out of his mother's bedroom window. Witness thought the statement was meant to be defamatory of plaintiff's character.

Cross-examined: Witness subsequently mentioned the matter to plaintiff's son, who denied that he had ever made such a statement.

Mr. De Villiers closed his case.

The defendant, Ada Mangiagalli, stated that her husband was a sawyer. Of late, plaintiff had been rather angry with her because plaintiff's son visited defendant's house. Defendant denied having made use of the words as to the German man getting out of plaintiff's bedroom window; she had never made use of such words. Plaintiff did not like her son visiting defendant's daughter. Plaintiff's son had never told witness such a story about his mother.

Cross-examined: Witness did not know that plaintiff objected to any proposed marriage between plaintiff's son and defendant's daughter.

[De Villiers, C.J.: Is it true that you said those words to Thorndike?]

Defendant: I do not know anything about it.

Berthold Frahm, son of plaintiff, stated that Thorndike had mentioned the alleged slander to him, and subsequently witness asked Thorndike for the names, which the latter gave him.

Cross-examined: He had not been on good terms with his mother since this case had been on.

Angelo Mangiagalli, husband of defendant, said that Thorndike told him that Mrs. Fernandez had informed him of the alleged slander. Witness then said to Thorndike: "Good boy, I will put you in the paper on Monday." Thorndike replied: "Don't do that, it will spoil my connection."

Mr. Gardiner having closed his case,



Counsel were heard in argument on the facts.

De Villiers, C.J.: The decision in this case must depend on the credibility of the three witnesses alleged to have been present at the time the defamatory words were said to have been spoken. The witnesses were Mrs. Fernandez, Thorndike, and the defendant. Mrs. Fernandez gave her evidence in a very fair manner, and I am satisfied that she intended to speak the truth, and that she understood the defendant to make use of the words mentioned in the declaration. It was not she who brought the matter to light, but Thorndike, who was a friend of the son of plaintiff's, and who thought it his duty to warn his friend as to the language that had been used. The son naturally wished to clear his mother's character, and made further inquiries. Well, the son took Thorndike first of all to the defendant's house, and there had a conversation with both the defendant and her husband. Now, it is alleged that Thorndike, in their presence, said that he had heard these words not directly from the defendant, but from Mrs. Fernandez. Well, supposing he did, I do not think that is conclusive, because he might well wish to screen himself from the charge of disseminating a scandal of this kind. When he was confronted with Mrs. Fernandez, she maintained in his presence that she had not mentioned these words to Thorndike, and that she had never mentioned them to anyone else, and that she did not know that anyone else knew of them until that moment. She knew Thorndike entered the house immediately after the words were spoken, but she did not know that he had heard the words. I am quite satisfied that Mrs. Fernandez at all events has spoken the truth, that these words were uttered by defendant. It is difficult to know where Mrs. Fernandez could have got hold of this story if she did not get it direct from defendant. It is suggested that the two families were not on good terms, but apparently they were on good terms. I am quite satisfied that whatever ill-feeling Mrs. Fernandez might have had against the defendant it would not induce her to charge the defendant with using words she did not utter. I am quite satisfied that the words were made use of, and that both Mrs. Fernandez and Thorndike heard them used at the house. It follows, of course, that I cannot accept the statement of defendant that she did not make use of them, and the only other question is what damages should be awarded. It is certainly a paltry case; I think a Magistrate's Court might well have disposed of it. Mrs. Fernandez certainly did not think the worse of plaintiff for these words, nor did, apparently, Thorndike. It is said, on behalf of defendant, that she could not be expected to apologise

if she did not make use of the words. Well, I fully agree, but if the Court finds she did make use of the words, then the Court might fairly expect that she should apologise, that she should admit that in an unguarded moment she spoke a bit of scandal, and that she did not mean to say anything against the character of plaintiff, and desired to make no excuse. If she had done that no Court in the world would have done more than award nominal damages and order the payment of Magistrate's Court costs. But she has all along denied using these words and has compelled plaintiff to come into Court. There can be no reason to doubt as to the defamatory nature of the words. Here is a widow leading as far as would appear a chaste life, and it was alleged that a man was seen coming out of her bedroom through a window at night-time. The suggestion is as clear as anything that it was for some illicit purpose, and that there was a want of chastity on the part of this widow. It does appear to me that it was a charge of unchastity against plaintiff, and that she was entitled to come into court to have her character cleared. I think the sum of £5 will satisfy the justice of the case, and I think costs must follow the result.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorneys: Moore and Son.]

#### GREEN AND SEA POINT MUNICIPALITY V. DODDEMEADE.

##### Municipal regulations—Advertisement boardings—Interdict.

*Under its Act of incorporation the plaintiff Council had the power to make regulations for determining and regulating the place and manner in which placards and bills should be displayed; and accordingly a regulation was made that no person should erect a hoarding on, or near, or in view of a street for the purpose of displaying placards, &c., without the written consent of the Council. After the passing of the regulation a hoarding, which had been placed near the street by the respondent on his property, was blown down, and he, without obtaining the consent of the Council, proceeded to re-erect and reconstruct the hoarding to a greater height.*



*Held, that the Council was entitled to an interdict restraining such reconstruction.*

This was an application to make absolute a rule nisi which had been granted on November 13 restraining respondent, William Renny Doddmeade, from proceeding with the erection of an advertisement hoarding.

Mr. Gardiner was for the applicants.

Respondent, who appeared in person, said he had been a tenant of property around which the hoarding had been erected for the last 14 years. At the commencement of his tenancy he applied to his landlord (Mr. Wessels) for leave to erect a hoarding for the purpose of advertising, and Mr. Wessels gave him his unqualified sanction to do so. Respondent drew the rents from the hoarding. The bye-law had been in existence for only three years, while the hoarding had been erected for 14 years, and he took it that the bye-laws could not be retrospective. A portion of the hoarding had been blown down, and it was so damaged that a portion of it had to be erected with new material. Mr. Wessels gave respondent his verbal consent to the erection of the hoarding, but as Mr. Wessels was a lawyer he would not put down anything in writing about it. Respondent did not ask the Municipal Council for its permission to re-erect a hoarding, as he did not acknowledge its right in the matter. Previously the hoarding varied from 10 ft. to 7 ft. in height, whereas now it was 10 ft. right through. He had altered the hoarding for the better.

[De Villiers, C.J.: From your point of view. No doubt it is highly desirable that the Municipality should have power to prevent the defacing of the landscape by the erection of unsightly hoardings.]

The respondent observed that the hoarding had been blown down on several occasions and had always been re-erected without any objection by the Council.

[De Villiers, C.J.: Still that would not prevent them carrying out their regulations now. If they did not insist on their regulations being complied with in the past, that is no reason why they should not now insist.]

The respondent, proceeding, said the hoarding did not intercept anybody's view. The times were bad, and the hoarding was a source of income to him. He would like the Court to consider that.

De Villiers, C.J.: The 52nd section of the Act under which this application is made, confers very large powers on the Municipality, among which is that of making regulations for determining and regulating the place and manner in which placards and bills shall be displayed. That is an

enactment of the Legislature, and it must be obeyed. In pursuance of that enactment the Municipality has made the following regulation: "No person shall erect a hoarding or framework in or near or in view of any street or thoroughfare for the purpose of displaying placards, bills, advertisements, or notices of any kind without the written consent of the Council, and in granting such consent the Council may impose such conditions as may seem to them desirable." It appears that the hoarding which the respondent had used for advertising purposes was blown down, and thereupon the respondent, without asking for the written consent of the Council, proceeded to re-erect the hoarding, and not only to re-erect it, but to somewhat alter the height of a portion of it at all events. That he had no right to do. He had no right in the face of the regulation made under the Act of Parliament to insist on taking the course which he took. He was bound to ask the consent of the Council before re-erecting the hoarding and altering the structure, and even if he did not alter the structure, I am of opinion that he should have obtained the Council's consent before re-erecting it. Therefore I think the Council was quite within its rights in obtaining an interdict. Unfortunately the work had been completed before the interdict was served, and there is no application for the removal of the hoarding. But I think there was sufficient ground for the application to be made and the rule nisi should accordingly be made absolute with costs. As to the removal of the hoarding, a fresh application for that purpose should be made, but I would advise the respondent to come to some terms with the Municipality. Possibly they may be able to agree upon some mode of advertising which will not be objectionable to the public and may at the same time be profitable to the respondent. He says that in these hard times the hoarding is a means of earning something, and no doubt the Council will bear that in mind if application is made in proper form, but this Court cannot decide in that matter. I am not prepared now to decide the question whether the Court should order the removal of the hoarding. I am not prepared to express an opinion in case application should be made for its removal, but I think there was sufficient ground for an application for an interdict, and the rule granted must be made absolute with costs.

[Applicant's Attorneys: Van Zyl and Buissinné. Respondent in person.]

# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TAUTE V. ODENDAL. } 1906.  
Nov. 23rd.

Defamation — Malice — *Animus injurandi*.

*The defendant having been informed, as the fact was, that his uncle, who was very old and weak in body and in mind, had given a general power of attorney to the plaintiff, asked the old man why he had given the plaintiff a power under which he could do as he liked with the property and under which he had already begun to call in debts. The old man replied that he had not given the plaintiff such a power; upon which the defendant said that if his uncle did not give the power, the plaintiff was doing what was illegal. The Court, being of opinion that the words had been spoken in the interest of the defendant's uncle, without any animus injurandi,*

*Held that the defendant was not liable in damages.*

This was an action for damages for slander.

The plaintiff's declaration was as follows:

1. The plaintiff is an attorney, notary, and conveyancer, practising at Prince Albert, in this colony. The defendant resides at Prince Albert.

2. Before the utterance of the slander hereinafter mentioned, the plaintiff had been employed by one Jan Coenraad Lotz, of Prince Albert, as his attorney and agent for the general administration of his estate, and a general power of attorney had been executed by the said Lotz in plaintiff's favour on August 24, 1906. Defendant was aware of this.

3. On or about August 28, 1906, and at Prince Albert, the defendant, addressing the said J. C. Lotz, in the hearing of Willem Avenant and Jacobus Coenraadus de Beer, falsely and maliciously spoke and published of, and concerning, the plaintiff, in relation to his profession, as aforesaid, to his business as general agent of the said Lotz, and

to the conducting thereof by plaintiff, the following defamatory words, in the Dutch language to wit: "Waarom geef jy ver Taute een volmacht procuratie? Hy doet onwettige dinge in zyn kantoor en hy laat onwettige dinge teken en hy zal gauw jou geld doorbreng," which, in the English language, means: "Why do you give Taute (meaning plaintiff) a general power of attorney? He (meaning plaintiff) does illegal things in his office, and he causes unlawful documents to be signed there, and he will soon run through your money."

4. Thereafter, on the same day and at Prince Albert, the defendant, addressing one Andries Stephanus Snyman, and in the hearing of the aforesaid Avenant and De Beer, falsely and maliciously spoke and published of, and concerning, the plaintiff in relation to his profession as aforesaid, to his business as general agent of the said Lotz, and to the conducting thereof by plaintiff the following defamatory words in the Dutch language: "Hoe kan julie zoo een kerel als Taute een vreemdeling een procuratie geef om Oom Jan zyn zake waar te neem. Wanneer hy dit achter kom zal hy Oom Jan zyn goed zoo deurgebreng het dat die ou man niks zal he en hy zal de eenigste erfgenaam wees. Weet jy dat hy nou al onwettige dinge doen en onwettige papieren laat teken in zyn kantoor," which, being translated into English means: "How can you give such a fellow as Taute (meaning plaintiff), a stranger, a power of attorney to take charge of Uncle John (meaning Mr. J. C. Lotz)? By the time he (meaning the said Lotz) realises the true state of affairs, then he (meaning plaintiff) will have so administered the estate of Uncle John (meaning Mr. Lotz) that the old man (meaning the said J. C. Lotz) will have nothing left, and he (meaning plaintiff) will be the sole heir. Do you know that he (meaning plaintiff) is even now doing illegal and improper things, and causing illegal and improper documents to be signed in his office?"

5. The aforesaid words mean, and were intended and understood to mean, that plaintiff was and is in the habit of acting fraudulently, dishonestly, and illegally in the course of the practice of his profession, and would act in that way in administering the estate of the said Lotz, with the result that the said Lotz would discover in the end that the plaintiff, by his fraudulent, corrupt, and dishonest manipulation of the said estate, had unlawfully transferred it to himself, and had left nothing for the said Lotz or his lawful heirs; and that plaintiff was not a fit and proper person to be entrusted with the administration of the affairs of the said Lotz or of anyone else.

6. By reason of the premises the plaintiff has been and is greatly prejudiced and injured in his credit and reputation,

and in his profession and business aforesaid.

Wherefore plaintiff claims: (a) Payment of the sum of £2,000, as and for damages for the the injury above stated; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. Paragraph 1 is admitted.
2. The defendant denies the allegations in paragraph 2.

3. Prior to the month of July, 1906, the said Jan Coenraad Lotz, of Prince Albert, of whom the defendant is a relative, was the holder of various promissory notes, given for moneys lent by the said Lotz, and which promissory notes were held by the said Lotz as investments, the interest being paid by the debtors, but the principal remaining due. In the said month of July the said Lotz began to suffer from *dementia*, and in and during the month of August he was not mentally sound, or in a fit and proper mental state to transact any business.

4. Shortly before the 28th of August, 1906, the plaintiff, purporting to act under a general power of attorney, granting to him by the said Lotz, and giving the said plaintiff the general administration of his affairs, and of which the defendant had no knowledge whatever, began to call up the aforesaid promissory notes, including notes which the said Lotz had promised not to call up in his lifetime, and generally to demand from persons holding papers and documents belonging to the said Lotz that they be handed up to the said plaintiff; and on the 28th of August the defendant went to the house of the said Lotz for the purpose of inquiry, and, in the presence of the said Avenant and De Beer and others, addressing the said Lotz, said in the Dutch language: "Hoe kom ge Oom Jan ver Taute een volmacht procuratie," or words to that effect, which, being translated into English is: "Why did Uncle John give Taute (meaning the plaintiff) a general power of attorney." The said Lotz denied that he had given such a power of attorney, and stated that the only document he had signed was one confirming one Nicolaas Cornelius van der Hoven as his executor, and thereupon the said defendant said in the Dutch language, in the presence of the aforesaid persons: "Dan als Oom Jan nie die procuratie gege het nie, dan doet hy mos onwettige dinge"; and further: "Jy moet jou papiere laat vra en terug kry anders kan die man nou met jou goed maak net wat hy wil"; and further: "Hy het al ver Mr. Van der Hoven geze hy wil die geld uitzet op verband," or words to that effect, which being translated are: "Then if Uncle John did not give the power of attorney, then he (meaning the plaintiff) must be doing what was illegal (or unlawful things)"; "You must have your papers (documents) demanded and get

them back, or otherwise that man (meaning the plaintiff) can do with your estate as he wishes; he has already told Mr. Van der Hoven that he is going to put out the money on mortgage."

5. Thereafter the defendant on the same day, not addressing the said Snyman in particular, but in conversation at which Dr. Luttig, the said Snyman, Sybrand R. de Beer, J. C. Lotz, and the said Avenant were present from time to time, said in the Dutch language: "Hoe kan julle laat Oom Jan voor zoo een vreemde man als Taute volmacht procuratie ge oor zijn goed zonder eenig securiteit," "Als hy reg kom en dit achter kom zal hy baing ontevreden wees: volgens die procuratie kan hy nou met Oom Jan zyn goed maak net wat hy wil," "Hy kan tot zyn grond laat verbind," or words to that effect, which being translated into the English language are: "How could you let Uncle John give a general power of attorney over his estate to such a stranger as Taute without any security," "if he (meaning the said Lotz) recovers his sound senses (meaning that the said Lotz was not then mentally sound or in a mental state of mind fit to do any business) and realises what has been done he (meaning the said Lotz) will be very angry:" "according to the power of attorney he (meaning the plaintiff) can now deal with Uncle John's estate as he pleases," "he (meaning the plaintiff) can go so far as to mortgage his land." Save as above, he denies the allegations in paragraphs 3, 4, 5, and 6, and says that the words spoken by him on the 28th of August were spoken without malice, were true in substance and in fact, and were spoken in the public interest. The defendant specially denies that he did, or intended to, impute to the plaintiff that he had acted, or was in the habit of acting, or that he would act, fraudulently or dishonestly or illegally in his profession or otherwise, or that he would do so in the administration of the said Lotz's estate or anybody else's estate, or that he would transfer the said Lotz's property to himself and leave nothing of the estate for Lotz and his heirs, or that he was not a fit and proper person to administer the estate of Lotz or anyone else. Therefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication stated:

1. Plaintiff admits that prior to the month of July, 1906, the said Jan Coenraad Lotz, of Prince Albert, was the holder of various promissory notes given for moneys lent by the said Lotz, and that he, upon the instructions of the said Lotz, called up certain of the notes, the interest on which had not been paid for some considerable time. He admits further that, being specially authorised thereto by the said Lotz, he requested one J. M. Theunissen, an attorney of Prince Albert, to deliver up to him all papers

and documents belonging to the said Lotz, which were in the possession of the said Theunissen.

2. Save as above and except in so far as the plea contains admissions, he denies all and singular the allegations of fact and conclusions of law in the said plea contained, joins issue thereon, and again prays for judgment in terms of the declaration.

Mr. W. P. Buchanan (with him Mr. Sutton) for plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner) for defendant.

At the request of Sir H. Juta, all witnesses were ordered out of court.

Jacobus Conradus de Beer, carpenter, of Prince Albert, said he was the son of S. R. de Beer, and his mother was a sister of Lotz. Witness had been asked to take care of Lotz, who was about 80 years of age. Taute was sent for, and witness was present at the interview between Lotz and Taute. The latter was given some promissory notes to collect by the former, and Taute was also handed Lotz's power of attorney. On August 28 last, witness, who was not then looking after Lotz, called at the latter's residence. He there saw Odendal, who was talking to Lotz. Odendal asked witness if he had signed as a witness to a certain power of attorney, and witness replied "No." Odendal then said that Taute did unlawful acts in his office, and allowed unlawful documents to be signed. Subsequently witness met defendant in a bar, and there was "a row" between them. About a week later defendant met witness, and the former asked him whether he (witness) had made an affidavit against him. Witness answered "Yes," and defendant said that if he had been in witness's place, he would not have done it for £500. On another occasion defendant showed that he had ill-feeling against plaintiff.

Cross-examined: Lotz had been in a weak state of mind. Defendant's wife was a niece of Lotz. Witness was not speaking the truth when he told defendant that he had not signed the power of attorney. Witness was not certain how many papers he signed, but he thought two.

Willem Avenant, farmer, of Prince Albert, said he lived near Lotz, whom he looked after in succession to the previous witness. Lotz during the time witness was there was ill, and witness could not say he was quite in his right mind. Witness was present when defendant called on August 28. Defendant asked Lotz what papers he had given to plaintiff. Lotz answered that plaintiff was his attorney. Odendal then observed: "That paper means that Taute is now the possessor of your belongings, and he will as quickly as possible do away with them." Odendal added that Taute was doing illegal things already.

Andries Stephanus Snyman, farmer, said he had been acting as chief overseer to Lotz, to whom he was related by marriage. Witness did not know of the passing of the power of attorney until it had been signed. One day Lotz asked witness to sort out some promissory notes to be sent to his attorney. On August 28, Odendal visited Lotz's house, and asked the latter what papers he had signed. Odendal had some words with De Beer, who was amongst those also present. Odendal said they allowed strangers to come and get the old man to sign papers without the presence of his relatives. De Beer then observed that if Odendal did not leave the old man alone he (De Beer) would go to the Magistrate, and Dr. Luttig urged them not to quarrel. Odendal next said: "How can you appoint such a man as Taute, who is a stranger, and will squander all Uncle John's property, and the old man won't have any possessions, and Taute will arrange it so that he will remain sole heir of Uncle John." Witness retorted: "If you say that I will go to Mrs. Lotz and tell her." Defendant then said that Taute had already allowed illegal documents to be signed in his office, adding that there was a sum of £300 which they would never see again. Subsequently, Mrs. Lotz sent witness to see the papers with the instruction that if there was anything wrong with them he was to bring them back.

Sybrand R. de Beer, storekeeper, of Prince Albert, said he was brother-in-law to Lotz. Witness knew of the power of attorney the same day it was signed; he witnessed it, but did not see it signed. Taute read the power to witness, and Lotz told witness about the matter. Witness used to go to Lotz's house three or four times a day. At the time the power was signed, Lotz was weak, but in his sound mind. On August 28 witness went to Lotz's house, and asked defendant whether he was not ashamed to disturb the old man in that way. Defendant said: "You allow strangers to come here with powers of attorney without even the presence of a relative." Defendant further said, "Taute has now the general power of attorney, and he will now raise bonds on the property of the old man, and he will afterwards be the sole heir of the old man." Witness turned to the doctor, and said, "An end must be made to this now," but defendant went on: "Taute has now already in a disgraceful manner got people to sign notes in his own name."

Johannes Nieuwoudt, farmer, of Prince Albert, stated that on August 23 Lotz sent him to Taute to ask whether the latter had collected certain accounts for him. At that time Lotz was in his sound mind, and spoke to witness about farming operations.



Cross-examined: At times, Lotz was sick in his head; witness was one of his night nurses for a time.

Johan Godfried Taute, an attorney, of Prince Albert, stated that he had known Lotz since June last, when he asked witness to act for him as his attorney. On August 22 witness was sent for by Lotz, and on the following day witness went to see the old man, who went into affairs generally with him. Koos de Beer was present throughout the whole of the interview. The power of attorney was signed on August 24. When Lotz signed the power of attorney he was undoubtedly in full possession of his mental powers. Amongst the promissory notes was one signed by Van der Hoeven, which was overdue. Witness got Van der Hoeven to give a new promissory note, payable at witness's office. Witness had heard what Odendal had said, and immediately sent him a letter of demand. Witness, in December, 1906, had also warned defendant to be careful what he said about him. Mrs. Lotz sent for witness on August 28, and told him that defendant had made the statements, to which witness replied that they were false. Witness's object in bringing the present action was not to get heavy damages, but to stop the circulation of the report, which was certainly doing him a lot of harm.

Cross-examined: Witness did not know Lotz was weak in his mind until August 28. Van der Hoeven never spoke to witness about the old gentleman's state of mind. If Dr. Luttig knew Lotz was insane, it was his duty to tell witness; if witness had known it, he would not have had the power of attorney signed.

Mr. Buchanan closed his case.

Nicholas Cornelius van der Hoeven, farmer, of Prince Albert, deposed that he was well acquainted with Mr. and Mrs. Lotz. On August 27 last Taute sent for witness. At that date the old gentleman was not right in his head—his mind wandered. Taute accused witness of favouring Theunissen with Lotz so far as the latter's papers were concerned; witness denied this. Taute then showed witness his general power of attorney, witness expressing his surprise thereat. Plaintiff then said, "I'll show you something more," and produced two promissory notes which witness had passed in favour of Lotz. Witness refused to sign a fresh note in favour of Lotz, because it was payable on demand.

[De Villiers, C.J.: Did Taute ever tell you that he intended putting out Lotz's money on mortgage?]

Yes; he did.

[De Villiers, C.J.: Did you tell Odendal what Taute told you?]

Yes.

Dr. Luttig, of Prince Albert, said that in July last he attended Lotz, and was

of opinion that Lotz was incapable of looking after his own affairs. Witness accordingly recommended that the estate should be placed under curatorship. On August 28 witness was present at a conversation between Odendal and De Beer at Lotz's house. Odendal expressed surprise at Taute being given Lotz's power of attorney without his giving security. Witness did not hear anything said about Taute having done illegal things in his office or having promissory notes made in his own name instead of that of Lotz. It did not appear to witness that Odendal said anything maliciously. It struck him that Odendal said what he did say merely to point out the possibility of such things happening, and that Odendal wanted to be accurate in a matter of business.

Cross-examined: Witness was Theunissen's brother-in-law. Witness had witnessed two powers of attorney which Lotz had passed in favour of Taute.

Stephanus Johan Marincowitz, of Prince Albert, deposed that on August 28 he went to Lotz's house with defendant. Witness detailed the conversation which took place between Odendal and De Beer on that occasion.

John William Odendal, the defendant, said he knew that in July and August last old Mr. Lotz was not in possession of all his senses. Lotz had one son, aged 52, who was also of weak mind. Witness first heard of the power of attorney being given to plaintiff in August 28. He had occasion to go to Lotz's house that day, and in conversation he made use of the words set out in his plea.

Sir H. Juta: Did you accuse Taute of doing unlawful things in his office?

Defendant: Not in the very least.

Did you intend to impute anything dishonourable or fraudulent to Taute?—Not in the very least.

Did you say anything from which anybody could imagine that he wish to act fraudulently?—No.

Or that he would act fraudulently and dishonestly in the administration of Lotz's or anybody else's estate?—No.

Or that he would steal all Lotz's property?—No.

Sir H. Juta closed his case.

Mr. Buchanan having been heard in argument on the facts,

De Villiers, C.J.: The only material evidence in this case is the evidence of witnesses who deposed to what took place at the conversations on August 28. If the version given by plaintiff's witnesses is correct, there can be no doubt that defendant would have been guilty of defamatory libel. If, on the other hand, the version given on behalf of the defendant is correct, then I consider that, under all the circumstances of the case, there was no defamation rendering defendant liable. Defendant had gone to see the old man, not as a stranger meddling in the affairs of others, but



as a relative of the old man, who was very weak in mind and body. Lotz had an old wife, who could do little for him, and an imbecile son, who could do less. Accordingly plaintiff came as a friend and a relative, and not as a stranger. He had heard something about a power of attorney which had been passed, giving very large powers to plaintiff, and I accept the defendant's version of what took place, fortified as it is by the evidence of Marincowitz. Defendant asked: "Why did Uncle John give Taute a general power of attorney?" Then there is evidence that Lotz denied giving a general power of attorney. This little bit of evidence is of importance, because plaintiff's own witnesses say that the old man was always harping on the fact that he had given a document to Van der Hoven confirming him as his executor. I quite accept the statement made by Marincowitz and defendant that the old man denied giving such a power to the plaintiff. The old man was wrong, however, but that does not affect the point. Defendant said: "If Uncle John has not given a power of attorney, then Taute must be doing what is illegal." Under all the circumstances, I consider that the words used as they were are not to be regarded as libellous. I would not treat the occasion as a privileged one, but I should certainly say this, that the use of the words under these particular circumstances show that there was no *animus injurandi*. Mr. Buchanan says there may have been a verbal power given, but that was not the point. The point was, that there was this written power. The only powers he relied on were written powers, and if they fell to the ground, the legality of what plaintiff did would also fall to the ground. I am not prepared to say that plaintiff's witnesses came here positively to swear to words which were never used, but I think plaintiff's witnesses really misunderstood what took place. The misunderstanding is so evident, because part of what they said was really said, but they did not follow the whole of the context, and did not hear Lotz deny his having given the power of attorney. It seems to me that plaintiff's witnesses misunderstood the gist of the conversation, that they did not quite understand that these words were used in consequence of Lotz's denials, and they were led to believe that this statement was made by defendant. In my opinion, they were mistaken. The same remarks would apply to the second conversation on August 28. Dr. Luttig's evidence I fully accept as to what took place, but here, again, there may have been a misunderstanding. Snyman, I am satisfied, misunderstood the greater part of the conversation that took place. Part of this conversation both parties are agreed upon. For instance, as to giving the

power of attorney to a stranger, that is admitted, and it is quite a reasonable thing for defendant to remark upon it, but there was certainly nothing libellous in the objection to this general power being given to a stranger. As to the statement that plaintiff could mortgage the land if he chose, that was perfectly true, and there was no doubt it was a very dangerous proceeding on the part of Lotz to give his general power of attorney to a person who was a comparative stranger. Objections of that kind are not necessarily libellous, and certainly not when used under the special circumstances under which they were used by defendant. The result of my finding is that plaintiff has not proved that the words alleged in the declaration were used by defendant, and consequently there must be judgment for defendant, with costs.

[Plaintiff's Attorneys: Findlay and Tait. Defendant's Attorneys: Dempers and Van Ryneveld.]

#### *Ex parte* WEGE AND *Re* VAN DYK AND MARAIS V. ABRAHAM AND CO.

Mr. McGregor moved for the revocation of the order granted on October 31, on the petition of V. Abraham, and an order that the writs of execution issued in terms of judgment obtained by Van Dyk and Marais in the Resident Magistrate's Court of Calvinia be no longer suspended, and that the messenger forthwith proceed with the execution, and hand over the proceeds thereof to Van Dyk and Marais.

A rule *nisi* was granted calling upon the respondents to show cause on December 12 next why an order should not be granted, rule to operate as an interim interdict, notice to be served on the Cape Town attorney for the respondent.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY]

EAST LONDON HARBOUR BOARD V. CALEDONIA SHIPPING CO. AND ANO-THER. 1906. Nov. 27th

Consolidation of actions—Leave to appeal.

*Two companies instituted separate actions against a Har-*

bour Board for damage done, through the defendant's negligence, to certain vessels belonging to the two companies respectively, but in order to save expense, it was agreed between all the parties that, as the same evidence would have to be taken in both cases, the two actions should be consolidated, which was accordingly done. The amount claimed by one of the companies was less, and the amount awarded was less than £500.

Held, that the Board was not entitled, by reason of such consolidation, to appeal to the Privy Council, as if the amount claimed had exceeded £500.

This was an application on the part of the East London Harbour Board, in the case of the Board, and the Caledonia Landing, Shipping and Salvage Company, Ltd., and the Colonial Fisheries Company, for leave to appeal to the Privy Council.

The two actions had been consolidated by consent of parties, and judgment had been given in favour of the first plaintiff (Caledonia Company) for £3,000, and in favour of the second plaintiff for £250. The first plaintiff's claim had been for a sum of £4,000 and the second plaintiff's claim had been for a sum of £345 (16 C.T.R., 792).

Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan) appeared for the applicant Board. Mr. Searle, K.C. (with him Mr. Benjamin) appeared for the respondents.

Mr. Schreiner contended that there was one consolidated case and one consolidated judgment. The consolidated claim had been for a sum of over £500, and so the defendants had a right to appeal to the Privy Council in both cases. The right involved in the case was of far greater value than £500 to the Harbour Board. The judgment, though it only awarded damages, was really a declaration of rights. The civil right involved was the liability of the Board for an action of the Harbour Master, which was beyond its authority.

[De Villiers, C.J.: That right can be decided on appeal in the Caledonia case without appealing in the Fisheries case.]

Counsel quoted *De Villiers v. Divisional Council* (1875, Buch., p. 125).

[De Villiers, C.J.: Yes, but there the right involved (i.e., the right to take gravel) between De Villiers and the Council was worth more than £500, although the claim was only for £25;

but here the right involved between the Board and the Fisheries Company is not worth more than £500.]

Continuing, Mr. Schreiner said that the Fisheries Company was in liquidation, and if this Court refused leave to appeal in the Fisheries' case application for leave would be made to the Privy Council, and he asked that execution be stayed till the Privy Council gave or refused leave to appeal.

In support of this application he quoted *Smith v. Davies* (Buch., 1878), *Roebuck v. Murdoch* (1 J., 43), and *La Foret v. Nourse* (1 M., 497). The Fisheries Company was in liquidation, and could not give security for the return of the money if the amount of the judgment were paid over to them.

Mr. Searle said that no leave to appeal had yet been granted in the Fisheries case, and so there was no reason to stay execution. Notice had been given to the applicants that application would be made by the respondents to amend the judgment by adding interest *a tempore morae*. This was a mere formal omission from the judgment, and he asked that interest *a tempore morae* be added to the amount of the judgment. The respondents were entitled to interest. He cited Voet (21, 1. 11).

Mr. Schreiner, in reply, said that interest *a tempore morae* was never granted on an illiquid claim for damages. He did not oppose the application for interest from the date of judgment.

De Villiers, C.J.: I am quite satisfied in this case that the only object of the consolidation of the two suits was to save the expense of a double set of counsel, a double set of attorneys, and of hearing witnesses twice over. Beyond that there was no object in the consolidation, and I certainly do not think that the effect of the consolidation would be to allow the East London Harbour Board to appeal to the Privy Council in respect of the Colonial Fisheries Company as if the claim in that case had been in excess of £500. The claim was only for £350, and I do not think this Court would be justified in giving leave to appeal merely because the action brought by that company was for certain purposes consolidated with an action for more than £500 brought by another company. There is something in the suggestion as to a stay of execution. It is a very peculiar case. It is not a case likely to frequently occur, where the company, which has obtained the benefit of the judgment is in liquidation, and there is a clear intention on the part of the unsuccessful party to appeal against the judgment. The Court will stay execution for a short period, just sufficient time to make application to the Privy Council for leave to appeal, that

is for six weeks from this date. In regard to the Caledonian Company, there the amount was far in excess of the £500, and clearly the Harbour Board is entitled to appeal, and the only question is as to security, whether security should be required from the Harbour Board, or whether the Court should direct execution. I cannot see what takes this case out of the ordinary rule. Here was damage done to the ship, for which the Court has held the Board liable. There seems to me to be no special reason in this case why the ordinary course should not be followed and the Harbour Board ordered to pay the amount of damages. As to the interest *a tempore morae*, I am not prepared to say what the Court would have done at the time if the application had been made, but the Court's attention was not drawn specially to the matter, and the Court is not prepared to alter the judgment. The result therefore will be that there will be leave to the applicant to appeal to the Privy Council in the case of the Caledonian Company and direct that the judgment be carried into execution, and that the company, before execution, enter into good and sufficient security as directed by the 50th section of the Charter of Justice. Leave refused to the applicants to appeal to the Privy Council in the case of the Colonial Fisheries Company, but a stay of execution granted for six weeks, the costs of the application to be paid by the applicants.

Hopley, J., concurred.

HOTZ V. STANDARD BANK. { 1906.  
Nov. 27th.

Appeal to the Court of Appeal—  
Extension of time—Good  
and sufficient cause shown.

*On an application for an extension of time within which the appellant shall prosecute his appeal under the last proviso of Sec. 24 of Act 35 of 1896, it appeared that he could not be ready within the time fixed, that there was a bona fide intention on his part to appeal, and that the delay was not due to any culpable neglect on his part.*

*Held, that good and sufficient cause had been shown for extending the time.*

This was an application for an extension of time in which to prosecute an

appeal from a judgment of Mr. Justice Maasdorp.

Sir H. Juta, K.C. (with him Mr. Scarle, K.C., and Mr. Upington), appeared for the applicant; Mr. Schreiner, K.C. (with him Mr. McGregor), appeared for the respondents.

Sir H. Juta said the judgment had been satisfied. The appeal was noted in time, but it was impossible to print the record within the three months allowed by the rules of Court.

Mr. Schreiner said the time could not be extended unless good and sufficient cause were shown for extending it. Here no good and sufficient cause was shown. Counsel quoted *Hiscock v. De Wet* (1 A.C., 35) and *Van Nickerk and Brown v. Colonial Government* (18 S.C., 23).

De Villiers, C.J.: A very large discretion is left to the Court of Appeal, under the last proviso of the 24th section, and the Court has never placed a rigid construction upon the words "good and sufficient cause shown." The Court must be satisfied that it is a *bona fide* application; that there is a *bona fide* intention on the part of the person applying to appeal, and that there has been no culpable negligence on his part. In the present case there has certainly been some neglect, but not such negligence as would justify the Court in refusing leave. There is certainly no evidence of any desire on the part of the applicant to delay the appeal. Circumstances have induced him to postpone the matter, but I do not think it was intentional. Under the circumstances the Court will grant leave to appeal, notwithstanding the expiration of the time. But, considering that the costs of this application would not have been incurred if the application had been made in time, I think the precedent established in the case cited might fairly be followed here, and the applicant ordered to pay the costs of the application.

Hopley, J., concurred.

[Before the Hon. Mr. Justice HOPLEY.]

O'CONNOR AND CO. V. { 1906.  
KNIGHT. { Nov. 27th.

Spoliation—Warranty of horse.

Mr. Close was for the applicant, and Mr. Benjamin was for the respondent. Mr. Close moved to make absolute a rule nisi, granted on the 31st October last, calling on the respondent to show cause why he should not be ordered to return to the applicant a cart, horse, and harness.

Mr. Benjamin read an affidavit by the respondent which set out that he exchanged a pony, cart, and harness with

the applicant for a heavier horse, and he also paid the applicant thirty shillings in addition. The horse which he received from the applicant was not up to the guarantee given, and he returned it and took away his pony, cart, and harness. The horse was guaranteed to be quiet, whereas it kicked and jibbed freely, and several times refused to move.

In a replying affidavit the applicant denied giving any guarantee with the horse.

[Hopley, J.: He has made a bad exchange. It was an exchange which is recognised by our law. His remedy surely must be by way of damages for a false guarantee.]

Mr. Benjamin: The position we take up is this: It was taken under such circumstances that the Court would not interfere by way of motion. It was quite competent for the applicants to bring their action. I submit it as a matter which should be decided on action.

Hopley, J.: The rule must be made final. The respondent parted with his cart and horse for a horse which he says was guaranteed to be fit for certain work, but which he found out afterwards was not really fit for the work. He gave a chestnut pony and a cart for this animal and took thirty shillings to boot. He took the animal and the thirty shillings, and delivered his own property to the applicant Findlay. After a trial he found that the animal he had received was not fit for the work which it had been guaranteed to do. Consequently he was dissatisfied with the bargain he had made, and instead of taking the proper legal remedy he went and tendered back the animal at the stable rented by the applicant and re-possessed himself of the horse and trap which had once been his own property. This he did without notice to the applicants. Apparently there was some sort of person in charge of this stable, but one does not know whether he had any authority to consent on the part of the applicant. Presumably he could not. When the applicants found out the course of conduct adopted by the respondent they at once protested, and threatened him with the rigour of the criminal as well as the civil law. It was only then that the respondent tendered back the thirty shillings as well as the horse in place of the one he had given away. He could not take such a course and the applicants are perfectly right in asking that their property should be restored. If they really guaranteed this as a good horse to do certain work—if they guaranteed a jibbing horse, a kicking horse, as a good and quiet worker, the respondent would have his remedy by way of action. Though the respondent did not use force in getting back the cart and pony, and though he

acted openly, in a certain sense, still it was, in my opinion, an act of spoliation, carried out in a bold, high-handed manner. He took property which did not belong to him, and should be compelled to hand it back forthwith. The rule must be made absolute with costs.

#### ROSE V. TABLE BAY HARBOUR BOARD.

Mr. Russell applied on behalf of the applicant for the fixing by the Court of a day for trial by jury of this action, which was a claim for £1,500 damages for personal injuries.

Sir H. Juta, K.C. (with him Mr. Upington), who appeared for the respondents, did not object.

His Lordship: What date do you suggest?

Mr. Russell: The Act does not say that it is necessary for a trial by jury to take place during term.

His Lordship: Surely you do not wish the Judges to sit out of term more than they do.

Sir H. Juta: If the case is heard out of term I will object.

His Lordship: The Judges are trying to get a breath of sea air before the next term begins.

The case was set down for trial on February 7 and 8.

#### PERSON V. PERSON.

Mr. P. S. T. Jones applied on behalf of the applicant for an order compelling the respondent, James Henry Person, to pay her the sum of £30 to enable her to sue the respondent for a judicial separation.

Dr. Greer appeared for the respondent.

The applicant's affidavit stated she was married to respondent at Claremont in 1891, and that since December, 1905, he had become addicted to the excessive use of alcoholic liquor, and had ill-treated her by assaulting her. He had taken possession of her property, which included a bank-book. She believed that he intended to realise the whole of the property and leave the country, and with the object of frustrating that she had applied to the Court to interdict him from selling the property.

The respondent's affidavit stated that he was a jobbing contractor, and that owing to the depression he was only earning 22s. a week, out of which he had to support an adopted child. He denied that he was addicted to the excessive use of alcoholic liquor, or that he had ill-treated his wife. She had left him of her own accord, and he was at present suing for restitution of conjugal rights.

In a replying affidavit the applicant stated that the respondent had, during



the present season, laid down ten tennis courts at an average of £7 each, and had drawn money from the Claremont Municipality for a contract.

[Hopley, J.: It is very extraordinary how these people will waste money. Why the cost of the application and opposition in this motion will cost as much as would have settled this application.]

Counsel were heard in argument.

An order calling on the respondent to hand over the amount in the savings bank (£10), and another £10 to the applicant, was made. The question of costs to stand over.

#### SYRKIN V. WEINBERG BROTHERS.

Mr. Benjamin applied to make absolute a rule nisi, calling on the respondents to show cause why they should not be interdicted from collecting any of the debts due to applicant or from using his stock-in-trade. Dr. Greer appeared for respondents.

Affidavits on both sides having been read,

Hopley, J., inquired if it was not rather hard on the respondents if they had a case that their business should be stopped, especially if they could give security.

Mr. Benjamin said he was instructed that if the £300 was not returned, then they wished to press for their pledge.

[Hopley, J.: Suppose the £300 is contained in the stock-in-trade on the shelves?]

Mr. Benjamin: There is no proof that it is.

[Hopley, J.: Do you say that the £300 has not gone into the business?]

Mr. Benjamin: It has not.

Dr. Greer: I am instructed that it has.

Mr. Benjamin: And I am instructed that it has not.

[Hopley, J.: Then that makes the case all the harder. Why should you be keen on this pledge if he gives you ample security?]

Mr. Benjamin: We would be prepared to accept that.

Hopley, J. suggested that the parties agree to use only £100 worth of stock-in-trade, and give absolute security for that amount.

Dr. Greer: I am instructed that there are other creditors—

Mr. Benjamin: They are not before the Court.

[Hopley, J.: I have nothing to do with other creditors. If he cannot settle with them, then there must be an insolvency.]

Dr. Greer asked leave to discuss the matter with his clients.

[Hopley, J.: Yes; I do not want to see these people cutting each other's throats.]

Dr. Greer said his client accepted the suggestion of the Court.

Mr. Benjamin asked if the security could be given subject to the approval of the Registrar.

Hopley, J., inquired what was to be done with the outstanding debts.

Dr. Greer said his client would place all outstanding debts which formed part of the security over to a special account.

Mr. Benjamin: I think the money collected should be handed over to us. I have authority to ask for an order that they should be handed over.

Hopley, J., suggested that the accounts be handed over to some impartial accountant for collection.

Mr. Benjamin said he was instructed to agree to that, and suggested Mr. Foot.

Dr. Greer said he could not agree to that.

[Hopley, J.: You do not want me to make this rule absolute, do you, and spoil the business?]

Dr. Greer said he feared that the rights of other creditors would be imperilled. If the debts were collected by an impartial person and retained by him pending the decision of the case, they would agree.

[Hopley, J.: Yes, I see your point.]

Hopley, J.: In this case, it seems to me, as the matter is presented on the papers, that there is an agreement between the parties whereby the applicant advanced £300, and there seems to be very good documentary evidence that he did actually pay over the sum of £300 or its equivalent to the respondents, and that the respondents agreed to give him certain plant, stock-in-trade, and book debts in security, and to transfer and assign all their interest in such property to him to effect such security. Now, this is an arrangement which is not at the present moment being questioned by any third party or any creditor, who says that he would suffer thereby. The party who questions it is one of the partners of the firm, and the reason he questions it is because he was out of the country at the time it was made, and his partner, a younger brother, made the arrangement. Such a person cannot take up that point, because his partner has power to make a compromise in the business, and, if necessary, to pledge the assets. It is not denied that this was an advance to the business, but Reuben Weinberg says that on his return he repudiated the entire arrangement. But he could not repudiate it unless he was in a position to pay off to the person with whom the debt had been contracted the amount advanced, and to free the property pledged. Therefore, the thing must stand as an arrangement of advance against a pledge of moveables. There may be a question as to whether there was a valid delivery, but on the affidavits, as far as I can see,



a delivery which is good and maintainable in law was made. The goods with which the parties were carrying on business were taken to another place, which was specially hired for that purpose, and the key was held by the applicant himself, in token of the possession which he had acquired. The book debts were not ceded to him, as they ought to have been under the agreement. It is only right, as long as the agreement stands, that they should be handed over, if not to him, to somebody who will collect them for the applicant. It might, however, be inadvisable to hand them over to the applicant, because he might think he had sufficient security in the stock-in-trade, and might not take diligent care to forthwith collect these book debts, and so they might become bad, and be lost to all the parties in this case. Therefore, it is wise to say that an impartial business man shall collect them as quickly as possible, so that they may be saved to all these parties. It is perfectly clear on the documents, since nothing has been said of any fraud, that £300 is owing. It is, therefore, to the advantage of the respondents, as well as the applicants, that whatever can be collected should be paid off this £300. Upon Reuben Weinberg coming back from Europe, he tried to repudiate the whole thing, and treated the applicant as though he had no right to the things, or to exercise any rights upon the premises in which they had been placed, and where the respondents were carrying on the business under a sub-lease of the premises. The best order I can make so as to try and safeguard the rights of all parties, is that the rule be made absolute pending the result of any action which the respondent might bring. It is further ordered as to the outstanding debts that they be ceded forthwith, collection to be made by Mr. A. N. Foot, and to be applied by him to reduction for the advance of £300 by applicant, and it is further ordered that the stock may be used by the respondents in the course of their business upon their giving security to the satisfaction of the Registrar of this Court for any stock which may be taken by them for such use. Stock to be taken in lots of not less than £50 at a time. The costs will abide the result of the action, and failing any action brought by the respondents, the costs to be paid by the respondents. The action to be instituted within the next fortnight, and to be put down for hearing next term.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*In re* COLLISONS, LTD. { 1906.  
*Ex parte* COLLISON. { Nov. 28th.

Company—Winding up—Inability to pay debts—Unrealizable assets.

*In an application by certain debenture-holders of a company for its winding up, on the ground of its inability to pay its debts, it appeared that the assets were valued at £145,000 and its liabilities at £95,000, that the Standard Bank, with which it dealt, refused to grant it further banking facilities, and that in consequence the company found great difficulty in satisfying current liabilities; but the Court, not being satisfied that the company did not possess sufficient realizable assets for the payment of its debts or that sufficient efforts had been made to get the company out of its difficulties,*

*Held that under the circumstances, the application should be refused.*

This was an application brought on the petition of the chairman of directors of Henry C. Collison, Ltd., for a winding-up order under sections 135 and 136 of the Companies Act, 1892.

The affidavit of Harry Collison stated that he was the chairman of directors of Henry C. Collison, Ltd., carrying on business as wine and spirit merchants, in Cape Town and Johannesburg. The company had a registered office at 9, Castle-street, Cape Town, and was registered in the office of the Registrar of Deeds, Cape Town. The company was indebted to the Standard Bank, Ltd., at its Cape Town branch, in the sum of £11,049 16s. 10d., whereof £7,500 was covered by guarantee, since paid, but there was a clear balance unsecured of £3,549 16s. 10d. The amount so owing was the balance of an overdraft. The bank had refused further facilities, and had demanded payment of the sum of £11,049, on which

interest was accumulating, and although the sum of £7,500 had been paid, the company was quite unable to settle the balance. The company had counted on further facilities from the bank and a further overdraft to carry on business for the next five or six months, but the bank had refused further advances and had closed the account. The company was also indebted to the Standard Bank Johannesburg branch in the sum of £11,000 or thereabouts, and the bank had applied for judgment on this claim in the Transvaal courts, and would with all expedition proceed to execution. The directors, in meeting assembled, had passed a resolution in favour of the winding up of the company. At a special meeting of the shareholders, in meeting assembled, it was resolved "that owing to the attitude taken by the bank and the endeavours to satisfy them having failed, steps be taken forthwith for the compulsory winding-up of the company." The company was unable to pay its debts to the bank as demanded. All shares in the company were fully paid up. The assets in the company were valued at £113,902, and, in addition, the Johannesburg branch was indebted in the sum of £34,000 to the Cape Town branch, and the liabilities were £82,310, of which £40,000 was represented by debentures. The assets in Johannesburg were £31,000, and the liabilities £12,069, in addition to the indebtedness to the Cape Town office, viz., £40,000. There was no available cash to carry on the business, as the Standard Bank had stopped banking facilities both at Cape Town and Johannesburg. Petitioner prayed for an order in terms of sub-sections 4 and 3 of sections 135 and 136 of the Companies Act, 1892, for the winding-up of the company, or for other relief.

The affidavit of Frederick Fitzwilliams, assistant manager of the Cape Town branch of the Standard Bank, stated that the bank was a creditor of the company in the following sums: Overdraft, with interest, £3,662 19s. 1d.; bills under discount, £10,174 4s. 11d.; drafts on the London office at the Cape Town branch, £2,012 10s. The bank also held certain bills for a considerable amount from the said company, which were held as security for the account of another customer. The bank was also a creditor of the Johannesburg branch, and, according to advices received from their Johannesburg branch, the account stood as follows: Overdraft, £5,115; bills under discount, £11,408. A separate account was in credit to the extent of £132 6s. 2d. As security for the whole amount, certain scrip was held valued at £6,679. The business was of very old standing, and had been carried on for many years, until it was floated into a registered company with limited liability in the year 1899. Since then the company

had also carried on business successfully in Cape Town, but, as far as he could ascertain, it had become embarrassed through having advanced a considerable amount of capital for the purpose of carrying on the Transvaal business. Last year the Cape Town business resulted in a profit of £1,932 0s. 6d., though no portion of that was available, as there had been a loss of £7,744 10s. 11d. on the Transvaal business. From his knowledge of the business, deponent believed that it was in a sound condition, and that the embarrassment due to the loss in the Transvaal was temporary, and he submitted that a company which in the present state of depression in trade in Cape Town was able to show the profit above referred to must be considered to be in a strong position. The authorised capital of the company, according to the memorandum and articles of association, consisted of £85,000 divided into 17,000 shares of £5 each. He was not, however, able to say what proportion of these shares had been issued. The company owed about £12,000 on mortgage. In addition to this, it had issued debentures to the amount of £40,000, of which £25,000 was held by the widow of the late H. C. Collison, and £15,000 was held by one Harry Collison (chairman of the Board). Communications had passed between the said Harry Collison as representing the company, and the bank, the object being to endeavour to see whether security could be found to enable the bank to continue banking facilities. The bank held as security the guarantee of Harry Collison and one Reginald F. Vaile (vice-chairman of the company, and its representative in Johannesburg). The bank was not prepared to continue banking facilities above the amount of the guarantee of the said Harry Collison without further proof as to the financial position of the said Vaile. Deponent believed that the company was solvent, and that the object of the said Harry Collison and the other directors in proposing to go into liquidation was to secure the debenture-holders in respect of their debentures for £40,000. A sale of the assets in the present state of the market would result in a considerable loss. It would be injurious in the interests of the creditors, except the debenture-holders and mortgagees, to liquidate the company and dispose of the property of the company. Mr. Fitzwilliams, in a further affidavit, said that had any satisfactory arrangement been made or offered, the bank would certainly have allowed the overdraft to continue. As to the proceedings in Johannesburg, deponent said that the bank in Cape Town had received advices from Johannesburg stating that no proceedings had been taken there, except against the said Vaile as surety. An affidavit by Alfred John Barry, of Barry Bros., said that

his firm was a creditor of the company for £4,812 4s. for wines and spirits sold. He was satisfied, from information that he had received, that the company was solvent, and that, in spite of certain losses which it had incurred in its Transvaal business, it was quite able to continue its business, and to pay its creditors in full. The position of the mortgagees and debenture-holders would not be prejudiced by the continuation of the business. The landed property of the company had recently been valued at £33,000. It would, deponent added, be a gross breach of faith if the company were now to be liquidated merely for the purpose of securing the holders of debentures. He believed that that was the real object of the present application.

Mr. Searle read a replying affidavit by Harry Collison, who said that several bills had already been dishonoured for a considerable amount. The company had no available sums to meet its bills. A large sum would be due at the end of the month for salaries. There would be no money to pay these salaries. The immovable property was already heavily hypothecated. No business arrangement could be made.

Mr. Searle, K.C., for applicants: Mr. Gardiner for Standard Bank and Barry Bros. (respondents).

Mr. Searle contended that the only point in the case was whether the company was in such a financial position as to be able to pay its debts. It seemed clear to those who had an intimate knowledge of its affairs that it could not pay its debts. The bank had still an overdraft of £3,000 odd against the company. The only possible way to protect the debenture-holders, creditors, and shareholders appeared to be that liquidators should be appointed. There need not be any realisation of the assets by a sale at present. It was necessary—in order that the rights of parties might be properly determined—that there should be a liquidation, otherwise the bank would take out a writ when it had obtained judgment, and would execute on the assets of the company. The bank did not deny that it had closed its account with the company. The company could not get any money anywhere, there were large debts due, bills had been dishonoured, and surely the company was insolvent, because his lordship had laid down on more than one occasion that the best proof of insolvency was where the party concerned could not pay his debts.

[De Villiers, C.J.: I suppose if the bank would be willing to continue facilities you would not insist upon this order?]

We have tried to obtain facilities, but have not succeeded. Mr. Collison is not anxious to have this business liquidated, but he has tried to

get facilities, and the bank has closed him down. We are in the position of a starving man who asks for food, and is told that he has a good digestion and a good constitution, but is not given anything to eat.

Mr. Gardiner said that the petition was not properly before the Court. It was not a petition by the company itself under section 137, and the application did not fall under section 135.

[De Villiers, C.J.: But petitioner is a large creditor.]

Mr. Gardiner: Yes, but he is a debenture holder, and he can only come to the Court if his debentures are due and unpaid. Proceeding, he cited Buckley (8 ed., pp. 262, 264); Tennant's footnote to section 135 and the *Melbourne Brewery case* (1901, 1 C.D., 453). If the company's assets were insufficient a paid up shareholder had no interest whatever. He referred to *Rica Gold-washing Company* (11 C.D., 36).

The resolution of November 26, continued Mr. Gardiner, was not a special resolution under section 110.

[De Villiers, C.J.: But this technical objection is only postponing the evil day.]

Mr. Gardiner: One doesn't know that. Continuing, he referred to section 36 of the Companies Act. According to Mr. Collison's statement, there was an excess of £50,000 of assets over liabilities. Surely the company could give part of its assets as security. It could pledge stock. Under section 144 of our Act which corresponded to section 91 of the English Act, the Court might have regard to the wishes of the creditors and contributories. He referred to the case *In re Uruguay Central Railway* (11 C.D., 372).

Mr. Searle, in reply, referred to Buckley (p. 217), and said that if the company had not assets available to meet current liabilities it had to be wound up.

The assets in Cape Town were estimated at £113, 902, and in Johannesburg £31,000, while the liabilities were £94, 369. This showed a nominal balance of £50,000.

[De Villiers, C.J.: How can I say then that this company is insolvent?]

It has got nothing to pay its debts. As Buckley says, a company may be wealthy, but still it may be insolvent.

[De Villiers, C.J.: I cannot accept that, even if Mr. Buckley says it, because it is simply ridiculous. It seems to me to be a ridiculous statement to make. I cannot consider that a company which has a balance of £50,000 assets over liabilities is unable to pay its debts.]

Mr. Searle: That is what the assets have been valued at. Counsel pointed out that the company had no available assets with which to pay debts and salaries falling due. As to the technical objections raised by his learned friend,

he submitted that if sections 135 and 137 were read together, the company could petition the Court.

De Villiers, C.J.: I am not satisfied at this stage that with care and prudence this company cannot yet pull through and be able to pay its debts. According to the petition presented to the Court, the assets of the company amount to £144,902 and the liabilities to £94,369, leaving a balance of assets over liabilities of £50,533. No doubt a large proportion of this balance may be unrealisable, but I am not satisfied that a considerable portion cannot be realised. I do not think that the applicant has done everything that can be reasonably expected to enable this company to carry on its business. Reference has been made to a passage from Buckley in which he says: "If a company is commercially insolvent, if, that is, it cannot meet current demands, it is properly the subject of a winding-up order. It is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound; that is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable, but, although this be so, yet if it have no assets available to meet its current liabilities it is commercially insolvent." With the greater part of this passage I quite agree, but I should find it difficult to believe that a wealthy company would not have some assets which it could realize for the payment of its debts. Certainly, in the present case, there is not sufficient evidence that the company does not possess sufficient realizable assets for the payment of its debts. Sufficient efforts have not been made to pull it through, and, so far as I can judge, the present application is made chiefly with the object of giving further protection to the applicants, who, as debenture holders, are already well secured.

Certainly the concurrent creditors are not fully represented before the Court. It is true that Mr. Collison is also a creditor for £7,000, advanced, but other creditors for more are opposing this application. The Standard Bank and Barry together are creditors for more than the claim of Mr. Collison, and there may be other creditors who would object to this order being now made, so that at this stage, with the information now before the Court, I am not prepared to grant an order, and the application will be refused.

Mr. Gardiner applied for creditors' costs of opposition.

De Villiers, C.J., said that costs of opposition would be allowed.

## GENERAL MOTIONS.

*In re* THE MILK SUPPLY CO. § 1906.  
(Nov. 28th.

Mr. Roux moved, in the matter of the Pure Milk Supply Co. (East London), for confirmation of first report of the official liquidator (Mr. Watson). Counsel stated that the report had lain for inspection, and that publication had been made, as ordered, in the "East London Dispatch," without any objections having been lodged.

De Villiers, C.J., said that he really did not see that there was anything in the report to confirm. There was simply a statement of the company's objects and financial position, but nothing was contained in the way of recommendations.

Mr. Roux said that he moved as a matter of practice. The application was purely formal.

[De Villiers, C.J.: Has the Court ever confirmed a report which proposes nothing? I will accept this report, but I cannot confirm it.]

Mr. Roux said that he would be prepared to take an order in those terms.

[De Villiers, C.J.: You may put in the report, but it is not an order. I do not see the object of making an application for confirmation of such a report as this.]

Mr. Roux said that he applied in accordance with what he understood was a well-recognised practice of the Court.

De Villiers, C.J., said that he would make an entry that the report had been put in, costs of this application to be costs in liquidation.

## *Ex parte* LOUGHER.

Mr. Alexander moved for leave to petitioner to withdraw from his appointment as joint liquidator of the Assets Realisation Association, Ltd. Petitioner said that practically the whole of the assets of the association had been realised, and there now only remained the investigation of the affairs of the company, for which purpose petitioner thought one liquidator would be sufficient. He asked for permission to withdraw, leaving Mr. Wyndham Bishop sole liquidator. Mr. Bishop supported the application.

Order granted as prayed.

## *Ex parte* VAN HEERDEN.

Dr. Rainsford moved, on behalf of petitioner, who resides at Victoria West, for an order authorising the registration of a certain ante-nuptial contract entered into by petitioner and his wife, before a certain notary. The notary, in his affidavit, stated that through the stress of work in his office at the time



he had inadvertently omitted to send up the contract to his attorneys in Cape Town for registration.

[De Villiers, C.J.: It is great negligence on the part of the notary.]

Dr. Rainsford said that, of course, the parties were not to blame in any way.

De Villiers, C.J.: I was thinking how we might make the notary feel he has been negligent. I cannot imagine such a tremendous stress of work at Victoria West that the notary should not have time to post a letter. An order will be granted as prayed. Although I cannot make an order against the notary to pay costs, seeing that he is not before the Court, I would suggest that he should pay costs.

#### SALIE V. SALIE.

Mr. Lewis moved, on the application of Nomenati Salie, to make absolute certain rule nisi, calling upon her son (Amanie Salie) to show cause why certain moneys standing in the Standard Bank, Cape Town, in his name, and the property of the applicant, should not be paid over to her duly-authorized agent, and why he (respondent) should not pay costs of this application. Counsel said that respondent had been served personally at Port Elizabeth, and that he had failed to appear to show cause.

Rule absolute, with costs.

## SUPREME COURT

### FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

CARTER V. WIERSMA. { 1906.  
Nov. 29th.

This was an application brought by George Samuel Carter, upon notice to respondent to show cause why an order should not be granted compelling him forthwith to remove certain facing boards, guttering, and portion of the gable of certain premises erected by him upon his property, lot No. 22, adjoining the property of the applicant,

lot No. 21, situate off Forrest-road, Rondebosch.

The applicant alleged that respondent was the owner of an adjoining property, and that the portion of his premises overlapped his (applicant's) property. The respondent, who was a builder and contractor, had sold to applicant the ground now owned by him, and had erected a house for him. The respondent set up an agreement. He alleged that before he built his house he was given leave for the overlap by the applicant.

Mr. Close was for applicant; Mr. De Villiers was for respondent.

Affidavits having been read,

Mr. Close said it was undisputed that there was an encroachment, and it seemed clear that part of the trouble had been removed because the flow of water from the guttering on to applicant's property had now been stopped, and thus the application had to that extent been justified. Then, in regard to the overlap, it was alleged that an agreement had been arrived at between the parties. As to that, two important facts had to be remembered—no servitude had been registered against the applicant's property, and at the time when the alleged agreement was arrived at a survey had not been made.

[De Villiers, C.J.: It is a great pity that in a paltry matter of this kind there should be all this litigation, but I am afraid it is impossible to decide it now. There is a great conflict of evidence upon an important question of fact as to whether this consent was given. I am afraid applicant will have to go to trial.]

Mr. De Villiers applied for costs, and urged that, considering that a servitude was involved in this case, the applicant had been entirely mistaken in his remedy, and should be ordered to pay costs of these proceedings.

De Villiers, C.J.: I do hope that the parties will settle the matter amicably. It is not worth litigating about this paltry matter, but there is an important question of fact involved which I cannot, upon affidavit, decide. The respondent alleges that there was a distinct agreement that, before he began building, that house, he should be allowed to put up this guttering, which would overlap the applicant's buildings, and he has supported his statement by a witness. The applicant, on the other hand, positively denies that any such agreement ever was made. Under these circumstances, I think the applicant should proceed by action, and the costs of this application will be costs in the case.



WEIGHT AND ANOTHER V. ( 1906.  
KELLY, N.O. AND OTHERS. ( Nov. 29th.

Society—Change of constitution  
— *Ultra vires.*

*The Grand Council of a Society, whose Constitution had been obtained from a Society in England "under the banner of Surrey," having had a disagreement with the Mother Society, resolved to constitute itself a Society "under the banner of South Africa," although nominally respecting the authority of the Mother Society. The Grand Council had no power under its Constitution to pass such a resolution. A delegate from a branch at S. had attended the meeting, but there was no evidence that he had any authority from the branch to agree to the resolution. Subsequently a meeting of 6 members out of 30 constituting the branch passed a resolution at S., without previous notice to all the members at S., in favour of the change of banner, but at the next meeting, which was attended by a larger number of members, this resolution was not confirmed. Thereupon, by direction of the Grand Council, the branch at S. was declared defunct and its regalia and other property were taken possession of.*

*Held, that the property thus taken must be restored to the S. branch.*

This was an application upon notice calling upon the first and second respondents to show cause why they should not be ordered to restore to the custody of the first applicant certain property of which they were alleged to have illegally dispossessed him, and pay costs of this application, or, should the first respondent oppose the application, why they should not all be ordered to pay costs.

The property in question consisted of one set of regalia (thirteen pieces), four rituals, one minute-book, one registrar's books, etc.

A considerable body of affidavits was read, and the position of the parties may be briefly summarised as follows:

The Somerset West Lodge had, with other lodges in this country, been affiliated to the Sub-Council in South Africa of the Grand Surrey Banner of the Royal Antediluvian Order of Buffaloes, and a movement had been promoted with a view to the formation of a new banner, to be called the South African banner. At a meeting held at Woodstock on the 10th July last the following resolution was adopted: "Proposed by J. W. Kelly, K.O.M., A.D.G.P., seconded by W. F. Buchanan, that we, the delegates in Council meeting assembled, of the Grand Surrey Sub-Council of South Africa, whilst affirming the principle that the Grand Surrey Council in England in their dispute with the Grand Surrey Lodge, the said Council were then, and are now, the supreme governing authority of the Order: (a) Resolved that, in consequence of the internecine warfare between the said Council and the said G.S. Lodge, as exemplified by the conduct of the representatives of the G.S. Lodge, Johannesburg, due in a large measure to the laxity of the said Council in not withdrawing the charter of the G.S. Lodge when the said lodge became contumacious, and refused to recognise the validity of the decision arrived at by the said Council; (b) that in consequence of the unwarrantable interference of the Council and lodge (in their corporate and individual capacities) that this said Council in issuing to the Transvaal, without reference to this Council, in 1894, dispensations and properties thereto, and granting dispensations to Port Elizabeth, East London, and Bulawayo, when they had only three, one and two lodges respectively, a proceeding entirely at variance with their decision arrived at in Council assembled in 1890, wherein they laid down the principle that four lodges is the minimum; (c) the said Grand Council having since unduly interfered in lowering the status of this Council, especially in granting a Provincial Grand Lodge charter to Kimberley, with only three lodges, a proceeding in direct contravention of the before-mentioned decision of the Council; (d) having regard to the unreasonable delay in answering correspondence, supplying properties, and to their great lack of knowledge of the requirements of the Order in this country, and in view of the fact that it would be to the best interests of the Lodges in South Africa for properties to be procured and supplied by this Council direct, thus saving time and expense, we forthwith form ourselves into a South African Banner of the R.A.O.B., and we hereby constitute ourselves the Grand Council of such new banner." This resolution was put before the Somerset West Lodge at a meeting on the 14th July, when it was resolved: "Knight Kelly reading the resolution

and giving us to fully understand the object of the said resolution, and also showing us how beneficial it would be to the lodge, it was moved by Primo James Lonsdale, and seconded by Primo Lacey, that we adopt the resolution, which was then put to the vote and carried." At a further meeting, however, the Somerset West Lodge declined to confirm the foregoing decision, and the Grand Council afterwards met and adopted the following resolution: "Sir Edward Collins proposed, and Sir James Savage seconded, that the charter of the Somerset West Lodge, No. 165, be taken away from them, that the Lodge be now declared defunct, that two members of the Grand Council be sent down to receive and take away all properties belonging to the said lodge, that the bank be notified that all moneys invested in their names are now ours, and that we require same to be handed over to us forthwith. Carried, *nem. con.*"

"Primo Evans proposed and Sir James Savage seconded that the Right Hon. Sir Wm. Buchanan, P.G.P., and Sir Edward Collins, P.G.P., be the two members of this Council to go to Somerset West and secure the properties. Carried, *nem. con.*" In accordance with this resolution, Messrs. Buchanan and Collins went to the lodge rooms of the Somerset West Lodge on the 8th September last, and during the absence of Mr. Weight, to whom the regalia, etc., had been entrusted, as the Grand Host of the lodge, removed the property in question, his bookkeeper allowing the property to be taken on the production of the authority under which the emissaries of the Grand Council of the South African Banner were acting.

Mr. McGregor was for the applicants, James Weight, hotel proprietor, of Somerset West, and Arthur Stanley Wood, in his capacity of president of the Somerset West Lodge, No. 165, of the Royal Antediluvian Order of Buffaloes (Grand Surrey Banner). Mr. Upington was for James Wm. Kelly, as president of the Grand Council of the Royal Antediluvian Order of Buffaloes (South African Banner), and as such representing the Grand Council, and Edward Collins and Wm. F. Buchanan.

De Villiers, C.J., interposed, and asked Mr. Upington what was the effect of the resolution when the Grand Council cut themselves adrift from the Grand Surrey Banner?

Mr. Upington: Not entirely, but they are the governing body of the Order in South Africa at the present time, or those lodges, at any rate, which have given in their allegiance to it, such as the Somerset West Lodge.

[De Villiers, C.J.: Under what regulation was this Council constituted?]

Mr. Upington: They have not actually withdrawn from the Grand Surrey Banner; they have only taken wider powers than they possessed before. They

still hold their charter from the mother body of the world, the Grand Surrey Banner. I have the charter here (produced).

[De Villiers, C.J.: Under what regulation did they pass that resolution?]

Mr. Upington: The resolution providing for their having wider powers?

[De Villiers, C.J.: Well, it is rather more than that. I want to follow the affidavits as they go along.]

Mr. Upington: I do not know that there is any actual rule relating to that matter, but I think it was done in pursuance—

[De Villiers, C.J. (interposing): This taking away the charter. It is proposed and seconded "that the charter be taken away from the Somerset West Lodge, and that the Lodge be now declared defunct."]

Mr. Upington: That was because they were considered as being in contempt under the provisions of this rule.

[De Villiers, C.J.: In what way?]

Mr. Upington: Well, for one thing, they removed their lodge from one place to another without the permission of the Grand Council, and in the second place they have taken up the position—and that really is the bone of contention between the parties—that, after passing this resolution in favour of the Banner of South Africa, they subsequently purported to rescind it.

[De Villiers, C.J.: What I want is a rule authorising these delegates in Council assembled to pass this resolution.]

Mr. Upington said he was not aware that there was an actual rule upon the point. The only thing is a letter annexed to the affidavit by Mr. Buchanan from the Grand Secretary of the Grand Council under the Grand Surrey Banner of the mother banner of the world, defining the position of the Council in South Africa.

The reading of the affidavits was then proceeded with.

Mr. Upington, in argument, called his lordship's attention to the resolution passed at the Conference at Woodstock on the 10th July last, and the resolution subsequently passed on the 14th July by the lodge at Somerset West, when it was agreed to adopt the resolution passed by the Woodstock meeting. So that all that the present applicants made now of their dispute with the Grand Council being due to some subsequent action on the part of the Grand Council really had no basis or fact at all. If they, knowing the full terms of that resolution, adopted it, then surely they could not take advantage of that fact now, and say that the Grand Council had formed a new banner, and that they withdrew their allegiance from the Grand Council.

[De Villiers, C.J.: How could that bind the lodge at Somerset West?]

Mr. Upington said it bound the lodge in this way: The Grand Council had a delegate from Somerset West there present when the long resolution was passed on the 10th July. He contended, firstly, that their delegate was there, and, secondly, the lodge on the 14th July adopted the resolution passed by the Woodstock meeting on the 10th July.

De Villiers, C.J., said that the meeting at Somerset West was not duly convened.

Mr. Upington: They say now that it was not duly convened.

[De Villiers, C.J.: How many members were present?]

Mr. Upington: We cannot speak as to that.

[De Villiers, C.J.: Apparently there were six present.]

Mr. Upington said that his clients had had no opportunity of answering that allegation.

[De Villiers, C.J.: What I am anxious to see is your authority for passing this resolution, firstly, the resolution of the 10th July, and then the subsequent resolution by which you claim the right to all the property subscribed for by the people in Somerset West.]

Mr. Upington said that, in the first place, his contention was that the people in the Somerset West Lodge, having adopted the resolution passed on the 10th July at Woodstock, and accepted the Grand Council as the governing body in South Africa, could not now be heard to say that they desired to withdraw. The Somerset West Lodge resolved to approve the formation of the South African Banner of the R.A.O.B., and recognise the new council as the governing body of the Order in South Africa.

[De Villiers, C.J.: The sitting Primo, Wood, says that that was a wholly illegal meeting.]

Mr. Upington submitted that there was nothing to show that six members who were present at the meeting did not form a quorum. The Court would presume that things were done decently and in order, unless there were something to show that Mr. Wood, who was responsible for the regulation of the proceedings, showed that they were not in order. Mr. Upington went on to submit that in any case it was quite clear, South African Banner or no South African Banner, that the Grand Council still acted under the Grand Surrey Banner. It had not absolutely cut adrift and become a perfectly independent banner. If the resolution of the Somerset West Lodge were irregular and illegal, of course there was an end to the matter, but it was curious that this point was not brought out at such a stage as to enable respondents to answer it. But, apart from that, the fact still remained that, as regarded South Africa, the Grand Council was still the governing

body, and the rules (112-3-4) provided that lodges guilty of certain offences may be declared defunct, and their property may be taken. So that, entirely apart from the legality or otherwise of the resolution of the Somerset West Lodge, the parties would revert to their original position, and their original position would be that the Somerset West Lodge would be a minor lodge under the constitution prior to July, 1906.

Without calling upon Mr. McGregor.

De Villiers, C.J.: It is impossible not to respect the patriotism of these respondents, who are anxious to give prominence to the South African Banner in preference to the mother banner of Surrey. Their patriotism, however, must give way to the law, which is on the side of the applicants. On the 10th July there seems to have been a meeting of delegates in council, and the following declaration was passed: that the delegates in council meeting assembled of the Grand Surrey Sub-Council of South Africa, affirming the principle that the Grand Surrey Council in England were then and are now the supreme governing authority of the Order." They admit that, and then they forthwith proceed to adopt a vote of censure upon the Home Council, and to declare that they now forthwith form themselves into a South African Banner, and to forthwith constitute themselves into a Grand Council. I asked for some authority or rule under which they had the power to constitute themselves into a South African Banner and the Grand Council of such Banner, and no answer was given. No answer has been given, nor can be given. The resolutions which were passed referred to several matters and referred to the Grand Council have unduly interfered in lowering the status of this Council, especially in granting a Provisional Grand Lodge Charter to Kimberley with only three lodges, a proceeding in direct contravention of the before-mentioned decision of the Council. "(D) Having regard to the unreasonable delay in answering correspondence, supplying properties, and to their great lack of knowledge of the requirements of the Order in this country, and in view of the fact that it would be to the best interests of the lodges in South Africa for properties to be procured and supplied by this Council direct, thus saving time and expense, we forthwith form ourselves into a South African Banner of the R.A.O.B., and we hereby constitute ourselves the Grand Council of such new Banner." They passed that resolution. I do not, therefore, consider that the letter which four years before had been received from the Grand Surrey Council's secretary had anything to do with the resolution. Well, then, it would appear that the Somerset West Council held a meeting there,

and that Council seems to have passed a resolution which is relied upon by the respondents, and that resolution was signed by Wood. Wood explains what took place. He says: "Kelly came to Somerset West and brought together six members of the lodge out of a total number on the books of 30, and at this meeting of six members held on the 14th July, 1906, at the Central Hotel, Somerset West, the resolution was passed. This meeting was not summoned in accordance with the rules of the Order, and no proper notice was given either by advertisement or by circular, as provided by rule 108." Now, even although that rule does not apply, certainly common justice would require that before the lodge at Somerset West could be called upon to serve under this self-constituted Grand Council of Woodstock, there should be full notice given to every member of the body at Somerset West, who are the subscribers to the funds. Well, then, they took an opportunity at the very next meeting, on the 21st July, to undo what had been done. Wood, sitting as Primo, makes the following statement: "It was proposed by . . . and seconded by . . . that the minutes, cash account, and roll-call be passed as correct, with the exception of minute No. 2, *re* changing our banner, as there were only six financial members present, and further that the financial members had not been warned by circular or advertisement, as should have been done, and therefore, object to that resolution being confirmed, and request the Grand Secretary to withdraw this lodge." Now, there was no delay; it was at the very next meeting. The lodge members confirmed the minutes of the previous meeting, but they refused to confirm that minute, which was relied upon by the respondents in regard to this new banner. Well, then, what is the next step taken by the Grand Council of the South African Banner? On the 6th September "Sir Edward Collins proposed, and Sir James Savage seconded, that the charter of the Somerset West Lodge, No. 165, be taken away from them, that the lodge be now declared defunct, that two members of the Grand Council be sent down to receive and take away all properties belonging to the said lodge, that the bank be notified that all moneys invested in their names are now ours, and that we require same to be handed over to us forthwith.—Carried *nem. con.*" Also: "Primo Evans proposed, and Sir James Savage seconded, that the Right Hon. Sir Wm. Buchanan, P.G.P., and Sir Edward Collins, P.G.P., be the two members of this Council to go to Somerset West and secure the properties.—Carried *nem. con.*" Well, it is a most extraordinary proceeding—this self-constituted Banner passing this resolution sending two men down there to take

away their property, which other people had subscribed and paid for. Such a proceeding cannot for one moment be sanctioned, even if everything had been properly done at the Woodstock Conference, but considering that that Woodstock Conference itself has not proved its right to constitute itself the Grand Council of a new banner, as they call it, I consider that there is no power whatever on the part of the respondents to send this deputation down to Somerset West to deprive the lodge thereof of that property. The property may not be of much value, but they treasure it, they treasure their regalia and all the property they have in their humble manner acquired, and the respondents must return the property forthwith. The application must, therefore, be granted, with costs.

Having heard counsel on the question of costs of previous proceedings, when the hearing had been postponed,

His Lordship said that he saw no reason for altering the decision he had already announced, that the application would be granted, with costs.

[Applicants' Attorneys: Walker and Jacobsohn. Respondents' Attorney: W. G. Coulton.]

## GENERAL MOTIONS.

*In re* MORGAN'S BREWERY CO., LTD. 1906. { Nov. 29th.

Mr. Gutsche moved for an order authorising the surviving liquidator of Morgan's Brewery Co. to complete liquidation by signing and paying out certain cheques connected with the company, which had been dissolved. The amount was about £818. The Standard Bank refused to pay out the money belonging to the company unless petitioner were authorised to draw and sign cheques alone, or a co-liquidator were appointed.

De Villiers, C.J.: I think, under the circumstances, the only course that should be adopted is to grant an order authorising the petitioner to complete the liquidation. An order will be granted accordingly.

## LAWRENCE AND CO. V. MISNUM.

Mr. Gutsche mentioned this matter, in which leave had been given to applicants to sue respondent in a provisional case. They had been unable to find respondent, and now applied for an order for substituted service. Respondent's last known address was Johannesburg.

De Villiers, C.J., granted the application, and ordered one publication to be made in the "Star" (Johannesburg), and the return day to be extended to the 12th January.



*Ex parte* ESTATE LOUW.

Mr. Close moved for leave to the executor testamentary to dispose of by public auction a certain farm, Hartbeestfontein, in the division of Calvinia. Mr. Close suggested that the property should be sold as recommended by the Master in his report, and that the proceeds should be paid into some trust company, to be dealt with at the death of the usufructuary, and in the meantime, that the interest be paid to the petitioner as usufructuary, as she was entitled to.

Order granted authorising the sale, and directing the proceeds to be paid into the South African Association for administration, and the interest to be paid to testatrix during her life, and the capital paid at her death into the joint estate.

LINDLEY V. ST. JOHN'S CHURCH,  
WYNBERG.

Mr. Burton moved for a certain rule *nisi* to be made absolute calling upon all concerned to show cause why, wherever the words "the parish of St. John's" appear in the deeds of Kenilworth Church, the words should not be substituted "St. John's Church, Wynberg," and why, after the words "conformably to local custom," the words "subject to the provisions of Act No. 9 of 1891" should not be inserted. Counsel said that there was now no appearance on the other side.

Rule absolute.

*Ex parte* SCHADE.

Mr. Van der Byl moved for an order authorising amendment of certain documents in the Debt Registry by the insertion of petitioner's full name.

Order granted as prayed.

SUPREME COURT  
FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIEBS, P.C., K.C.M.G., LL.D.).]

*Ex parte* BUSH AND OTHERS. { 1906.  
Nov. 30th.

Mr. Benjamin moved, as a matter of urgency, for the appointment of E.

W. McLachlan Thomas as *curator bonis* of the estate of David Levi, draper, Long-street, Cape Town, with power to carry on the business. Counsel said that the estate had been provisionally sequestrated. In ordinary circumstances the Master appointed a *curator bonis*, but in this case it was desired that the *curator* should have power to carry on the business as a going concern, and to take advantage of the opportunity of realising the goods to advantage during the coming Christmas season. He cited the case of *Hoffman v. Black* (14 C.T.R., 83).

[De Villiers, C.J.: But when could a trustee be appointed?]

Mr. Benjamin: A trustee cannot be appointed until the 21st December next.

[De Villiers, C.J.: Is there such a wonderful demand for drapery in the Christmas season? I have heard of Christmas delicacies being required, but I did not know that drapery was in great demand for Christmas.]

Mr. Benjamin: Apparently the goods could be realised in the way of Christmas presents, and so on with greater advantage at this time than if the premises were closed, and the realisation delayed until after the appointment of a trustee. That would practically postpone the matter until after Christmas.

De Villiers, C.J.: It is not usual for this Court to appoint a *curator*; the practice is for the Master to appoint, but the Court will authorise the Master to appoint a *curator bonis*, with power to carry on the insolvent's business until the appointment of a trustee, and that is only done because of the special circumstances here. It is alleged that the season's sales will be lost, and also that the alleged insolvent does not intend to oppose the sequestration. Under these special circumstances the order is made.

ASSIGNEES KAISER BROS. V. HOESCHEN AND OTHERS. { 1906.  
Nov. 30th.  
Dec. 4th.  
" 10th.

Lease—Remission of rent—Lessee's right to quit—Lessor's failure to repair—Leaks.

*In an action for rent, in which the defendant pleaded that the defective state of the leased premises justified his quitting possession during the subsistence of the lease and refusing to pay rent after vacating the premises:*

Held, that it lay on the defendant to prove that the defect was of so material a nature as to render the premises



*practically useless for the purposes for which he had, to the knowledge of the plaintiff, hired them.*

This was an action brought by Wentzel Tichy, G. W. Steytler, and E. R. Syfret, as assignees of the estate of Kaiser Bros., of Cape Town, against Paul Fistenheim, Richard Rubin, and Heinrich Hoeschen, trading as the Continental Caoutchouc Company, to recover £120 rent.

Plaintiffs, in their declaration, said that Kaiser Bros. assigned their estate in December, 1905, and the plaintiffs were appointed assignees. Defendants were sued individually, and as carrying on the business. On the 21st June, 1904, a written agreement was entered into with Kaiser Bros. by the defendants under which the latter leased certain premises in Rutger-street for a period of five years from the 1st January, 1904, at a rental of £60 per month. The rent was paid to the end of April, 1906, but defendant neglected and refused to pay the rent for May and June, 1906, the amount of which (£120) plaintiffs now claimed.

Defendant Hoeschen, in his plea, said he had no knowledge that the firm of Kaiser Bros. had assigned their estate. He admitted paragraph 2 of the declaration, with the qualification that he said the firm of the Continental Caoutchouc Co. dissolved partnership in or about June, 1905. He craved leave to refer to the agreement of lease at the trial, and said that the lease had been ceded as collateral security by the firm of Kaiser Bros. to the Master of the Supreme Court, and that by reason thereof the plaintiffs were not entitled to sue in this action. He admitted that he refused to pay the sum claimed, and said that in the month of April, 1906, and for several months prior thereto, payments were made under protest and without prejudice to the defendant's rights and claims under and in respect of the lease. The premises were at the time the lease was entered into, and during the months of May or June, 1906, and for several months prior thereto, utterly unfit for use and occupation, of which facts plaintiffs and the aforesaid firm had knowledge. On the 28th April, 1906, defendant vacated and gave up possession of the premises, and ceased to be liable for the rent.

Plaintiffs, in their replication, admitted that the lease had been ceded as security to the Master, but said that the cession was cancelled before the commencement of the present suit. They specially denied the allegations that the premises were unfit for use and occupation, and said that they had never been called upon to render the premises fit for use and occupation, and that when

requested from time to time Kaiser did effect such repairs as were reasonable and necessary.

Mr. Close (with him Mr. Roux) was for plaintiffs; Mr. Benjamin (with him Mr. Alexander) was for the defendant, Hoeschen.

Mr. Close said that Hoeschen was the only one of the defendants who had pleaded, the others being out of the jurisdiction of the Court.

Wentzel Tichy, acting secretary of the South African Association, said that he was one of the assignees in the estate of Kaiser Bros., in which one of the assets was the lease between them and the Continental Company. Witness had found that there had been a dispute between Kaiser Bros. and the company concerning a demand made by the company for damages and cancellation of lease, dating back from September, 1904. The dispute was referred to the arbitration of Mr. Lawton in May, 1905, but as far as witness and his co-assignees knew at the time they were appointed, nothing further had been done. Witness spoke to a letter which he had received in January last from Mr. Andrews, defendant's attorney, calling attention to the condition of the premises. He also spoke to the way in which the matter was hung up, because it was uncertain whether sequestration or assignment of Kaiser Bros.' estate would take place. Apart from the single letter he had referred to, no complaint had been received from Mr. Andrews that the premises were unfit for occupation until on the 28th April a letter was left at the office along with the keys of the premises. In this letter complaint was made that the premises were not watertight and were unfit for occupation. Witness had been perfectly willing, if the premises were in an unfit state to put them in order. It would be impossible to obtain a rental of £60 for the premises in Rutger-street in the present juncture. He thought it would be difficult to get a tenant at all for the premises now. He considered that £20 per month would be the utmost they would be able to get for the store to-day.

Cross-examined by Mr. Alexander: Witness did not have a full opportunity of inspecting the pleadings in the action commenced by the Continental Co., and he was unaware in what respect the premises were alleged to be unfit for occupation.

Mr. Alexander (in answer to the Court) said that soon after it had been decided to refer to arbitration the dispute between the lessors and the Continental Co., the former got into difficulties, and it was considered that it would be futile to go on with the proceedings.

Cross-examination continued: Witness had on one occasion been to see the property since the dispute commenced.

The estate itself was in an embarrassed condition, and it was unlikely that the second bondholders would receive anything. The assignees had one or two inquiries for the premises in May last. The rental asked for was £40 a month. They had not succeeded in finding a tenant.

By the Court: Witness went to the premises shortly after he had commenced his administration, but he found nothing wrong with the premises. He did not enter into the details of the pleadings of the case of the company against Kaiser Bros., and he did not know at that time what the nature of the dispute was.

G. W. Reynolds, Master of the Supreme Court, said that the lease was ceded to him during 1904. The cession was cancelled recently to enable the assignees to sue.

By the Court: Witness had never been to look at the premises.

Daniel F. Bosman, of Zietsman and Bosman, attorneys, spoke to having seen the premises in July, 1904, when he was unable to find any leakage. Witness also gave evidence to the effect that Kaiser Bros. had always had difficulty in obtaining payment of the rent from defendants, and that on one occasion Hoeschen had said that a German firm, who had been supporting the company, had ceased to support them, and that the only obstacle to the liquidation was the existence of this lease. Hoeschen also made a proposal to take over the lease at a reduced rental of £50 a month. Witness said that he again saw the premises in October, 1904, during a rainy period, but again failed to find any leakage, except on one of the floors, which was afterwards attended to. The place was used for motor garage, bicycles, etc., and there was a considerable amount of oil about the floors.

David Thomas Godfrey, plumber, Cape Town, spoke to having carried out repairs to the premises in 1904, at the instance of Mr. Kaiser, but said that he had been unable to find any leakages. Mr. Kaiser had always been anxious to keep the premises in repair.

By the Court: Witness made an examination of the roof last week, and found that it was, apparently, in a perfect condition. It was, of course, impossible to gauge the condition of a roof in dry weather. He had not seen the premises lately during wet weather.

De Villiers, C.J., pointed out that the important question in the case was what was the condition of the premises at the present time. He was somewhat surprised that counsel for the plaintiff had not left it to the other side to lead the evidence as to the condition of the premises, seeing that a lease was sued upon.

T. W. Cairncross, engineer, said that he had inspected the premises at different periods in 1905 and 1906. He found

on one occasion that during rainy weather the windows had been left open, and there was water on the floor. He closed the windows and went to the place again afterwards, and was unable to find any trace of a leakage. There was a certain amount of dampness in one part of the premises, but he did not consider that that affected the utility of the room, and it was such a defect as could easily be rectified.

Cross-examined by Mr. Alexander: Witness considered that the sky-sign was a proof of the excellence of the roof. He considered that the building was a good one of a class that was common in Cape Town.

At this stage Mr. Close closed his case, subject to the right to call rebutting evidence.

Mr. Benjamin objected, and submitted that his learned friend must elect to lead further evidence, or finally close his case at this stage.

[De Villiers, C.J.: I think there is no objection to this course—that, even after it has taken some evidence for the plaintiff, the Court should, for its own convenience, ask defendant to go on with his case, and reserve the right to the plaintiff to call rebutting evidence.]

Mr. Benjamin proceeded to call his witnesses.

Heinrich Hoeschen (one of the defendants) said he was formerly in partnership with the other defendants named on the record. The partnership was dissolved in June, 1905. The partnership had been registered in Berlin, and the dissolution had also been registered in Berlin.

Mr. Benjamin said he wished to make it clear that he was not instructed by the other defendants.

Witness (continuing his evidence) said he first noticed a serious leakage in the premises in June, 1904. The state of things became worse as time went on. The rent was only paid under protest. There was a bad leakage when he gave up possession in April last. When the place was leaking they had to put buckets and cans on the floors and move their goods about, as far as possible, to prevent damage. The principal part of the leakage was on the first floor. Occasionally the place was leaking in 20 or 30 spots at one time. The assignees showed no inclination to put the building into repair, and, in fact, appeared to be just as bad as Kaiser Bros. had been. Witness and his partners used to carry from £5,000 to £10,000 worth of stock in the premises. Considerable damage was done to the goods by the rain, the plated parts of bicycles, etc., suffering from rust.

Cross-examined by Mr. Close: There were large doors on the ground floor and the first floor. There were large openings, but they were not in the

habit of leaving the doors and windows open to the weather. During bad weather the roof leaked in different places, and they never knew where the rain would come through next.

By the Court: Witness was now occupying premises in Burg-street, for which he paid £35 a month. The premises were about as large as the Rutger-street premises, but not so suitable. Kaiser Bros. knew at the time they entered into the lease that they were going to store bicycles, motor-cars, etc., there.

F. B. Andrews, attorney, spoke to having given notice to the assignees, soon after they had been appointed, of the action that was pending against Kaiser Bros. and an interview that he subsequently had with Mr. Tichy.

Cecil H. J. Brook gave evidence as to leakages on the first floor of the premises, while he was employed by Hoeschen in 1904 and 1905, necessitating the use of buckets and cans, and the constant removal of the goods. A crack also appeared in one of the walls.

Ludwig Bachman also gave evidence as to leakages during the three years he was in Hoeschen's employ. One of the employees slept on the premises, and on one occasion the leakage was so bad that he had to put an umbrella over his bed to keep the rain off.

Mr. Cherry, architect, said he considered that the construction of the roof was exceedingly faulty. He found numerous evidences that the building was leaky and that it was unfit for occupation at the present time. He regarded it as a very third-class building. He did not approve of the construction of the sky-sign.

Mr. Middleton, cross-examined by Mr. Close, stated that the main roof was in a very serious condition. The roof would leak in a heavy rain without wind. When he visited the place in February, 1905, there had been previously a heavy rain, and he found several leakages in the main roof. Between each pair of columns there had been a sagging.

Re-examined by Mr. Benjamin: The building was never constructed on the principle of a warehouse. A heavy rain, combined with wind, would cause the water to get through either roof.

James Petersen, builder and contractor, of Cape Town, stated he was called in in February, 1905, to report on the building. He had examined the building again in November last, and found it in a worse condition. The front roof of the main building was in a very bad condition at present. As a rough guess it would cost about £600 to make the building habitable.

Cross-examined by Mr. Close: It was not raining when witness visited the place, but it had been raining, and he saw signs of the leakage.

Hubert Willis Cox, who examined the building in November last, gave corro-

borative evidence as to the faulty nature of the building. As a warehouse it was not at present fit for occupation, and it would cost about £500 to make it right.

Charles Henry Edwards, building surveyor to the Cape Town Corporation, stated that a completion certificate had not been issued in respect of these buildings. In March, 1905, he found a horizontal crack in one of the walls.

John Lyon, architect, of Cape Town, who drew the original plans of the building, but who had nothing to do with the superintendence of the building, stated that a building of this kind should have been supervised by an architect.

By De Villiers, C.J.: He could not say whether his plans were carried out or not.

Cross-examined by Mr. Close: Unless the Town Council approved of deviations the building would have to be carried out according to the plans.

George Rowe Rowe, who inspected the building on Saturday last, stated that he found water leaking through in five places. There was no wind, and a misty rain.

Mr. Benjamin closed his case.

Daniel K. MacIntosh, architect, of Cape Town, stated that in March and April, 1905, and May, 1906, he made inspections of the building. On his last visit the weather was stormy with a heavy wind, which he considered a good test for a building of that class. He found one leakage at the end of the back roof. Witness corroborated what Mr. Cairncross had stated. From the evidence given by Messrs. Cherry, Middleton, and Petersen, witness would expect to find the place flooded in a driving rain. The leak he found could be easily remedied. The place, in his opinion, was fit for a warehouse.

Cross-examined by Mr. Benjamin: The timbering of the roof was rather slight and the rain might come in in a heavy fall. Theoretically the roof was a bit off. He was not very well satisfied with the top roof.

Robert Esten, civil engineer, of Cape Town, who made inspections of the buildings on four occasions, including one on Saturday last, stated he found only one leak, the one which the last witness had spoken of. From the evidence given by the other side he expected to find more leaks. The roof was perfectly straight. The leak, he said, was not a serious one.

Cross-examined by Mr. Benjamin: The wind was not strong before Saturday night.

Charles Stuart, secretary of the Meteorological Department, gave evidence as to the rainfall at Woodstock in February, 1905, and also the rainfall on Saturday last.

This concluded the evidence.

Mr. Close proceeded to address the Court on the facts of the case, when the Chief Justice said that as to the

facts the burden was on the defendant. On the law, Mr. Close said that the tenant was only entitled to give up possession when there was a grave inconvenience. It was a question of degree. He cited Voet (19, 2, 23) and Grotius (3, 19, 12), who relied on the Digest (19, 2, 19, 6). The difficulty had to be of a serious nature. A leak, unless very serious, would not excuse a lessee from paying rent.

Mr. Benjamin said that the question was whether the premises were in a fit and proper state.

De Villiers, C.J.: Do you say the premises were in a worse condition in April, 1906, than during the two previous years, during which they were good enough to occupy?

Mr. Benjamin said that all through these two years defendant called on plaintiff to repair, and the premises were gradually getting worse. He cited Pothier (vol. 7, p. 236 and p. 256) and Digest (19, 2, 25, 2). Mr. Benjamin further cited the cases of *Bensley v. Clear* (B. 1878, p. 89) and *Alexander v. Armstrong* (B. 1879, p. 233).

After further argument, and after hearing Mr. Close in reply,

*Cur. Adv. Vult.*

*Postea* (December 10th).

De Villiers, C.J.: This is a case of far-reaching importance, and although I had no doubt, after the argument, as to what the judgment should be, I considered it well to give the case some further consideration. The plaintiffs are the assignees of the estate of Kaiser Brothers, with whom the defendants had in 1904 entered into a written agreement of lease. The lease was for a term of five years from 1st January, 1904, the rent was £60 per month, the lessees agreed "to occupy the hired premises with motor-cars, bicycles, and other merchandise," and the lessors agreed "to keep the outside of the premises in good and proper repair." About five months after the defendants had taken occupation they found that with rain, accompanied by wind, portions of the premises were in a leaky condition. The leaks chiefly came from the roofs, and complaints were from time to time made to Kaiser Brothers, who employed a competent plumber to attend to the matter, but the leakages were never completely stopped. An action was brought by the defendants against Kaiser Brothers for damages alleged to have been done to their goods and for a cancellation of the lease in case the leakages were not put an end to, but the action was never brought to a hearing. Ultimately arbitration was agreed upon, but when Kaiser Brothers assigned their estate further proceedings in the arbitration were stayed. For some time the defendants paid the monthly rent under protest to the assignees, but in April of

this year the defendants decided to vacate the premises, and gave notice to that effect to the plaintiffs. At the end of April there had been no renewal of leakage, but in anticipation of such renewal the defendants quitted the premises after paying the rent up to that date. The object of the present action is to recover rent for the two following months, and the defence is that owing to the defective condition of the premises the defendants are not liable for the rent claimed. The defendants have not claimed damages in reconvention, but by quitting the premises and refusing to pay rent during the subsistence of the lease they have raised the simple issue whether circumstances existed which justified them as lessees in so quitting the premises and being relieved from the payment of rent. It is unfortunate that there are no decided, or, at all events, reported cases either in the Dutch or South African Courts to assist this Court in the decision of the question as to what degree of inconvenience would justify a tenant in quitting the premises leased. The text-books contain general statements of the law as understood by the writers, who, in most cases, refer to passages in the Digest as their authorities, but a few decided cases would have been of greater assistance than the vague generalities found in the books. Grotius (introduction 3, 19, 12) says: "The lessee is entitled to the use of the property or compensation for his interest in the same. Consequently he may compel the lessor to keep the property in a good state of repair, so as to be fit for use, and this the lessor must do at his own expense, and if he be in default, the lessee may advance the money for the repairs and place it to the account of the rent, or may even give up possession of the property." In support of this last statement the learned author refers to a well-known passage of the Digest (19, 2, 25, 2), which reads as follows: "If the light of a dining-room is shut out by reason of a neighbour's building on adjoining property, the lessor of an urban tenement is liable to his tenant; certainly there is no doubt that the tenant of either a rural or an urban tenement may put an end to the lease . . . We should hold the same if the lessor does not replace doors or windows which are too much decayed." Voet (19, 2, 23) says that if the lessee had just cause for quitting the premises, he is not bound to pay rent beyond the use which he has had of them. A just cause, according to him, exists "if the convenient use of the thing has not been furnished to such a degree that the tenant ought not to (I presume he meant 'could not') remain without great inconvenience to himself," and he illustrates his meaning by the case of a neighbour shutting out the light of a dining-room completely, not slightly



(*in totum non modice*), and the case of a failure to make repairs necessarily required for the use of the premises let. He cites several passages from the Digest, including the one already mentioned. In another passage cited by him (Digest 19, 2, 15), it is said that the lessee has an action *ex conducto* against the lessor if he is not allowed to have the enjoyment of the thing let, and as an example is given a case in which *villa non reficitur*. On the strength of this passage the defendants' counsel has contended that the mere failure to repair a country house which needs repair was a sufficient ground under the Roman Law, at all events, for the tenants quitting possession, but it is obvious from the context that the failure to repair would only be a good ground in case, without such repair, there could be no use and enjoyment of the house. Van Leeuwen discusses the matter very briefly in his *Censura Forensis* (1, 4, 22, 17), and says that the lessee of an urban tenement has a just cause for leaving if the house threatens to tumble down. In the case of *Albony v. Ittemeyer* (3 Moo., P.C.C. 452), the question was raised before the Judicial Committee whether the hirer of slaves is entitled to a remission of the rent when, without any default on his part, he ceased to be able to retain the entire enjoyment or use of the subject let to him. Three of the leased slaves had been manumitted by the act of the lessor himself, and the remaining slaves had been converted into apprenticed labourers, and their hours of labour reduced under the Act for the Abolition of Slavery. The Judicial Committee held that the lessee was entitled to a remission of the rent in respect of the three manumitted slaves, but not in respect of the remaining slaves. I gather from the brief judgment of the Board delivered by Parke, B., that the remission of rent in respect of the three manumitted slaves was based upon the Roman-Dutch Law authorities which had been cited before the Board, but as to the other slaves, it was held that the lessee ought to have put in his claim before the Commissioners of Compensation, and that he was consequently not entitled to claim abatement of rent from the lessor. The case, therefore, is an authority for the view that a lessee is entitled to remission of rent in case of his ceasing to have any use of the thing let, but leaves undecided the question whether such a remission can be claimed in case of a partial or temporary limitation to his use and enjoyment. In this colony, although there have been several cases which recognise the right of the lessee, under certain circumstances, to claim damages for injury sustained by reason of the lessor's negligence in not keeping the premises in repair, there is a singular dearth of authority upon the

question now under consideration. In the appeal case of *Salisbury Building Society v. B.S.A. Company* (21, S.C.C., 238), it was held that the tenant of certain rooms forming part of a house which had been destroyed by fire was not liable to pay rent for the period during which he was deprived of the use and occupation. The nearest approach to a decision of the present question that I can find was made by the Supreme Court of the Transvaal in *Lipinski v. Bezuidenhout* (T.S.C. for 1902, p. 231). It was an action for rent, and the plea was that there had been no beneficial occupation of the premises, as it was impossible to proceed with the building on the stand owing to the prevalence of hostilities at the time. The learned Judge (Smith, J.) held that the principles of the Roman-Dutch law are not applicable to the case of building leases such as he had to deal with, but he made some pregnant and valuable remarks as to what those principles really amounted to. "Now," said he, "as I understand the principles of the Roman-Dutch law, the lessee is bound to pay rent according to his agreement, unless during his tenancy the property itself becomes worthless for the purposes for which it was hired, by reason of causes independent of his control, e.g., if a house becomes ruinous owing to an earthquake, or, in the case cited from the Digest, of the room hired as a dining-room, the light of which was so obstructed by a building erected on adjoining land as to render the room useless for the purpose for which it was hired. . . . In such cases as these the tenant was justified in quitting the property, and his liability to pay rent ceased." In this state of the authorities the question arises, what workable test should be applied for the purpose of ascertaining, in any particular case, whether a tenant who is inconvenienced by the defective condition of the premises let is justified in quitting possession until the defect is remedied. It is obvious that it is not every inconvenience, however slight, which would so justify him. I said at the outset that the case is of far-reaching importance, and for this reason: The lease was entered into at a time when land was high in price, and when rents were also proportionately high. Land has since depreciated in value, and, consequently, rents have also fallen. The defendants after quitting the premises which they had hired at £60 per month, were able to obtain suitable premises at £35 a month. I do not suggest that this was the reason why they did relinquish the lease, but there are probably many other long leases in existence, which the tenants would be glad to get rid of if they can find a plausible excuse for so doing. It is well therefore that definite principles should be laid down for the decision of this and other cases that may arise. The



conclusion at which I have arrived is that in order to justify his quitting possession during the subsistence of his lease the tenant must prove that the defect relied upon by him was of so material a nature as to render the premises practically useless for the purposes for which he had hired them. If he succeeds in his proof he is not liable for rent so long as the defect remains; if he fails in his proof he is liable for the rent, and must counter-claim for any damage done to him by reason of the defect. In taking this view I am glad to be able to adopt the statement of the law made by Smith, J., in the Transvaal Supreme Court, and thus to assist in maintaining the uniformity of the laws of South Africa.

Applying the principle just enunciated to the present case, I am of opinion that the defendants have failed to prove that they were justified in leaving the premises. Much of the evidence given on their behalf was to the effect that structural defects existed at the time when the lease was executed, which might then have been discovered if the defendants had caused an inspection to be made before they hired the premises. But there really was no such structural defect as would render the premises useless for the defendant's purposes. They were no worse and no better at the time when the defendants left than when they took possession, and yet for two years the defendants remained in possession, paid their rent, and used the buildings for the purposes of their business. They from time to time complained about the leakages, and they even began an action for relief, but the action dragged on, and was never brought to trial. The reason is said to have been that at first there was a block of business in the Court, and afterwards Kaiser Brothers were financially so weak that it would have been useless to sue them, but the important point is that during all that time the premises were not in so bad a condition as to be useless for the purposes for which they had been hired. It has been urged on behalf of the defendants that as they sustained damages to the extent of £350, they could not have had beneficial occupation, but I am not prepared, without further evidence, to accept the statement that the damages reached that sum or anything like it. The tarnishing of the goods was not proved to have been occasioned by the leaks, and if any serious reliance had been placed upon the evidence there surely would have been a claim in reconvention for the amount of damage. As the pleadings did not raise the question of damage, the plaintiffs could not have been expected to give rebutting evidence on the point. As to the general evidence regarding the structural defects of the buildings, the plaintiff's expert witnesses probably underestimated those defects,

whilst the defendants' witnesses somewhat exaggerated them, but I am satisfied that the premises, although subject to leaks during rain accompanied by heavy wind, are not so materially defective as to be practically useless for the defendants' purposes. It is still open to them if they can prove actual loss to continue their action for damages, and if the plaintiffs should refuse to repair the premises, as repairs are required, the defendants may be entitled to effect the repairs and deduct the expense from the rent, or they may be entitled to claim a cancellation of the lease, but in this action and upon the evidence before the Court, there must be judgment for the plaintiffs for the amount claimed, with costs.

Mr. Close (for plaintiffs) applied for the qualifying expenses of certain architects, who, he said, went to the premises for the purposes of making a report and giving evidence.

His Lordship: Architects, I think, would have been required in any case. I think it would be a dangerous precedent to make any special order. Of course, they will be entitled to their expenses as witnesses.

Mr. Benjamin (for Hoeschen): Do I understand that the judgment in this case is against all three defendants? I may say that I only appear for one.

His Lordship: The others are, I take it, in default?

Mr. Close said that was so. Service was made by leaving three copies of the summons with Hoeschen.

His Lordship: The action is brought against the defendants jointly and severally?

Mr. Close said that, according to the second paragraph of the declaration, the defendants were sued individually and as carrying on the business of the company.

His Lordship said that judgment would be granted as prayed.

[Plaintiffs' Attorneys: Zietsman and Bosman. Defendants' Attorney: F. B. Andrews.]

#### ADMISSIONS.

Mr. W. Porter Buchanan moved, as a matter of urgency, for the admission of Malcolm Hensley McKenzie as an attorney and notary. Counsel said that the applicant formerly served for a period of four months before the war, and then there was a break of service, but upon the re-occupation of Vryburg he had served a full period of three years.

Application granted, with leave to take the oath before the Resident Magistrate of Vryburg.

# SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ERASMUS V. NXONYE. { 1906.  
Dec. 3rd.

## Transkeian Magistrates — Jurisdiction.

*Under the Transkeian Regulations the Magistrates in those territories "have jurisdiction in all civil suits and proceedings for and against persons residing within their respective districts."*

*Held, that a claim for the restoration of cattle and failing restoration thereof for the payment of £100 falls within such jurisdiction.*

This was an appeal from a judgment of the Resident Magistrate of Engcobo in an action brought against appellant by respondent for the restoration of five head of cattle, alleged to have been wrongfully and unlawfully seized, or payment of their value, £100, and for £20 damages for wrongful seizure and detention of the cattle.

From the record it appeared that the plaintiff had bought mealies, and other goods from the defendant, who is a trader. He said that he had only pledged one cow as security for the debt. The defence was that the plaintiff had pledged four head of cattle, and that a written agreement had been entered into. Erasmus said that he had only seized the cattle which he was entitled by the pledge to take.

The Magistrate, in his reasons for judgment, expressed some doubt whether the native would have entered into an agreement to pledge cattle very much higher in value than the amount of the debt. Furthermore, the document gave defendant no right to seize the cattle. The defendant admitted that no delivery took place, and the case was clearly one of spoliation, and there would be an order for restoration of the cattle and the payment of £7 10s. damages. Judgment was given accordingly.

Mr. Alexander was for appellant (D. Erasmus); there was no appearance for respondent.

Mr. Alexander raised a question as to whether the 23rd regulation relating to the Native Territories was sufficiently wide to enable the Magistrate to order specific performance, having in view the

fact that Circuit Courts had now been established in those districts, and that such powers did not vest in the Resident Magistrate's Courts in the Colony proper. The point arose whether under the vague general terms in the regulation the Magistrates in the Territories had got exactly the same power and jurisdiction as the Supreme Court. Proceeding, counsel said that the rest of the case seemed to be more or less a question of fact. He recognised the difficulty of upsetting a Magistrate's judgment on a question of fact, but he submitted that if it were clear from the whole record that the Magistrate was wrong on the facts the Court would not hesitate to reverse the judgment.

The Magistrate had no jurisdiction to order the restoration of the cattle *Le Roes v. Goldie* (5 C.T.R., 392), Reg. 23, p. 117 of Proclamations of 1896.

[De Villiers, C.J.: Assuming everything said by the defendant be true, what right had he to seize the cattle? He had a mere pledge, and the Court has continually decided that there is no real right acquired in property which does not remain in the possession of the pledgee.]

Mr. Alexander: That is so, and if there had been a third party with a claim in conflict with the defendant's claim against the native the defendant would have had no claim, but where there is no third party with a claim I submit that the question is rather different.

[De Villiers, C.J.: It has been repeatedly decided that a person has no right to take the law into his own hands.]

Mr. Alexander: What he says is that the property was left in the native's possession entirely of his own account, and that he went up there and had a discussion with regard to the debt that was due, and the plaintiff said, "You must take all the cattle."

[De Villiers, C.J.: Surely, he could not have intended it. Was any counter-claim brought by the defendant in the action?]

Mr. Alexander said that it did not appear so from the record. Counsel having been heard further.

De Villiers, C.J.: The first objection raised in this case is to the jurisdiction of the Magistrate. Of course, if this had been a case heard before an ordinary Magistrate in this Colony, the Magistrate would not have had jurisdiction, but the jurisdiction of the Magistrates in the Transkeian Territories is very much wider. The 23rd regulation says that "a Magistrate shall have jurisdiction in all civil suits and proceedings for and against persons residing within their respective districts." It is true that at the conclusion of that clause it says that "the proceedings shall, as near as may be and so far as circumstances permit, be the same as

those in the Courts of the Resident Magistrates in the Colony," but that has reference only to the procedure. The wider jurisdiction granted in the earlier part of the clause remains, and the jurisdiction so given is quite wide enough to embrace a case like the present where the defendant was sued to restore four head of cattle taken away from him, or else pay £100. The objection to the jurisdiction, therefore, must fail. In regard to the merits of the case, it seems to me that the Magistrate was perfectly right. Even taking the defendant's evidence to be correct, he was not acting within his rights when he took the cattle. It is said that the plaintiff had said, "Oh, there's all my cattle; take them." But it is clear in what spirit that was said. He was not willing that they should be taken, and the defendant's own cattle were returned, because he wished no longer to keep them. Then, in the same week, the defendant removed these cattle which were said to have been pledged to him. Even if this had been intended to be a pledge, even if this document had been duly executed, defendant allowed the plaintiff to remain in possession of the property, and the defendant had no right to take the law into his own hands by taking these cattle against the plaintiff's will, as I take it, he did, and the Magistrate properly treated the case as one of spoliation and ordered the defendant in the first instance to restore the plaintiff to the position in which he was before the spoliation took place by handing him back the cattle. Of course, if the plaintiff's evidence is to be believed—and the Magistrate clearly believed that evidence—there can be no doubt whatever as to the liability of the defendant. The Magistrate is doubtful as to whether this document which is relied upon by the defendant was ever executed. The only point that might have been raised in the case is this, that the plaintiff admittedly owed the defendant some money, and possibly the amount might have been set off, but then the difficulty of setting off that amount would be that the defendant himself claims a very much larger sum than that which was admitted by the plaintiff, and, consequently, there might have been a difficulty in allowing the set off to be exercised in the present case. The defendant, of course, still retains his right of action. He is still entitled, if the plaintiff owes him this larger sum of money, which he claims, to bring his action, but the fact that he has that right of action does not affect the question of whether the Magistrate was right in his decision in the present case. As I said before, there has been no claim in re-convention by the defendant, and the Court, therefore, was justified in leaving out of consideration the fact that the plaintiff admitted that he owed this sum of money to the defendant. The result is that the appeal must be dismissed.

#### VENTER V. GRAHAM AND MULLER.

##### Immovable property—Fixture— Rights of mortgagee.

*At the time of the execution of the mortgage of certain land there had been erected on it a corrugated iron building, forty feet by forty in size, attached by bolts to the soil, such bolts going through the foundations into the soil, the foundations being sunk for the greater part about six inches in the soil and the building being used as a store.*

*Held, that the mortgagee's rights attached to the building.*

This was an appeal from a judgment of the Resident Magistrate of Elliot in an action brought by appellant against respondents to have a certain building situate on erf No. 445, in the town of Elliot, declared to be attached to the said erf and to be immovable, and for a declaration of rights.

From the record it appeared that the erf in question was sold by appellant to one Montague H. Graham for £350, and that a bond was granted to him by appellant for that amount. At the time a building, composed of corrugated iron, was in course of erection for Graham Bros., of which firm Montague Graham was a partner. Subsequently the firm of Graham and Muller succeeded the firm of Graham Bros., and purchased from the latter the building for a sum of £200. Graham and Muller had given appellant notice of their intention to remove the building from the erf, but Venter claimed that it was immovable, and that it was part of the soil, and had been hypothecated to his bond.

The Magistrate, in his reasons for judgment, said that on two grounds he found for the defendants. Firstly, the power to pass the bond was signed by M. H. Graham to purchase the ground alone for £350. Plaintiff, therefore, had been negligent in not getting the power signed by Graham Bros., as he well knew the firm were starting business there. He considered that the building was movable, as the foundation was superficial. It consisted of two layers of stone. In occasional places the foundation went a few inches into the ground owing to the ground not being quite level, but to all intents it had been placed upon the surface, and might be removed without damage to the erf. He considered that W. H. Graham deceived the plaintiff. He also felt certain that W. A. Graham knew of the

bond either at the time the bond was signed or shortly afterwards.

Mr. Gardiner for appellant. Mr. Benjamin for respondents.

Mr. Gardiner contended that the building was pledged by Mr. Graham with the implied consent of Graham Bros., because Mr. Graham was a partner in the firm of Graham Bros., so Graham Bros. were bound by the pledge. Graham and Muller could not be in any better position than Graham Bros. Counsel quoted *Coaton v. Alexander* (1879, Buch. 17), *Van Leeuwen's Consultat.* (4-13-4), and *Van Leeuwen's Cens. For.* (1-14-7-4).

In the second place, the building was a fixture, and could not be removed by the defendants. He quoted *Kimberley Mutual Building Society v. Lewis and others* (T.H.C. 241) and *Grotius* (2-1-13).

Mr. Benjamin contended that when Graham and Muller purchased the property they had no knowledge that the building had been pledged. Mr. Graham had no right to pledge a building which belonged to the firm. He quoted *Adams v. Mocke* (16 C.T.R., 652).

The Resident Magistrate had examined the building, and decided that it was movable.

Mr. Gardiner, in reply, quoted the case of *Cairncross v. Nortje* (21 S.C., 127). The firm of Graham Bros. had paid the interest on the bond and the premiums of insurance, so they must have known that the building was hypothecated by the bond.

De Villiers, C.J.: In this case the Magistrate has arrived at the conclusion that the building did not form part of the land, he seems to have examined the premises, and his examination confirmed him in this view, and, no doubt, these are circumstances which would strongly weigh with this Court in deciding whether or not this building does form part of the land. But it does not appear that the decision of this Court in the case of *Cairncross v. Nortje* (21 Supreme Court Reports, 127) was brought to his notice. In that case there was a kraal and inside the kraal was a shed, the roof of which consisted of galvanised iron screwed on to rafters, which rested at one end on the poles to which they had been screwed and at the other on the stone walls of the kraals. The shed had been erected by the lessee, who was still in occupation of the farm. It was held that the shed was a fixture forming part of the farm, which the defendant as vendor was bound to deliver with the farm, and that, failing such delivery, the plaintiff was entitled to damages. Now, what do we find here? This building had been used as a store. It was erected upon a stone foundation which for some six inches in the greater part was sunk into the soil, and the building was attached to the soil itself by means of bolts, which went through the founda-

tion into the soil. Every witness who has been examined said that it would be impossible to remove the building as a whole, it would be necessary to take the building to pieces. Then the Court must bear in mind also the size of this building, and must take all the circumstances into consideration. Certainly the size of the building would go far to lead to the supposition that this was intended to be part of the soil. It was 40 feet by 40, a very considerable structure. It was used for a store, and the parties themselves must have regarded it as a structure which was part of the soil, because it was part of the contract, part of the mortgage contract, that the buildings upon the premises should be insured. Now, that was the only building apparently on the premises that ever was insured, and, at all events, one of the partners, Graham, knew of this insurance, knew of the bond, and knew that this building was insured under the bond. I don't mention this as a reason for holding that the defendant is liable, independently of the property being immovable, but I say that the fact that the parties themselves treated this building as part of the soil which was to be mortgaged, shows that the parties themselves treated it as being immovable property. Therefore, under all the circumstances, notwithstanding the view which the Magistrate has taken, I am satisfied that he has not arrived at a correct inference from the undoubted facts of the case, and upon the questions in this case the Court of Appeal is in as good a position as the Court of first instance to express an opinion. I am satisfied that this building should be considered as part of the soil and subject to the mortgage, and that the Magistrate was wrong in his decision. The appeal must, therefore, be allowed with costs, and judgment entered in terms of the summons with costs in this Court and in the Magistrate's Court.

[Appellant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: Michau and De Villiers.]

## SUPREME COURT

### SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

### GENERAL MOTIONS.

*Ex parte* ESTATE LAUS- { 1906.  
BERG. { Dec. 4th.

Sir H. Juta, K.C., moved on the petition of the executors testamentary.



and the surviving spouse of the late Jean L. Lausberg for a rule *nisi* to issue, calling upon certain parties to show cause why a decision of a commission appointed in terms of Act 7 of 1865 in relation to the boundaries of certain farms in the division of Clanwilliam shall not be reviewed and set aside.

The petitioners were Celius L. C. Lausberg and Joseph M. B. Lausberg, as executors testamentary of J. L. Lausberg, their late father, and Sophia Lausberg, his surviving spouse. There was registered in the name of the said J. L. Lausberg four-sevenths undivided parts or shares in the farm Ratelrug, division of Clanwilliam. During the year 1905 the owners of the farm Bovenbergsvlei, situate to the east of the farm Ratelrug, caused the said farm Bovenbergsvlei to be surveyed, and in the course of such survey a dispute arose as to the correctness of one of the beacons common to the said farms. Thereafter a commission was appointed under Act 7 of 1865 and, despite the objections of the petitioners, the Commissioners proceeded to consider and determine the boundaries of the respective properties. Petitioners complained that there had been an irregularity in the appointment of a surveyor, and that the respondents—the owners of Bovenbergsvlei, Pieter Gideon Smit and the estate of the late Alwyn Johannes Smit—had not complied with the necessary preliminaries so as to secure an independent investigation.

Rule *nisi* granted, calling upon P. G. Smit, the estate of Alwyn J. Smit, the commissioners appointed by the Divisional Council, and the Divisional Council (through their secretary), to show cause on the 12th January why all proceedings in the said matter, subsequent to the petition to the Divisional Council for the appointment of a commission, should not be set aside, and why the said P. G. Smit and estate A. J. Smit should not pay costs.

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*Ex parte* ROWE.

Rule of Court No. 273—Extension of return day.

*Where a return day has already lapsed the Court will not extend the return day and proceedings must be commenced de novo.*

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Mr. Struben applied for an extension of the return day of edictal citation so as to enable publication to be given in the "Government Gazette." Petitioner was suing his wife for restitution of conjugal rights, and it had been found im-

possible to effect personal service of the citation upon her in Melbourne.

Hopley, J., asked for what date the rule had been made returnable.

Mr. Struben said that the rule was made returnable on the 15th October.

Hopley, J., put it to counsel that the rule had now lapsed, and that the applicant must proceed *de novo*.

Mr. Struben said that great efforts had been made to discover the defendant, but apparently without success. It would be unfortunate if the applicant were now to be penalised for having made considerable efforts to trace the defendant. Under the special circumstances, counsel submitted, it would be sufficient if the return day were extended and publication were made in the "Government Gazette" in order to comply with Rule of Court No. 273.

Hopley, J.: It seems to me that I cannot make an order in this case. I think it would be introducing a very lax practice; people would not attend to the return days, they would find that they could come afterwards to cure any defects, and it would seem to me that it would have very far-reaching consequences to absent defendants. Proceedings months afterwards, when they thought the matter had lapsed, might be revived without notice to themselves, by some publication in a paper they have not seen nor are likely to see by an order of Court, and those proceedings would be set on foot which they had no reason to suppose from the Rules of Court would be set on foot against them. The Registrar informs me that he knows of no application like the present one having been granted, and I am not going to be the first to introduce a practice which, it seems to me, would be a wrong one. It is unfortunate for the plaintiff, who seems to be a poor man, that there have been mistakes, but it is not the fault of this Court, and he must proceed in the best way he is advised. No order will be made upon this application.

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*In re* DUSSEAU AND CO.

Mr. Watermeyer presented the second and final liquidation and distribution account, and asked for the usual order as to same lying for inspection, and as to publication.

Report to lie for 14 days at the Master's and Liquidator's offices, usual notice to be given.

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VERSTER V. VERSTER.

Mr. Payne moved for removal of trial to the next Circuit Court at Cala.

Case removed to the next Circuit Court at Cala.



**RASSON V. KATZ AND OLSWANG.**

This was an application calling upon respondents to show cause why taxation should not be authorised of a certain bill of costs incurred by applicant in connection with an action commenced by him in the Malmesbury Circuit Court against respondents.

Mr. Inchbold was for applicant; Mr. Burton was for respondents.

It appeared that applicant had instituted an action in the Circuit Court for damages for trespass by defendants' cattle. A compromise was, however, arrived at before the case came on for hearing, and the question now raised was as to the arrangement arrived at in regard to costs. It was agreed that £8 should be paid to applicant by way of damages. Applicant's case was that he should receive £8 clear, and that all costs should be borne by respondents. Respondents' case was that it had been agreed that the bill of costs should be submitted to the taxing officer, Cape Town, to decide what was meant by the terms of the settlement under which they (defendants) were to pay "all costs to date." The taxing officer decided against the plaintiff's contention, and the bill was thereupon withdrawn from taxation. The respondents' attorney said that when the settlement was entered into it was understood that defendants were to pay the usual ordinary costs, but not those between attorney and client.

Hopley, J., said it did not seem clear to him how the matter really came before the Court. The Court was not there to lay down an interpretation which should properly be made by the taxing master.

Mr. Inchbold urged that the matter was now ripe for an interpretation by the Court of the words, "all costs to date."

[Hopley, J.: I do not see how this Court is called upon at the present stage to adjudicate in this matter.]

Mr. Burton said that the taxing master decided that the words meant that the defendant should pay taxed costs between party and party, and as the plaintiff withdrew from the proceedings, he submitted that the applicant having mistaken his remedy, he should pay costs of this application.

Hopley, J.: It seems to me that at present the order must be refused, for the reason that the person in the first instance to decide this matter is the taxing master. If he decides on a wrong principle and in contradiction to decided cases, then it is for the party aggrieved to come to this Court to have such taxation reviewed. This was a case before the Circuit Court, a compromise was arrived at, and certain costs have been incurred. These would all, therefore, be from the very circumstances of their origin

within the purview of the duties of the taxing master. When the matter went before him because of an interpretation that he put upon the words of the compromise, one of the parties withdrew, instead of going on and having the matter taxed under protest. He should have allowed the bill to be taxed, and if he were aggrieved by the taxing master's decision, he ought to have come to this court and asked for a review, and that the taxing master should be set right. But he has not done that, and he now asks the Court, upon affidavits which are somewhat contradictory, to interpret a document which it was, it seems, to me, the duty of the taxing master in the first instance to consider and decide upon. The present application must, therefore, be refused, with costs.

*Ex parte* **ESTATE VAN DYK.**

Mr. M. Bisset moved, on the petition of the executor testamentary in the estate of Christoffel J. van Dyk and Catherina van Dyk, for the appointment of a *curator ad litem* to represent their major daughter, Belia F. A. van Dyk, in proceedings to have her declared of unsound mind and a *curator bonis* appointed. Respondent was now confined in Robben Island under a judge's warrant.

Hopley, J., observed that it was a pity if it were necessary that all these formal proceedings should be gone through in order to give the respondent the benefit of this property that was coming to her. It seemed likely that the bulk of the estate would be eaten up by the expenses. Dirk Petrus Johannes van Zyl would be appointed *curator bonis* of Belia F. A. van Dyk for such time as she is detained under Judge's warrant as a lunatic and authorised to obtain transfer of the landed property into the name of the said Belia van Dyk and to use the same during such detention on the understanding that he pay all costs and charges arising out of or connected with the said landed property, that the Master be authorised to pay expenses of the said transfers out of the funds belonging to the said Belia van Dyk in his hands, and that the executor pay in to the Master from time to time any sums coming to the said Belia van Dyk.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

VAN DER MEULEN V. { 1906.  
Greeff. } Dec. 5th.

Sheep lease—*Dominium*—Possession—Spoliation—Interdict.

This was an application to make absolute a certain rule *nisi* calling upon the respondents to show cause why they should not be interdicted from dealing or in any way parting with certain sheep and progeny left by them in the possession of the applicant, and why they should not restore the said stock to the applicant and pay costs of these proceedings.

From the affidavits, it appeared that the applicant had hired a number of sheep and goats belonging to one or both of the respondents on the "halves," and that the first-named respondent had removed them from his possession. The first-named respondent, in defence of this proceeding, alleged that applicant had committed a breach of faith and had not only failed to provide suitable pasturage for the stock, thus endangering their lives, but had infringed the arrangement made between them as to putting his (Greeff's) mark on the stock, and had sold a number to certain people without having first obtained his (Greeff's) consent. Under the circumstances, he submitted that he was justified in removing the stock. The applicant's position was that he had hired fresh pasturage on the farm of Dwars-in-de-Weg, that Greeff had no right to take the stock from his possession, and that 440 of the sheep had been given to him, for consideration, by Greeff. The contract under which he held the other sheep would not expire until January next, and he claimed that respondents had no power to move them at present. It was denied that the applicant had hired part of the farm of Dwars-in-de-Weg. Greeff also said that he had no knowledge until October that Zacks claimed to have bought any of the sheep.

Mr. Roux was for applicant (J. D. van der Meulen, of Laingsburg); Mr. Gardiner was for respondent, Hendrik Thomas Greeff and his wife (to whom he is married out of community); and Mr. Alexander was for one I. Zacks, who claimed to have purchased 100 ewes from Van der Meulen, in whose possession he had left the stock.

While Mr. Gardiner was reading the affidavits filed for respondents,

Hopley, J., commented on the fact that there was such an enormous mass of affidavits.

Mr. Gardiner: I am afraid I am to blame just now, but my learned friend (Mr. Roux) has a great mass to follow.

[Hopley, J.: Of course one mass of affidavits invokes another mass. I suppose the up-country attorneys have so little to do.]

A moment later his Lordship added that he was afraid he should have to draw the attention of the Taxing Master to the affidavits.

While Mr. Roux was reading the replying affidavits,

Hopley, J., interpolated the remark: These affidavits are extending their ambit. We shall be in the middle of the "Agricultural Journal" in a bit.

Mr. Roux: I believe these affidavits were drawn out of us by the voluminous affidavits filed by the other side.

Hopley, J., later on, observed that it was almost impossible to follow the history of the sheep from the affidavits, but as far as he understood, the position was that 900 odd sheep belonged to Mrs. Greeff. The Greeffs handed over these sheep to Van der Meulen for one year certain on the 21st February on the "halves," the same number of sheep to be returned at the end of the year, slaughter sheep to go off and count as ordinary loss and to be made up out of increase, or in any other way Van der Meulen liked. For the rest, Van der Meulen also could slaughter some of them and make them up. Anyhow, they had to be made up to the full number, and that came out of his share, and the increase on the whole flock was to be divided equally between them at the end of the year. Van der Meulen was to hand up the right number with half the increase. The question was, what was the legal position in a contract like that?

Mr. Gardiner said that counsel for the applicant would no doubt contend that this was a case of spoliation. Van der Meulen had a contract under which he specially held the stock as agent for Mrs. Greeff. He really had detention of the sheep, but was not in legal possession. Van der Meulen would have the right to half the increase, and correspondingly he would have the duty of looking after those sheep. As long as they did not deprive him of the right to half the increase, they were entitled to take back the sheep.

[Hopley, J.: Is your position that you could remove those sheep when you wished?]

Mr. Gardiner: I submit that we could, because the ownership of these sheep is in us. He has his rights to the wool and progeny, but he has no right to the sheep themselves.

[Hopley, J.: But what is this contract?]

Mr. Gardiner: It is a contract of letting of services.

[Hopley, J.: Whose services?]

Mr. Gardiner: Van der Meulen's services, in looking after the sheep entrusted to his care.

Hopley, J., said he was sure there must be cases in which these sheep leases had been considered.\*

Mr. Gardiner went on to contend that, as to any question of spoliation, the first spoliation had been by Van der Meulen in selling sheep to people without the respondent's authority and sticking to the proceeds. Before the contract was signed by Van der Meulen on the 21st February, Van Niekerk (acting for the respondents) explained to Van der Meulen that, as to the stock he had held for Mr. Greeff and Mrs. Greeff, the whole would belong in future to Mrs. Greeff, and would be left with him as her agent. It was difficult to believe, therefore, that two days afterwards, on the 23rd February, Greeff should have gone to Van der Meulen and made him a present of 400 sheep. The applicant's story was a very improbable one. Van der Meulen said that Greeff had agreed to allow him to remain on his farm until his (Greeff's) son, who was three years of age, should reach his majority, but that Greeff subsequently sold the farm, and, in lieu of paying him a commission of 5 per cent. upon the purchase price, as agreed upon, he gave him (Van der Meulen) the 440 sheep belonging to him. Again, in this matter, it appeared that the applicant did not come into Court with clean hands, because the first-named respondent alleged that Van der Meulen had sold some of the stock, and had not accounted to him for the proceeds. If that were true, applicant had been dealing very improperly with respondents' sheep. On the points as to the fitness of the veld where applicant had the sheep, and whether Van der Meulen had taken part of the farm Dwars-in-de-Weg, there was a great conflict on the affidavits. Under all the circumstances, he submitted that the person with whom the stock ought to be left was the owner. The applicant himself admitted that one-half belonged to Mrs. Greeff.

Mr. Alexander urged that in any order the Court might make, it should be stipulated that the 100 sheep bought by Zacks would not be affected.

Mr. Roux submitted that this was clearly a case of spoliation. It was with the respondents' consent that applicant had got possession of 900 sheep, with the increase now amounting to 1,175. It was not necessary that the applicant should show that he was the owner of the sheep; it was sufficient, in order to obtain relief, if the appli-

cant showed that he had been in *bona fide* possession. Van der Meulen was clearly entitled to an order of restitution, and to have possession of the stock, at any rate, until February next. Applicant received from the Greeffs 924 sheep and 1,175 were taken away by the Greeffs, and it was beyond doubt that in regard to a certain number, at any rate, there had been spoliation. Counsel went on to contend that this was a sheep lease, and not, as counsel for respondents had contended, a letting of services.

Hopley, J., said he was not satisfied that it was an ordinary sheep lease.

Mr. Roux submitted that the contract in this case was a sheep lease, and he cited *Scott v. Trustee, Insolvent Estate Nicholson* (6 E.D.C., 243), and *Swanepoel v. Van der Hoeven* (1878, Buchanan 4), and quoted from Maasdorp's Institutes (vol., 2, pp. 224 and 225). Counsel went on to submit that the applicant was the owner of 440 sheep, and pointed out that the contract itself only spoke of a portion of the sheep, and not the whole.

Hopley, J., said that it was most unadvisable to drive sheep about at this season, and he suggested that the sheep should be left in the hands of Greeff, as Van der Meulen's agent, until the 21st February, pending a settlement of the dispute between the parties.

Mr. Roux having been heard further.

Hopley, J.: Recognising all that Mr. Roux has said about spoliation to be perfectly good law, I am not quite satisfied that this is a clear case of spoliation. I think there is very much to be said on behalf of the respondents, for holding that this was not a case of spoliation, but a case of self-protection, a taking of their own property to save it, according to their view of the matter, and it would seem to me to be, not perhaps a harsh, but, at all events, an unwise order that these animals, which have now, apparently, reached a haven of comparative though temporary safety, should at this season of the year be driven across a considerable tract of country to some other pasturage, about which there is a dispute as to whether or not the applicant in this case has a right, for the purpose of grazing them. I think that, for the benefit of all the parties—there is no doubt that the stock in dispute would be safely guarded by either of the parties. It would be better that the sheep should be left where they are, and the legal aspect of the question can be settled hereafter by an action to be brought by one or other of the parties. I do not think that the sheep would be sold if they were left in the custody of the respondents for the present. But, while I am of that opinion in regard to the temporary custody of the sheep, I also feel that

\* See *Tucker v. Austin's Trustees* (Buch. 1868—145); *Swanepoel v. Van der Hoeven* (Buch. 1878—4); *Van der Hoeven v. De Wel's Trustee* (Buch. 1879—127); *Truter v. Krynaar* (10 C.T.R., 36); *Van Niekerk's Estate v. Sandtland* (15 C.T.R., 627); *Scott v. Nicholson's Trustee* (6 E.D.C., 243); *Van Druten v. Cloete* (3 H.C., 276).

Mr. Greeff should be held bound to give security that he will not in any way part with them, or one might simply extend the terms of the rule *nisi* to that effect. The order, therefore, will be that the rule be made absolute, interdicting Mrs. Greeff and her husband from parting with or in any way dealing with the sheep and goats, and progeny of such sheep and goats, taken by them from the possession of the applicant, pending a final account between the parties, and as to the restoration of the original sheep and the progeny, and the wool and other matters which arise out of the possession of the sheep, and pending an action as to 440 of the said sheep claimed by the said Van der Meulen as being his own individual property, to be brought in the February term by the said Van der Meulen to establish his right to the said 440 sheep, costs of the present application to be reserved.

Mr. Alexander said that the order made no mention of the 100 sheep belonging to his client.

Hopley, J.: In saying that the respondents are restrained from in any way parting with the sheep and goats and progeny in their possession, the 100 sheep claimed by Mr. Zacks are, of course, included, and he also may establish his right to the 100 sheep in any action brought by Van der Meulen and himself. The latter portion of the order will be "pending an action to be brought for such sheep as are claimed by Van der Meulen and Zacks, during the February term, costs reserved."

[Attorneys for Applicant: Mostert and Son. Attorney for Respondents: R. C. K. McLeod.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

*Ex parte* BIDEN.

1906.  
(Dec. 6th.)

Mr. Searle, K.C., mentioned as a matter of urgency the petition of the directors of Henry C. Collison, Ltd., whose affairs, it would be remembered, occupied the attention of the Court last week.

The petition was that of Wm. H. C. Biden, managing director of the company, who said that one, Reginald Francis St. Frere Vaile, was indebted to the company in the sum of £4,440 0s. 9d., which was due and payable forthwith. They had a good cause of action against Vaile for recovery of the said sum. The directors had passed a resolution to sue the said Vaile, who, though he had lately been resident in Johannesburg, Transvaal, was domiciled in England, but who was possessed of certain furniture at present stored in a room in this city leased to the company. The said Vaile contemplated leaving Cape Town, where he was at present, for England either by the next mail, or shortly afterwards. In order to institute an action against him, it was necessary that his furniture, stored at 9, Castle-street, should be attached. Counsel added that there would be no difficulty in regard to effecting personal service upon the respondent.

Leave granted to sue by edictal citation, returnable on February 1, personal service to be effected, and furniture mentioned in the petition to be attached *ad fundandam jurisdictionem*, with leave to serve interdict and notice of trial with citation.

### INSOLVENT ESTATE WATSON V. DAINES AND SEYMOUR.

This was an argument on an exception taken by the plaintiff to the defendants' plea in an action in which the trustee in the insolvent estate of William Henry Watson seeks to recover from Daines and Seymour, attorneys, of Mount Fletcher, Matatiele, and elsewhere, in the district of Griqualand East, a sum of money paid to them under certain insurance policy.

It appeared that the Sun Fire Insurance Company paid to respondents £335 14s. 10d., as the assessed amount of loss sustained by Watson by the destruction of his premises by fire. On the 31st July, 1905, defendants paid to the wife of the said Watson £137 8s. 8d., being part of the said amount. Plaintiff claimed the balance. Defendants pleaded non-liability. They said that they had paid Mrs. Watson £137 8s. 8d., and that, as to the balance of the said sum of £335 14s. 10d., the whole of that amount was disposed of by them in the manner set out in the account annexed, and with the consent, where such consent was necessary, of the wife of the said William Henry Watson, who was duly authorised by him to act as his agent.

Mr. Benjamin was for excipients; Mr. Close was for respondents.

Mr. Benjamin said that the estate was sequestrated on the 19th October,



1905. The trustee had commenced an action against the Standard Bank with regard to the sum of £137, which was handed to the insolvent's wife. The Standard Bank had paid the cheque to Mrs. Watson, and that amount had been recovered from the bank. That item, therefore, did not come into the present matter. As to the present action, exception was taken to the plea on the ground that it was vague and embarrassing, in that the account did not set out with sufficient particularity the disbursements which defendants said they had made. These items included fees paid for Resident Magistrate's Court and appeal in Botha at suit of Phillips. It was alleged that the costs in that matter were guaranteed by Watson, but no particulars were given. Then there were certain promissory notes from sundry individuals which were said to be "endorsed to us." He submitted that the plea was so vague that the plaintiff could not reply to it.

Mr. Close submitted that the plaintiff had all the information as to the facts on which the defendant relied put before him in the plea, so as to enable him to know what the case of the defendant was, and how to reply to it. The plea stated that the part of the sum in dispute paid over to the defendants had been disposed of in the manner set out in the account annexed to the plea. They said that the balance remaining, after the afore-mentioned disbursements, had been paid over to Mrs. Watson. From that it was clear that the items set out in the account were disbursements. It was also stated that Mrs. Watson was the duly-appointed agent of her husband, and that she gave the authority in all cases where the authority for disbursement was required, and that she accepted the balance. He contended that the plaintiff was not embarrassed by the plea.

Mr. Benjamin, in reply, pointed out that the trustee was in a great difficulty, because the insolvent had absconded, and Mrs. Watson was in the Argentine. The plea should have been more specific, and defendant should have set up a claim in reconvention. The items in the account were not set out with sufficient particularity.

De Villiers, C.J.: I quite agree with plaintiff's counsel that the plea does not distinctly set out the ground of defence. Whether that ground of defence is sufficient is another question, but the ground of defence, as I understand it, is that certain disbursements had been made on behalf of the plaintiff. I am not sure that the objection I should sustain is exactly the same as that contended for on behalf of the plaintiff. The objection I have to the plea is this, that it does not say that the debts were paid on behalf and at the request of Watson. The only point on which I

would like to hear further argument is whether there are any decisions to the effect that a person might pay the debts of another without being requested. Has that question been considered? Here is a distinct allegation that the defendant has, on behalf of Watson, paid certain debts. The question is, was the consent of that person required? If I pay the debts of another, is his consent required? By the law of England it is required. The plea says "where such consent was necessary." I should like to hear counsel further before giving my final judgment, because if a person may pay the debts of another and claim repayment, then there is no necessity for mentioning his consent or for mentioning the request. By the law of England you cannot claim a disbursement, unless you allege that it is at the request of such a person that the disbursement was made. In the present case, it is not said that there was a request from Watson, nor is it said that it was with his consent that his debts were paid, but it is said that it was "with the consent, where such consent was necessary, of the wife of the said William Henry Watson." I do not think there is any other difficulty in the plea, because it says that the money has been paid by the defendants on behalf of Watson.

At a later stage, counsel were further heard in argument on the point raised by his lordship.

Mr. Benjamin said that in all the cases he had been able to find the party paying had some interest in the matter. He cited the recent case of *Marais v. Cape Divisional Council* (16 C.T.R., 402), *Smuts v. Cathcart Divisional Council* (6 C.T.R., 384), *Bousfield v. Stutterheim Divisional Council* (12 C.T.R. 81), and *Colonial Government v. Smith* (11 C.T.R., 521), and quoted Burge (vol. 3, p. 825).

Mr. Close quoted Voet (46, 3, 1, and 3. 5, 11), and Maurice's English and Roman-Dutch Law (p. 226). He added, however, that he would be prepared to consent to the words "where such consent was necessary" being struck out of the plea.

[De Villiers, C.J.: I think the best solution of it will be to let this amendment be made, and let costs be costs in the cause.]

Mr. Benjamin asked that the words "endorsed to us" be struck out of the account annexed to the plea.

Mr. Close said that he did not object to that.

De Villiers, C.J.: The plea will be amended by striking out the words, "where such consent was necessary"; and also striking out the words, "endorsed to us," where they occur in the accounts annexed. Costs will be costs in the cause. It is not necessary now to consider the legal question.



REID AND CO. V. LOGAN. { 1906.  
Dec. 6th.

**Exception—Variance between declaration and replication.**

*The plaintiff, in an action founded on a contract, referred generally to such contract without stating that it was in writing. The defendant's plea raised several defences bearing upon the exact terms of the contract. Thereafter the plaintiff, in his replication, stated that the contract was in writing and set out some of its terms, but there was no inconsistency in other respects between the declaration and the replication.*

*Held, that there was no variance, and consequently no ground for excepting to the replication.*

This was an argument on an exception taken by defendant to the plaintiffs' replication in an action arising out of work done by the plaintiffs in the erection of the Masonic Hotel at Beaufort West.

Plaintiffs, in their declaration, said that they had entered into a contract with the defendant, whereby they, as contractors, undertook to erect the Masonic Hotel at Beaufort West for £8,000. Payments were made amounting to £6,250. The last certificate was granted by the architects (Messrs. Parker and Forsyth) on February 7, 1906, amounting to £1,250, making a total of £7,500. Defendant, after action brought, paid on the last certificate. Defendant had terminated the engagement with his architects. On February 11 the work was completed, and the premises handed over to defendant, and although the period of four months, during which the defendant was to retain certain percentage of the contract money, had expired, he neglected and refused to pay the sum of £500, retention money, which they claimed. Plaintiff also claimed a sum of £59 odd as extras.—Plaintiffs said that they had offered to submit the matters in dispute to the decision of an impartial architect, or to any referee to be mutually agreed upon; but the defendant had refused to submit such matters to such architect or referee.

Defendant, in his plea, denied indebtedness in the sum of £500, and said that the premises had not been completed. He complained that the work had

not been satisfactorily done. He also said that as to extras it was specially agreed that any extra work should be executed upon the authority in writing of the architect. He said he was not in law bound to submit any dispute to arbitration. He claimed to be entitled to retain the sum of £500, owing to the default of the plaintiffs, and said that in any case he was entitled to a reduction of £1,000 in respect of work badly done, or omitted to be done. For a claim in reconvention he claimed damages at the rate of £10 per week by reason of the failure of plaintiffs to hand over the premises completed by December 31, 1905. He further said that the plaintiffs' action was premature.

Plaintiffs, in their replication, craved leave to refer to a copy of the contract annexed, and specially called attention to clause 22 thereof in reference to arbitration.

Before pleading to the replication, the defendant excepted as follows: "(1) In that (a) the plaintiff in his declaration does not sue upon a written contract, whereas in the replication he sues upon a contract in writing, purporting to be signed by the plaintiffs only; (b) the contract so put in the replication contains material terms not set out in the declaration as part of the contract; (c) the replication contains a cause of action differing from that sued upon in the declaration; (2) the defendant says that the replication is inconsistent with the declaration, and is vague and embarrassing, and bad in law. Wherefore, the defendant prays that the plaintiff's declaration may be set aside with costs."

Sir H. Juta, K.C. (with him Mr. Close) for the excipient. Mr. Schreiner, K.C. (with him Mr. Upington) for the respondents.

Sir H. Juta said that the declaration simply set up that there was a contract made by which the hotel was to be built for a certain sum of money, that payments were made from time to time upon certificates of the architects, that the last certificates given by the architects was on a certain date, that the work was completed and handed over, and that it was a part of the agreement that, four months after completion of the work, the retention money should be paid, and that it had become payable, and all things had happened necessary to entitle plaintiffs to claim the same. Then came something which had no reference whatever to the contract, and was not alleged to be part of the contract at all, viz., that they had made an offer to the defendant to go to arbitration. In their replication the plaintiffs set up what they alleged to be a contract, and they referred to a certain clause, No. 22, according to which arbitration was compulsory. Now, the defendant wanted to know what was the position of the plaintiffs in their

declaration. Either this arbitration was compulsory, or it was voluntary. If compulsory, then plaintiffs should have sought an order to compel defendant to go to arbitration. If voluntary it should not have been brought in at all.

[De Villiers, C.J.: But is it not competent, if a party offers arbitration and the other party refuses, for that party to bring an action?]

Sir H. Juta: Then the pleading surely is irrelevant.

[De Villiers, C.J.: In his declaration, he said he had offered arbitration, which you have refused, and then in his replication he sets up the arbitration clause. Is that inconsistent with his declaration? The declaration is accompanied with the statement that you have refused arbitration.]

Sir H. Juta said that there was no connection between the offer to go to arbitration mentioned in the declaration and the contract.

[De Villiers, C.J.: Are both parties somewhat similar in that respect, because the defendant claims £10 per week as liquidated damages, which can only come in under this contract.]

Sir H. Juta: We deny that there is this contract which they allege. We say the damages were part of the oral contract between the parties. Counsel went on to point out that one of the prayers in the declaration was that the defendant should be ordered to go to arbitration.

[De Villiers, C.J.: As an alternative.]

Sir H. Juta said that was so, but under the declaration, as it stood, the prayer could never be granted. But, in the replication, the whole matter was altered, and the plaintiff put in clause 22, and said the defendant was bound to go to arbitration. Then the defendant was embarrassed by the replication, because it was not said what were the disputes that should be referred to arbitration under clause 22. Plaintiffs did not say that this was a dispute under clause 22. Counsel submitted that there was no answer in the replication to the plaintiff's allegation with regard to this action being premature by virtue of there being no final certificate of the architect that the work had been completed. Then, in the declaration, plaintiffs alleged that the contract with the architects had been terminated by the defendant. In their replication, plaintiffs alleged that the defendant could not terminate that appointment without their consent. Those statements, counsel submitted, were inconsistent. The defendant had a right to know where he stood in regard to the pleadings of the plaintiffs. In this very clause, No. 22, extras were exempted. Part of the claim was for extras. Defendant pleaded that, accord-

ing to the contract, they could not claim any extras unless upon the written certificate of the architect. The plaintiffs simply referred to clause 22, which specially exempted those extras. That, at any rate, was not a question that could be sent to an arbitrator. Then there was the question of the completion of the work. Plaintiffs said that any delay in completion beyond the appointed time was not due to any negligence on their part, nor did the architects certify that under clause 17 the work could reasonably have been done within that time. Now, according to clause 17, the contract must be completed within a certain time, unless through certain causes set out in the clause, and if due to one of those causes it must be completed within such time as the architects may consider reasonable, and which they in writing should appoint. The plaintiffs now sought to excuse themselves by saying that the architects had not certified that the work could reasonably be completed within the time. The plaintiffs also specially denied that the action was premature, but they did not say why they made that denial.

De Villiers, C.J., said that he would like to hear counsel for the respondents on the question of the alternative order prayed for in the declaration, that the defendant should be compelled to go to arbitration.

Mr. Schreiner admitted that there was only an implication that it was one of the terms of the contract that they should go to arbitration in any disputes or differences that arose. To avoid proximity one did not go and set out a long contract. All that would have been necessary to make the paragraph as to the offer to go to arbitration complete would have been to say "in terms of the contract." He submitted that the defendant must have known that the plaintiffs were there referring to the contract, and that if he did not know then he should have taken an exception to the declaration.

Sir H. Juta having been heard in reply,

De Villiers, C.J.: Several important questions of law have been raised in the course of the argument, but it will be impossible to decide those questions of law upon a technical exception to the plaintiff's declaration. The exception is "that the plaintiff in his declaration does not sue upon a written contract, whereas in the replication he sues upon a contract in writing, purporting to be signed by the plaintiffs only." Now, that in itself does not seem to me a ground of objection, unless there were an inconsistency between the statements in the replication and the statements in the declaration. Well, I do not think there is any inconsistency. What has taken place

is this, that plaintiff, apparently wishing to be as brief as possible, relied upon a contract without stating that it was in writing, and without stating the full terms of the document. I think it would have been better to have referred to the contract, which was in writing, and to have attached it to the declaration. But that was omitted. Then the plea raises several defences, whereupon the plaintiff, seeing that those defences bear upon the exact terms of the contract, for the first time mentions those terms. But it does not appear to me that they were intentionally omitted from the declaration. Certainly it would have been very much better to have inserted them for several reasons. One of them is that it is difficult to see how the second prayer of the declaration could be insisted upon unless there were an allegation that the contract between the parties provided for arbitration, because a person cannot insist upon arbitration unless there were a prior contract, or unless it were part of the contract that the differences arising out of it should be referred to arbitration. Therefore, I quite agree that, with the declaration as it stands, it would have been far better that the written contract should be attached, but I do not see that the exception itself as it stands, is a good one. It says "the contract so put in the replication contains material terms not set out in the declaration as part of the contract, and that the replication contains a cause of action differing from that sued upon in the declaration. The defendant says that the replication is inconsistent with the declaration, and is vague and embarrassing and bad in law." Well, I do not see exactly where it differs. I do not see the inconsistency nor do I see that it is vague and embarrassing and bad in law. But in disallowing the exception I think that the Court should give a direction that the declaration should be amended by referring to the contract, and by attaching it to the declaration, and, seeing that there was this informality in the declaration, this omission from the declaration, although it may not have exactly embarrassed the defendant in the defence, yet I think it was sufficient justification for the defendant raising this point, and, therefore, the question of costs may be reserved, and the costs will be costs in the cause. The order, therefore, will be that the exception is disallowed, but the declaration will be amended by referring therein to the written contract and attaching the same to the declaration, costs to be costs in the cause.

Sir H. Juta said that it might, as a consequence, be necessary to amend the plea.

His Lordship: If there is an amendment in the declaration, you should have leave to amend the plea. Leave

also will be given to defendant to amend the plea.

[Excipient's Attorneys: Van Zyl and Buissinné. Respondents' Attorney: G. Trollip.]

#### *In re* INSOLVENT ESTATE LIEBENSTEIN.

Mr. W. Porter Buchanan moved, as a matter of urgency, for the appointment of Johannes Smuts de Villiers as provisional trustee in the estate of Jacob Liebenstein, of the Paarl, which has been voluntarily sequestrated. Petitioners asked that the provisional trustee should be given powers to sell the stock and collect the rents of the property and outstanding debts.

Order granted as prayed.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

MYERS V. IMPERIAL COLD STORAGE AND SUPPLY CO., LTD. 1906.  
Dec. 7th.

This was an application upon notice calling upon respondents to show cause why a certain interdict restraining John Marcus, auctioneer, from paying over to applicant £85 from the proceeds of a certain sale of furniture at Belle Isle, Norfolk-road, Sea Point, pending an action to be brought by the respondent company, should not be set aside and the respondents be ordered to pay costs.

The interdict was obtained on an *ex parte* application by the Imperial Company, who said that Myers was indebted to them in the sum of £69 14s. 7d., for goods sold and delivered. Myers was at present in Europe, outside the jurisdiction. The house at Belle Isle was occupied by his sister, and Roberts, an official of the company had presented the accounts to her, but she had declined to pay the same. Deponent had been informed, and verily believed, that Myers did not intend to return to this colony and his sister was about to leave this colony for good, when the furniture had been realised.

The affidavit of Mr. Du Toit, attorney, who holds the applicant's power of attor-

ney, stated that L. M. Myers had been living with his family in Manchester, England, during the last four years, that the debt was contracted by one J. M. Myers, and that the applicant had not been a party to it. The meat in respect of which the debt had accrued was supplied to the said J. M. Myers and Miss Myers.

Affidavits on behalf of the respondents stated that the applicant had since the 30th April, 1902, at the address given, been a customer of the company, and had purchased meat from them. Accounts had been made out against the said L. M. Myers, and from time to time had been paid by him. No notice had been given by or on behalf of the present applicant that he was not responsible for the payment of the said accounts or that he had left this colony.

Mr. Gardiner was for applicant, Louis Mark Myers; Mr. Upington was for respondents.

Mr. Gardiner submitted that a *prima facie* case had not been made out for the interdict, and that the order already granted should be set aside.

Without calling upon Mr. Upington,

Hopley, J.: I do not think it is necessary to hear Mr. Upington in this matter. I do not see that the present applicant has made out so strong a case against the present respondent as to justify me in setting aside the interdict which I had granted. It is said that Myers, the applicant, had been away in England for four years, and that, therefore, this debt could not possibly be his, but it seems to me by no means to follow necessarily that that is so. The man goes away to England, apparently or possibly leaving his butcher, with whom he used to have a running account, without any information that he is leaving and leaving in the house, not strangers, but people bearing his own name, his own father and his own sister, and they have been living there since. It is by no means an improbable thing that a man who has a house and leaves his father and sister in that house, should have left his butcher under the impression that he was still to supply meat to the persons he had left there, and not only under the impression, but it is by no means improbable that a man so going away and leaving his account in this way might, in fact, be legally liable for the people who have gone on trading on that account. It may actually have been his intention that his father and sister should be supplied at his cost and expense, for all I know. Under these circumstances, I do not think I ought to set aside the interdict, but, at the same time, it may be that the allegations are absolutely correct, that L. Myers is not at all responsible for this account, and that the Imperial Cold Storage Company ought to have known

that others were now their debtors, and I think, therefore, costs should be costs in the cause.

*Ex parte* NAPIER.

Mr. Van Zyl moved, as a matter of urgency, for an interdict restraining the Municipality of Sea and Green Point from paying over the sum of £100, or any other sum which may be due from them, to one Leopold Edwin Prideaux, pending an action to be brought by petitioner against the said Prideaux to recover an amount of £108 8s. 2d. Petitioner said that Prideaux had held a contract from the Municipality, and had employed him as his works manager at the Lakeside Quarry. There was due certain money for services as works manager, a promissory note, etc. Prideaux had refused to pay the amount due. Mr. Van Zyl said that he knew this application was somewhat unusual, because the petitioner had not obtained judgment against respondent, and it was not alleged that the latter was about to leave the Colony. He cited *Ohlsson's Breweries v. Watson* (12 C.T.R., 21), and urged that there were special circumstances in this case, because the money retained by the Municipality was really earned by Prideaux out of work done by applicant, and that the Court should grant relief.

Hopley, J.: I am afraid I cannot make an order in this case. I can see the hardship of the position; I can see that Mr. Napier has done work under his contract with Mr. Prideaux, and that Mr. Prideaux is actually going to get money for work which is very probably partly the work of Mr. Napier's own hands, and yet that is a position in which a great many creditors are, and unless there be some sort of reason why the man's money should be interdicted beyond that, I do not think the Court should intervene in such a matter. The Courts of Law are open to the applicant in this case, and he can bring his action, and, as a matter of fact, he could have brought his action some time ago, and in such case he might have had an unsatisfied judgment, and on very good grounds he might have applied to have the money interdicted. But he has not taken a timeous course, and now he asks at the last moment that money due from the Municipality to Prideaux should be interdicted, or that Prideaux shall not get it until the applicant shall have time to take his judgment. These applications are constantly coming before the Court, and have been refused from time to time, and I am afraid there is nothing in the present case which removes it from the category of the unsuccessful ones which have been previously refused. There will be no order.



## GENERAL MOTIONS.

*Ex parte* OTTOSTROM. { 1906.  
Dec. 7th.

Dr. Greer moved for leave to petitioner to sue *in forma pauperis*. Petitioner proposed to institute an action against Stephan Bros. to recover £1,000 damages for personal injuries alleged to have been sustained owing to the negligence and carelessness of the defendants' servants. He said that he had been seriously injured by the fall of a derrick at Port Nolloth while he was in lighter No. 3 following his duties during the unloading of the steamship Aurora. He alleged that the derrick had not been properly secured by defendants' servants.

Mr. Burton opposed the application, and read an affidavit by the mate of the Aurora at the time of the accident, in April, 1905, who said that applicant had no business to be standing under the derrick, and that it was solely due to his own carelessness that he was injured.

Dr. Greer read further affidavits to the effect that applicant was coxswain of lighter No. 3, and that he was attending to his duties in a proper manner, and was in his proper place when the accident occurred.

Mr. Burton said he felt that, as the affidavits stood, leave to sue could hardly be opposed.

Leave granted to applicant to sue Stephan Bros. *in forma pauperis*, Dr. Greer to be advocate, and Mr. E. T. Sydney to be attorney of the plaintiff.

MASTER OF SUPREME COURT V. TRUSTEE, INSOLVENT ESTATE NORRIS.

Mr. Howel Jones moved for an order requiring respondent (Joseph B. Walker) to forthwith file liquidation account and the plan of distribution in an insolvent estate of which he is trustee, and to pay costs *de bonis propriis*.

Hopley, J.: What are the facts?

Mr. Jones: The usual notice was served upon the respondent, and he has failed to file the account within six months.

Order granted, respondent to pay costs.

*Ex parte* UNION-CASTLE STEAMSHIP CO.

Dr. Greer moved, on the petition of the Union-Castle Steamship Company, for an extension of the return day of a certain citation and for directions as to service. Petitioners stated that on the 5th September last they obtained leave of the Court to attach the Norwegian barque Cingalese, her cargo and freight, *ad fundandam jurisdictionem*, in

an action about to be instituted by them against the owners of the ship, cargo, and freight, for the recovery of their claim for salvage, and also obtained leave to sue the owners of the ship and cargo by edictal citation, returnable on the 14th November. Petitioners did not immediately sue out the citation; firstly, because they did not know the name of the owner of either the ship or her cargo, and, secondly, because negotiations were entered into by certain agents of the underwriters which led petitioners to believe that a settlement out of court would be arranged. Nothing, however, came out of the negotiations, and beyond an agreement between the underwriters of the ship and cargo and petitioners, that the ship and cargo should be sold and the proceeds of the sale paid into this court, to abide the result of the petitioners' action for salvage. The authority of the Court was thereupon obtained to sell the ship and cargo; the sale was held in due course, and the net proceeds, a sum of £1,701 1s. 8d., had been paid into court to abide result of the action. Petitioners had made every effort to find out the names and addresses of the owners of the ship, but they had not succeeded in obtaining definite information, although they had been informed and believed that the late owner of the Cingalese was H. A. Kvasse, of Christiansand, Norway, and that the late owners of the cargo were Messrs. Phillipi Bros., of Mozambique. One Heinrich Knorr, of East London, merchant, had throughout the negotiations described himself and acted as the representative of the underwriters of the cargo, and Messrs. Dreyfus and Co., of East London, merchants, had in like manner described themselves and acted as agents for the underwriters of the ship. Owing to the delay which had taken place in suing out the citation, it was necessary that the return day should be extended. Petitioners prayed for an order: (a) extending the attachment to the proceeds of the sale of the ship and cargo; (b) extending the return day of citation to the 1st February, 1907; (c) giving instructions as to service or substituted service, or as to publication of citation and other processes in the aforesaid intended action.

Hopley, J., asked whether the agents who had been acting in East London had refused to inform the petitioners as to who were their principals. The Court was in the position of absolutely not knowing whom the petitioners were going to sue.

Dr. Greer: I do not think it is contemplated that we cannot find out. I think the position is that the Union-Castle Co. are under the impression that they will be able to discover the names of the owners of the ship and cargo, but the point on which they would like your lordship's decision



would be as to whether they might not effect service on these people through their admitted agents in East London, viz., Messrs. Knorr and Dreyfus and Co.

[Hopley, J.: But supposing they took up the attitude that they had no right to accept service in actions at law, and so on?]

Dr. Greer: Then, I take it, it would be necessary to come again to the Court, and either have personal service on the owners or substituted service, as the Court might be inclined to allow.

The Court ordered that the proceeds of the sale of the ship and cargo be attached in lieu of the ship and cargo. that the return day be extended to the 28th February, 1907; service may be effected upon Messrs. Knorr and Dreyfus and Co., of East London, respectively, if they are the agents in this country, to accept service on behalf of the owners of the ship and cargo, costs to be costs in the cause.

#### ISAACS V. BEHKOOMIA.

Dr. Greer moved to make absolute certain rule interdicting respondent from removing certain goods stored at 47, William-street, Cape Town, pending the appointment of a trustee in the respondent's estate, should it be surrendered, and authorising the Sheriff to attach the said goods, and hold them, pending further order of Court, and the inclusion of the said goods in the schedules, and handing over of same for the benefit of his creditors, should his estate be surrendered. Service had been effected upon respondent, but he did not appear to show cause against the rule.

[Hopley, J.: Has his estate been sequestrated?]

Dr. Greer said that he had no information on that point.

The rule was extended to the 12th December, and the matter ordered to stand over until the 12th, pending further information, to be placed on affidavit.

#### REX V. ADAMS.

This was an appeal from a judgment of the Resident Magistrate of Stellenbosch, who, sitting at Somerset West, had convicted the appellant of contravening section 2 (sub-section 1) of Act 12, 1888, by wrongfully and unlawfully exposing for sale certain mineral waters to which a false trade description or trade-mark was applied, as to be calculated to deceive. Appellant had been sentenced to pay a fine of £5 or undergo one month's imprisonment.

Mr. J. E. R. de Villiers was for appellant; Mr. Howel Jones said that he appeared for the Crown to submit to

judgment, and that he was not able to support the conviction.

Mr. De Villiers argued that the appellant had not committed any offence with which he could be charged under this section.

Hopley, J.: In this case Mr. Jones, for the Crown, does not support the conviction, and I can quite understand why. The second section of Act 12 of 1888, under which the appellant was prosecuted, states that any person is guilty of an offence who sells or exposes for sale or has in his possession for sale or any purpose of trade or manufacture any goods or things to which any forged trade mark or false trade description is applied. Now, in the present case it seems to me very difficult to see how the facts proved bring the case of the appellant within the mischief aimed at by this section of the Act. It appears that he is a maker of mineral waters under the style or firm of the Crystal Spring Mineral Water Co., and people who deal with him, hotels and others, know perfectly well what they are buying. They are buying the goods manufactured by him, and can it make any difference to them that these goods are placed in bottles which are stamped with the name of some other firm? They cannot be deceived in any way, and it does not seem to me to matter at all whether they get their soda water in Schweppes' or Kops and Rawlings', or anybody else's bottles, provided that they, as purchasers, know perfectly well that they are buying the goods made by the appellant at his Crystal Spring mineral water factory, Somerset West. That was the case here, and it is not alleged that the accused purposely forged or placed a false trade description upon these things for the purpose of deceiving. On the contrary, it is stated in the evidence that, whatever the embossed marks in the glass of the bottles were, he used to send out the bottles with his own labels, such as those produced in evidence, placed on them. The Magistrate makes a point that the label did not completely cover the words which implied that the bottles belonged to somebody else. But surely that does not matter. The label indicated perfectly clearly to the purchaser that he was buying, not the goods of the firms whose letters were embossed on the bottle, but the goods of the firm who had placed a label on it. If they knew that perfectly well, surely they cannot be said to have been in any way deceived, nor can the appellant have contravened the second section of the Act. It seems to me that the Magistrate was misled by the mere fact that the wrong bottles were used, which, apparently is not an unusual thing in the trade. Customers do not return the bottles carefully to the firms who supplied them, and they

get mixed, and in the hurry very frequently the bottles of some rival manufacturer are employed, but so long as customers know perfectly well what they are getting it does not seem that this is punishable under the second section of the Act. The conviction must be quashed.

#### REX V. COHEN.

This was an appeal from a judgment of the Resident Magistrate of Sutherland, who had convicted the appellant (Benjamin Cohen) of a contravention of section 2, Act 28, 1898, by supplying an aboriginal native, to wit, a Hottentot woman, with a bottle of Cape brandy, without production of a permit from her European master or mistress, in breach of the condition endorsed on the licence of appellant's bottle store.

Mr. Burton was for appellant; Mr. Howell Jones was for the Crown.

The ground of the appeal was that the conviction was not supported by the evidence, and that it was not in accordance with true and substantial justice.

Mr. Jones did not support the conviction.

Mr. Burton having been briefly heard in argument,

Hopley, J.: It is clear that this conviction must be quashed. The licence contains a very useful provision that liquor shall not be supplied to aboriginal natives except under certain conditions, amongst others upon presentation of a written order from their employer. In this particular case a servant, known to be working for a woman called Du Plessis, came to the appellant's store and ordered a bottle of brandy verbally for Mrs. Plessis. Now, if the bottle had been delivered to this woman, Truy Percense, carelessly in the store, it might be that although the appellant believed she would carry it to Mrs. Du Plessis, there would be a contravention of the licence in so delivering it to that woman that she could drink it. But the greatest care was exercised, and the liquor was not delivered to this woman at all. It was treated as a sale to Mrs. Plessis, a woman perfectly competent to get liquor. The bottle was not given to Truy Percense, but it was sent to Mrs. Du Plessis, and delivered into her own hand in her house, and, therefore, it was never a sale to this woman, Truy Percense, at all. Mrs. Du Plessis acted a wrong part in that she acted as agent for this woman Percense. It seems that she intended all along that this bottle should be for Truy Percense, and she has been prosecuted and convicted for delivering this bottle to this girl, Truy Percense, but that is not a contravention by the accused of the condition of his licence. The conviction is wrong and must be quashed.

#### REX V. VAN DER VENTER.

#### Stock theft—Act 35 of 1893, Sections 22, 28 and 30.

This was an application for review, under Rule 190, of a decision of the Acting Assistant Magistrate of Gordon, who, sitting at Rietfontein, had convicted appellant of a contravention of section 22, Act 35, 1893.

Van der Venter had been charged in the Court below with the theft of five head of cattle belonging to one H. Matthys, and had been convicted of a contravention of section 22 of Act 35, 1893. The application called on the respondents to show cause why the proceedings and judgment should not be reviewed, set aside, or corrected, on the ground that "the proceedings before the Acting Assistant Resident Magistrate were wholly irregular and contrary to law, in that the said P. G. van der Venter was convicted and sentenced for an offence in respect of which he had not been charged, viz., contravening section 22, Act 35 of 1893."

It appeared that the papers had been sent up for review to Mr. Justice Lange of the High Court, sitting in chambers, but that he had consented to withdraw his certificate in order that the case could be argued before the Supreme Court.

Mr. Gardiner for applicant; Mr. Howel Jones for the Crown.

Mr. Jones said that a report had been received from the Magistrate, in which he said that no summons was issued against the accused, the procedure enjoined by the section 28, Act 35, 1893, having been followed by the police and section 30 by the Court. The Magistrate had said that he was satisfied that the accused's account as to how he came into possession of the stock was correct, but he was also satisfied from his account that he did not take due precautions to ascertain that the man who sold him the stock had the right to sell it.

Mr. Gardiner having been heard in argument,

Hopley, J.: The Stock and Produce Thefts Act, No. 35 of 1893, was intended to stretch the net very wide to reach almost any form of dishonest or lax dealing with stock and produce, and it gives a wide definition to the term "theft," so that there shall be no quibbling or getting out of a wrongful act, because it does not fall specifically under the term "theft" as defined by the common law. The first point in this appeal is as to the definition of "theft" in the second section of the Act. "Theft" is said to embrace, besides actual stealing, (1) receiving with guilty knowledge, (2) attempting to steal, and (3), (which is important in the present case), being or having been in unlawful possession, not being able to give a satisfactory ac-

count of such possession. Now, that, it seems to me, is especially put there in the interpretation clause of the word "theft," in view of the fact that in a subsequent portion of the Act such possession is specially dealt with, and such explanation is demandable under certain circumstances, and I am inclined to think that that portion of the definition of "theft" has reference to the sections 28 and 29. When we come to section 28, which is the important section in the present appeal, it enacts that "if there be reasonable grounds for believing that any person is or has been in unlawful possession of any stock or produce, it shall be competent for any Justice of the Peace, field cornet, landholder, or police constable, to apprehend . . . such person without warrant, and convey him before any Resident Magistrate having jurisdiction, and if it be found that he is or has been in possession of any such stock or produce, and is not able to give a satisfactory account of such possession to such Magistrate, he shall be deemed to be guilty of the crime of theft of stock or produce, and shall thereupon be dealt with as if he had originally been charged with such crime." In this case the man was originally charged with such crime. He was charged, as I find on the original depositions, with the crime of theft of stock, but it seems to me that, if this section makes the non-ability to account satisfactorily for the possession of such stock one of the modes of being convicted of the crime of theft, its effect is not taken away by the fact that the culprit was properly charged in the first instance with the crime of theft as defined in the second section and as explained in this 28th section. But in the 30th section of the Act it is enacted that if when a person is so charged the Court is satisfied that when he received the stock or produce he had no guilty knowledge that it was stolen he may nevertheless, if his explanation of possession is not fully satisfactory, be punished. He may in such case "be dealt with as though he stood charged with a contravention of the 22nd section of this Act." Looking back at that section, we find that a man may be charged with having got possession of stock by way of purchase, bargain, or exchange from any other person, which stock is stolen, without guilty knowledge at the time that it is stolen, but also without having reasonable cause, the proof of which shall lie upon him, for believing at the time of his acquisition that such stock was the property of the person from whom he received it, or that the person was authorised to deal with it," and in case of his failure to produce such proof he shall be deemed to be guilty of contravening this 22nd section and liable

to certain penalties. It seems to me that this is the first course that the Magistrate adopted in this case. The man was charged with theft, and the evidence against him was that he was in possession of stock belonging to somebody else. He was called upon by the Magistrate to give a satisfactory account of his possession, as the Magistrate had right to do under the 28th section. He gave an account, saying that he had purchased, and the Magistrate thereupon found that he was not guilty of actual theft, because he had no guilty knowledge at the time that he received his stock; but the Magistrate acting in accordance with the Act which authorised him to go further held that accused had no reasonable cause for supposing that the person who sold these things to him had any right to deal with them, or was the owner of them, and, therefore, he found the accused guilty, as he might according to the 30th section of the Act. I do not think there is anything irregular in that. I think that the course adopted by the magistrate should be construed in such circumstances by the light of 28th and 29th sections—that is, where a man is called upon to give a satisfactory account of his possession and he fails to do so. In my opinion the judge's certificate was correct in the first instance, and there is no reason for changing the conviction or for granting the present application. The application will be refused and the sentence confirmed.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

FEIN AND COHEN V. COLONIAL GOVERNMENT. 1906.  
Dec. 10th.  
" 17th.

Immigration Act (47 of 1902)—  
Deportation of undesirables  
—Notice of motion for release  
—Contempt of Court—Restoration to jurisdiction.

*The applicants were deported from the Colony as prohibited immigrants under the 8th*

section of Act 47 of 1902. Before they were actually removed, notice was served on the respondent, viz.: the Colonial Secretary and the Immigration Officer, that an application would be made to the Supreme Court for the release of the applicants: but, as the respondents had already made all their arrangements for sending the applicants away by a steamer on the afternoon of that day, they proceeded to carry out their arrangements.

Held on an application that the applicants be restored to the jurisdiction, that as the evidence shewed that the applicants were prohibited immigrants under the Act and were not domiciled in S. Africa, or otherwise exempt from the operation of the Act, the Court could not order their restoration to the Colony.

Held further, on an application that the respondents be punished for contempt of Court, that, as the respondents had not disobeyed any order of the Court and had deported the applicants bona fide in pursuance of arrangements made before they were served with notice of the application for the release of the applicants and not with the ulterior object of preventing the application from being duly heard, they could not be found guilty of contempt of Court.

In this matter there were two notices of motion. In the first, the respondents were called upon to show cause why they should not release and discharge the applicants from custody and detention. In the second the Colonial Secretary and Immigration Officer were called upon to show cause why they should not restore the applicants to this colony and jurisdiction of this Court, and pay the passage incidental to such restoration, and why both or one of them should not be personally committed, fined, or otherwise dealt with, for contempt of the said court and its process, and pay costs of this application.

From the affidavits, it appeared that the applicants, Jack Fein and Rebecca Cohen, of Cape Town, were deported

on an order of the immigration authorities by the steamship Guelph, on the 5th November last, on the ground that they were prohibited immigrants within the meaning of section 2 (sub-section E) of Act 47, of 1902. It was alleged that they had been convicted—Fein of procuring a girl in Natal for the purposes of prostitution and of living on the proceeds of prostitution, and Cohen of soliciting prostitution in Rhodesia. The Immigration Officer (Mr. Cousins) said that both the applicants had admitted these convictions to him, and that he warned them to leave the Colony some time before they were deported, but that they took no steps to do so. The applicants said that they were domiciled in South Africa. Fein said that he was a bookmaker by occupation, and that he had not brought himself within the terms of section 2 of the Act. He was by nationality a Russian. He had been in South Africa seven years, and had intended to acquire a fixed settlement here. Cohen said that she was a Polish Jewess. She was a widow, and came to this country about six years ago, and had resided in the Cape and Bulawayo. She had one child, who was attending a school at Hermanus. In support of the second application, it was alleged that on the day when the applicants were deported, Mr. Brady, their attorney applied to Mr. Broers, A.R.M., for leave to attend on their behalf a certain inquiry which was held prior to their deportation, but that leave was refused. He also said that he gave notice to the Immigration Department and the Colonial Secretary's Department that he was making application for an order to stay the deportation of applicants pending a decision of the Supreme Court, but that this was ignored, and that, notwithstanding this notice, the applicants were deported later in the day and were thus deprived of an opportunity of having their case considered by the Court.

Dr. Greer appeared for applicants; Mr. Howel Jones was for respondents.

Dr. Greer, in support of the second application, submitted that there had clearly been contempt of the process of this Court, and that these people had been removed from the Colony in a high-handed manner without fair warning to them at a time when an appeal to this Court was pending as to whether they should or should not be deported from this colony. There had been warnings given to the applicants, it was true, but no judicial proceedings had been taken, and if the applicants had come to this Court they could only have said that certain statements had been made orally that they would be deported, or that they must leave the Colony by a certain date. On the morning of the 5th November applicants were arrested, they were brought before the A.R.M. of Cape Town, and their attorney asked



for leave to be present at the inquiry, but this was refused, and there was an investigation in camera, a sort of Star Chamber inquiry, and the applicants were detained and were later on deported. He submitted that the one question that had to be decided was that of domicile. There was a *prima facie* case for asserting domicile. Fein had lived in South Africa for seven years, and Cohen had lived here six years. Clearly, the question of domicile was then raised, and that question apparently must have been decided by the Magistrate. Then the legal adviser of these people gave verbal notice to the Immigration Officer, which was not denied, that he intended having recourse to the Supreme Court.

[De Villiers, C.J.: When?]

Dr. Greer: Immediately after the investigation of November 5. They were arrested, tried, and deported all on the same day. Proceeding, counsel pointed out that notice was given of the application to the Immigration Officer and the Colonial Secretary's Department a few hours before the vessel sailed. Both these applicants had *prima facie* a domicile in this country, and were entitled to come to this Court for relief. He cited in *re Willem Kok and Nathaniel Balie* (Buchanan, 1879, 45), and *Sigcau v. the Queen* (12, Juta, 256). He went on to submit that once the question of domicile was raised before the Magistrate his jurisdiction was ousted.

[De Villiers, C.J.: How does it appear that the question of domicile was raised before the Magistrate?]

Dr. Greer: I think it appears from the affidavit of Mr. Cousins.

[De Villiers, C.J.: It is only an inference on your part that, inasmuch as the question of domicile was raised before the Immigration Officer, it must also have been raised before the Magistrate?]

Dr. Greer: I understand from Mr. Cousins's affidavit that the question of domicile was raised. Perhaps I should say that if the question of domicile were raised before the Magistrate, the Magistrate clearly had no jurisdiction (R.M.'s Courts Act, No. 20 of 1856, sec. 8. subsec. 3).

[De Villiers, C.J.: Do you contend that any person who is deported under the Immigration Act may raise the question of domicile and then the Immigration Officer and the Magistrate are impotent to act.]

Dr. Greer: I submit that every person has got the right under the Charter of Justice to appeal to the Supreme Court.

[De Villiers, C.J.: Oh, that is another point. On the question of the Magistrate's jurisdiction, surely he could decide the question of domicile?]

Dr. Greer: This case is complicated by the fact that there was no audience given at all to the legal representative

of the applicant. I submit that where there is a genuine *bona fide* question of domicile raised, that would be sufficient to remove it out of the Magistrate's jurisdiction.

[Hopley, J.: But was his jurisdiction ousted if the Magistrate had come to the conclusion that it was a bogus claim?]

Dr. Greer: The assumption is that it was a *bona fide* claim.

[Hopley, J.: The assumption is rather against you, because the only assumption is that everything was properly done.]

Dr. Greer: Unless it were shown that there were things that were improperly done.

[De Villiers, C.J.: Do you say Mr. Broers refused to allow Mr. Brady to appear before him at the inquiry?]

Dr. Greer: That is the allegation, and it is not denied. Proceeding, counsel said that there was really a more serious question arising in this case, and that was, it was not denied that at the time the respondents, in their official capacity, knew that the legality of their actions was being tested by an application to the Supreme Court they removed the applicants beyond the jurisdiction.

[De Villiers, C.J.: What the respondents say is that all arrangements had been made, that these people knew beforehand that they were going to be removed, and that they took no steps until the arrangements had been made, and the passage had been taken, and what, then, were they to do with these applicants?]

Dr. Greer: As a matter of fact, there was nothing on which the applicants could have come to the Supreme Court.

[Hopley, J.: Why not? Why shouldn't they have come before the 31st October?]

Dr. Greer: How could they have come, my lord?

[Hopley, J.: They could have said that they were threatened with deportation, and that they were domiciled in South Africa.]

Dr. Greer (continuing) cited the case of *Harris v. Colonial Secretary* (22 Sup. Ct. Reps., 378). He also cited *Li Qui Yu v. Superintendent of Labourers* (Transvaal Law Reps., 1906, vol. 2, 181), and submitted that that was sufficient authority for the present application. The ground of the present application was that certain persons, well knowing that the parties were making an application, yet in contempt of the process of this Court, removed the applicants from the jurisdiction. He also cited Tye's case, *Queen v. Barnardo* (23 Q.B.D., 305), and the Gossage's case, *Queen v. Barnardo* (24 Q.B.D., 283).

De Villiers, C.J., asked counsel whether he contended that there would have been contempt of Court in de-



porting the applicants irrespective of the question of whether it were shown whether that deportation was justified or not?

Dr. Greer submitted that under the peculiar circumstances of the case, the Court would find that there had been contempt of the process of the Court. It was, of course, impossible at the present stage to enter into the merits of the case, because the Court had no evidence.

[De Villiers, C.J.: The question is, whether a person, knowing that an application was going to be made, who does that which prevents the application from taking effect, does anything that would be contempt of Court?]

Dr. Greer submitted that this was a case in which the Court would mark its sense of the conduct of the persons concerned in removing the applicants from the jurisdiction.

Mr. Jones said that his case was rendered a good deal simpler by the fact that counsel for applicants did not attempt to set up the position that these persons were not prohibited immigrants.

Dr. Greer (interposing): Oh, yes, I do. I simply did not argue that part of the case, because there are no facts before the Court.

Mr. Jones said that, as to the facts of the case, the applicants had had ample opportunity of being heard. They knew why they were being deported. They knew that they were charged with living on the proceeds of prostitution.

De Villiers, C.J., suggested that counsel should argue the question of the removal of the applicants out of the jurisdiction by the Colonial Secretary's Department, when it was known that they were moving the Supreme Court against their removal.

Mr. Jones: I submit that if they had an action at all it was an action for damages.

[De Villiers, C.J.: But does the question of contempt of Court depend upon whether a person has a good case or not?]

Mr. Jones submitted that it did not; the question of contempt depended upon whether there had been actual contempt of any order of Court. The respondent was called upon to show cause why he should not be committed for contempt of the process of the Court. Where was the process of Court of which contempt had been shown? Was a bare notice a process of Court? At the last moment, just as these people were about to be deported, their attorney came to the Immigration Officer with a bare notice of motion, in which not one single reason was set out as to why it was proposed to ask the Court to restrain the deportation of the applicants. Furthermore, no cause had been shown why the application could not have been brought before the Court on the very

afternoon of the vessel's departure with the applicants. It was said that the Court was engaged with another matter, but that was no reason why this should not have been brought before their lordships as a matter of urgency. As to the Transvaal authority quoted by his learned friend, he (Mr. Jones) confessed that he could not follow Mr. Justice Mason's decision, a decision certainly that was not supported by any of the English cases that had been referred to by his learned friend.

[Hopley, J.: We may order you to bring these people back, and if you fail to do so you will be guilty of contempt.]

That may be, but the Court will not grant such an order in the case of prohibited immigrants.

[Hopley, J.: That is the whole question: they say that they are domiciled here.]

There is no evidence of domicile. A person cannot be domiciled merely in South Africa, he must have a fixed abode. He submitted that there had been no contempt of Court by respondents.

[Hopley, J.: What is it then?]

Mr. Jones: It is an act which a man takes upon his own shoulders, and it would make him liable in damages if it be held that he acted illegally. Counsel proceeded to cite *Rex v. Crystal* (13 "C.T." Reports, 1001) and *Salie and Mahomet v. Colonial Government* (16 C.T.R., 324). He contended that the Court had now sufficient information before it to decide the question of domicile, and that the facts showed that the applicants were not domiciled in this country. If they were not domiciled, then they were clearly prohibited immigrants. These people were aliens, prohibited from entering the country, and as such they could not invoke the aid of the Court in deciding a question as to whether the Colonial Secretary had been guilty of contempt of court. No alien can claim as a matter of right to enter a foreign country. *Chung Tien Toy's case* (Eng. Ap. Court 1891-272).

Dr. Greer, in reply, submitted that the process of the Court was initiated by the notice of motion which was given. It was not quite correct to say that the notice was served at the last minute, for there was a considerable interval before the vessel left. The cases cited by his hon. friend did not touch the point in the present matter because there the Court had all the facts before it and itself decided that the applicants were not domiciled in South Africa.

*Cur. Adv. Vult.*

*Postea* (December 17th).

De Villiers, C.J.: This is an application for an order on the

Colonial Secretary and the Immigration Officer to restore the applicants, Fein and Cohen, to the jurisdiction of this Court, and for an order to attach, fine, or otherwise punish the respondents for contempt of this Court or of its process. The first applicant is a Russian who arrived in this colony about seven years ago and has lived in South Africa ever since. During part of the time he lived in Johannesburg and also in Durban, Natal. At the latter place he seems to have been convicted of procuring a girl for prostitution, and once of having lived on the earnings of prostitution. After serving a period of imprisonment he was deported from Natal, and for three years he has lived in Cape Town, where he carried on the occupation of a professional bookmaker. According to the statement of Head Constable Grant, the applicant Fein has been the habitual associate of persons of ill-repute, pimps, and prostitutes, and is known to the police as a man of most undesirable character. On the 2nd of November he was summoned to appear before the second respondent for the purpose of an inquiry as to the circumstances of his re-entering into this Colony. He claimed exemption from the operation of the Act on the ground that he was domiciled in South Africa, but he was warned that as he had entered the Colony in violation of the Immigration Act it would be necessary for him to leave. This he declined to do, and he was accordingly warned that if still in Cape Town at 9 o'clock on the morning of the 5th November, proceedings would be taken under the provisions of the Act to deport him by the first available boat. Being still in Cape Town on the morning of the 5th, Fein was arrested and charged before the Resident Magistrate of Cape Town in terms of Regulation 23, framed under the provisions of the Act, as a prohibited immigrant, and ordered to be detained pending deportation. It is not clear at what precise time he appeared before the Magistrate, but it was probably about noon. Mr. Brady states that he applied to the Magistrate for permission to be present at the investigation, but was refused, that the investigation took place in his absence, and that Fein was removed in custody to Roeland-street gaol. Mr. Brady's clerk states that at 12.50 p.m. he served the second respondent with a notice that the Court would be applied to on the following day for the release of Fein, that the second respondent refused to accept notice, and that he (the clerk) thereupon placed the notice on the desk in front of the second respondent. The clerk further states that at 2 p.m. he applied at the Colonial Secretary's office and showed the notice to the assistant Under-Colonial Secretary, who said it was useless to serve the notice on him, and that it should be taken to the Immigration Officer. According to the

statement of the Immigration Officer, when the Magistrate had ordered the detention of the applicant all arrangements were made for securing a passage for him to England, and a ticket at the cost of the Government was taken by the S.S. Guelph, due to sail that afternoon, and the man was placed on board and removed from the Colony. In all substantial respects the second applicant, Cohen, stands on the same footing as the first applicant. She was a Pole, and arrived in the Colony about six years ago, and has, during the interval, lived at Bulawayo, where she seems to have earned a living as a prostitute until she was warned by the police in Rhodesia to leave that territory, which she did. After her return to this colony she also was warned by the immigration officer as far back as October 11 that she must leave the Colony before the 31st. On the latter date she appeared before him and stated that she declined to leave, and she was finally warned that if she did not leave before the Monday following she would be deported. On that day she was deported under the same circumstances as have been mentioned in regard to Fein.

I am bound to say at the outset that it is difficult to understand upon what ground Mr. Broers, the Magistrate of Cape Town, refused to permit the applicant's attorney to be present at the inquiry. The 8th section of the Immigration Act (No. 47 of 1902) enacts that "any person immigrating into this Colony by land or sea in violation of the provisions of this Act shall be liable to be removed at any time from within the limits of the Colony, and be kept in such custody as may by regulation be prescribed pending such removal." Among the regulations framed under the Act, the 23rd reads as follows: "In the event of a prohibited immigrant having entered this Colony in contravention of the Act, it shall be lawful, after due inquiry into the facts by the Magistrate of the district . . . to order such immigrant to be detained and accommodated in such place as the Minister may from time to time direct, pending the removal of such immigrant." The framer of this regulation could surely not have intended that the inquiry shall be a secret one, from which even the unfortunate immigrant's legal adviser should be excluded. At such an inquiry questions of the greatest difficulty and importance may have to be decided, and outcasts of society as people like the applicants may be, they were entitled to claim that their legal advisers be allowed to assist them. They seem to have raised the question that they were domiciled in South Africa, and that consequently they were excluded by section 3, sub-section (f) from the operation of the Act. Presumably evidence must have been taken on this point at the inquiry, and the Magistrate

should have welcomed rather than refused legal assistance in such a matter. The respondents, however, are not responsible for the Magistrate's mode of conducting his inquiry, and I proceed to consider whether, in case the motion for the release of the applicants had been heard before they were deported, the Court would have been justified in interfering.

For the purpose of this application every facility has been furnished by this Court to the applicant's legal adviser to bring forward every fact that might bear in their favour. They have been deported, but they have left affidavits behind stating the circumstances upon which they relied to establish their South African domicile, and they had full opportunity before they left to instruct their legal adviser as to the further evidence available here in support of their claim to such a domicile. The question to be decided is whether at the time when they immigrated into this colony, about three years ago, they were domiciled in South Africa, and the evidence appears to me conclusive that they were not. It follows that, as they were, under the 8th section of the Act, liable to be removed from within the limits of the Colony, the Court would not, if the case had been heard before their arrival, have prohibited such removal.

It follows further, that the Court cannot now accede to the application for an order that the applicants be restored to the jurisdiction of this Court. It has been contended, however, that inasmuch as the respondents removed the applicants after they had notice that an application for the release of the applicants would be made, they should now be compelled to restore the applicants to the jurisdiction. In support of this contention the case of *Barnardo v. Ford* (L.R.A.C., 1892, p. 326) was relied upon, but there the only point decided was that a parent whose child had been removed out of the jurisdiction by the head of an institution in which the child had been placed by the parent, was entitled to a writ of *habeas corpus* directed to such head, on the ground that the parent was entitled to require a return to the writ in order that the facts might be fully investigated. It was made clear that the writ should not be used as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it. In the present case, the applicants would presumably be quite willing to return if the respondents are ordered to restore them to the jurisdiction, but no good purpose would be served by such a course, because the result would be that a fresh order for their deportation would be made after their return.

It has been urged, however, that even if the respondents are not ordered to

restore the applicants, the Court should punish them for their alleged contempt of Court. It does not appear from the affidavits what part the Colonial Secretary took in the matter, but I am bound to say that the Immigration Officer would have been better advised if he had shown greater readiness to assist the applicants in bringing the matter before the Court, and had even postponed the removal of the applicants until the Court had been appealed to. It was no light matter for them, however undesirable denizens they may have been, to be hurried out of the Colony at such short notice. The second respondent stated in one of his affidavits that no reasons for appeal were disclosed, and no affidavits were attached to the notice served upon him, but in another affidavit he admitted that the applicants had themselves, when they appeared before him, claimed exemption from the operation of the Act on the ground that they were domiciled in South Africa. This was not a wholly frivolous claim, and the second respondent certainly sailed perilously close to the wind in the course he took, but was he guilty of contempt of court? That question must be decided under our own law, and not, as has been suggested, under the law of England. It is true that by the second section of the Charter of Justice this court was constituted a Court of Record, and that, according to the decision of the Privy Council, in *McDermott v. Judges of British Guiana* (L.R., 2 P.C. 341), such a court has power to commit for contempt without any appeal to the Privy Council, but it does not follow that the Charter of Justice introduced the whole of the English law relating to contempt of court into this colony. In the decision of the question whether, in any particular case, there has been a contempt, this court should be guided by well-established principles of our own law. It is surprising how little information is to be found in the text-books as to the Dutch practice in cases of contempt. Voet (5.1.2) mentions the power of a Judge to punish for injury done to him in his judicial capacity, quite incidentally, and as an exception to the general rule that no one should be a Judge in his own cause. "It is not," he said, "unjust for a Judge, by the imposition of a fine, to punish those who do not scruple by word or deed to inflict an injury on him as Judge, and while discharging his duty as such, provided only the case be treated as one for inflicting punishment in the interest of the public, and not for the benefit of the injured Judge." In another passage, Voet (2.2.3) points out how necessary it is for the due administration of justice that the decrees of a court of competent jurisdiction should be implicitly obeyed, and he adds that even where the Judge makes an unjust decree it must be submitted

to. Again, in his title on the crime of *falsum* (Voet, 48.10.4), he mentions, as an instance of such a crime, a case in which a person, *dolo malo*, steals away in order to evade process compelling him to give evidence in a court of law. The principle underlying these and other statements of the law made by Voet, is this—that the public interest requires that no one shall be allowed with impunity to wilfully impede or obstruct or otherwise interfere with the due course of justice, or to bring the administration of justice into contempt. There is no difficulty in applying this principle where there is a direct interference with the course of justice, as where a Judge is abused or obstructed in open court, or where his decree is disobeyed. In such cases it is of the very nature of the act that the offender must have intended the consequences of his act, and he cannot be heard to say that he did not wilfully impede the administration of justice, or bring it into contempt. Where, however, the alleged interference is of a more indirect nature, it must often become necessary to inquire into the intentions of the person charged with the offence. In the case, for instance, of *Queen v. Foye and Curlin* (2 Buch, A.C., p. 121), where the appellants had been convicted of the offence of defeating and obstructing the due course of justice, the Court of Appeal held that it was an indictable offence, although it might also be summarily punished as contempt of court, and that in order to support the conviction it must be shown not only that the necessary consequence of the appellant's acts was to prevent the due administration of justice, but also that he committed those acts knowingly and wilfully. The indictment in that case stated that one Eatwell had been duly summoned before the Special Court on a criminal charge, that one Jonas, a detective was a necessary and material witness for the Crown, and that the appellants, knowing that he was such a necessary and material witness, and was kept in the charge of the detective department did wrongfully, unlawfully, and with intent to defeat and obstruct the course of justice, entice the said Jonas away from Kimberley and did prevent him from appearing to give his evidence before the Court. Upon the evidence the Court held that the facts charged in the indictment had been proved, and consequently the Court had no difficulty in dismissing the appeal. The ground of the appeal was that the indictment did not allege that Jonas had been subpoenaed to give evidence, but seeing that the facts showed that the appellants had by their conduct enabled Jonas to evade the service of a subpoena, the non-service thereof could really not affect the decision. But supposing it had been proved in that case that before it was known to

the appellants that Jonas would be required as a witness, they had engaged him as a servant to accompany them on a journey, and that after this fact became known to them they had called upon him to fulfil his engagement, not because they wished to obstruct the course of justice, but because they required Jonas on their journey, no jury could have convicted them, and in case of a conviction no Court would have supported the verdict. There would have been no proof of the *dolus malus* which Voet considers essential to convict a person who steals away from the jurisdiction in order to evade a subpoena. It might have been different if a subpoena had to the knowledge of the appellants, been actually served on the witness. A person who, after having a subpoena served on him and reasonable expenses tendered to him, fails, without any lawful impediment, to appear, is liable under our Rules of Court to be attached, fined, and imprisoned for his contempt of the process of the Court. His failure, like any other disobedience of an order of Court, is in itself a contempt, and it may well be that a person who, knowing that a witness had been subpoenaed, persuades him to fulfil a prior engagement, renders himself equally liable to punishment. But there is no necessary contempt in inducing a witness who has not been subpoenaed to fill an engagement which may prevent him from attending as a witness in case he should be subpoenaed, and such conduct could only become a contempt if it were manifest that there was an ulterior object, namely, to obstruct the due course of justice. In the present case I am satisfied that the respondents had made their arrangements for deporting the applicants before the notice of motion was served on either of them. I quite agree with the applicants' counsel that the legality or otherwise of the deportation cannot affect the question whether or not the respondents were guilty of a contempt of Court. They honestly believed that they were acting within their powers, they disobeyed no order of the Court, and, although they deported the applicants after receiving notice of the motion, they did so *bona fide* in pursuance of arrangements previously made, and not with the ulterior object of preventing the application from being duly heard. But for the Transvaal case, therefore, which has been cited, I would have had no doubt that the respondents are not liable to be punished for contempt of Court. The case I refer to is that of *Li Kui Yu v. Superintendent of Labourers* (Transvaal L.R. for 1906, p. 181), and I am bound to say that, if the remarks of the learned Judge (Mason, J.) have been correctly reported, the case is a direct authority in favour of the applicants. The applicant there was a Chinaman, who had been illegally deported, but the illegal-



ity of the deportation, although it was the ground for ordering him to be restored to the jurisdiction, appears not to have been the ground on which Mr. Jamieson, the respondent, was found guilty of contempt of Court, and fined accordingly. The ground on which he was found guilty was that, knowing or having reason to know that an application would be made for the release of the Chinaman, he carried out his intention of deporting the Chinaman before the Court could be approached. In the course of his judgment the learned Judge said: "I do feel with reference to this matter that Mr. Jamieson ought to have known that an application was intended to be made to this Court for the purpose of requiring the production of this coolie. His actions have all the effect of defeating any such application, and I think that he did wrong in sending the coolie out of the Colony with a notice like that hanging over his head before he had given the solicitor specific intimation that he was going to repatriate the man, and give him every opportunity of applying to the Court." Further on the learned Judge said: "I propose to act in this case upon those English authorities which were quoted by Mr. Smuts, and which I think represent in substance our own law. Perhaps our own law may not go so far as the English authorities, but I certainly think it goes to this extent, that where a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose—where he has that knowledge or that suspicion, then, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind." If by this was meant, as it apparently was, that the offender would be punished for contempt of Court, the proposition is certainly a very startling one. Take the case of a person who has sold a certain property, and has arranged with the purchaser to give transfer on a certain day at noon. A third party serves a notice on the seller on the morning of that day that he intends to apply to the Court on the following day for an interdict to restrain the transfer to the purchaser. According to the learned Judge it would be a punishable offence for the seller to give transfer at the time fixed, because he has taken action before the Court could be approached. The practical result would be that every notice of an intention to apply for an interdict would really operate as an interdict, because, with the danger of punishment hanging over his head, no person could venture to take action before the application could be heard. Nay, more, if the seller has a suspicion that an application will be made, or is being

made, he must stay his hand lest he should do any act which might subsequently interfere with the power of the Court to prevent that act. The liberty of the subject, of course, stands on a higher plane, but the principle is the same. Where an order is made for the production of a person who is in custody, that order must, of course, be obeyed at all cost, but, until the order is made, the rights and powers of those in whose custody he is cannot be limited by an order which has not yet been made, although it may thereafter be made. If thereof the custodians in the exercise of the rights and powers which they believe themselves to possess, part with the custody, not with the object of defeating an application which they know will be made, but with the *bona fide* object of carrying out a resolution which they had formed before they acquired such knowledge, I cannot agree in the view that they are guilty of contempt. The only authorities cited before the learned Judge, according to the report, were the cases I have already mentioned, and two other Barnardo cases, previously decided by the Court of Appeal. The majority of the Lords who heard the case of *Barnardo v. Ford* did not accept the views which had prevailed in the Court of Appeal, and the only Lord who dealt with the question of contempt in the House of Lords was Lord Watson, and I presume, therefore, that the learned Judge in the Transvaal Court referred to his *dicta* as representing in substance our own law. "A man," said Lord Watson, "who parts with the custody of a child after he is served with the process of the Court, or who evades service in order that he may get rid of such custody, commits a plain contempt for which he is answerable to the Court." The process of the Court here referred to is the writ of *habeas corpus*, and of course a person who parts with the custody after being served with such a writ, or who, knowing that service will be made, evades it with the *mala fide* object of getting rid of such custody is guilty either of direct disobedience or of such a degree of *dolus malus* as would justify his committal. Further on, however, Lord Watson says: "I think it right to add that, in my opinion, no contempt is committed by a person who, lawfully or unlawfully, absolutely gives up the custody and control of a child from the mere apprehension that by retaining it he may become liable to a writ of *habeas corpus*, and without any notice that such a proceeding will be taken." I presume that the inference made from this passage was that with notice that such a proceeding will be taken the person giving up the custody would be guilty of contempt, but it is not a necessary inference, and it is quite consistent with the whole context that the learned Lord would



not have held conduct like that of the respondents to amount to a contempt of Court. Whether this be so or not, the present case must be decided under the law of this colony, and no Roman Dutch law authority or decided case in any South African court was quoted from the Bar, or by the learned Judge in the Transvaal case in support of the conclusions arrived at by him. There was no disobedience of any order of the Court, but, on the contrary, the direction of the Court that the Chinaman must be restored to the jurisdiction was implicitly obeyed. On the return of the rule the learned Judge remarked that he accepted Mr. Jamieson's statement that in this matter he acted *bona fide*—that is, that there was no malicious desire of injuring the Chinaman and there was no intentional desire to show disrespect to the Court. Notwithstanding this finding, the learned Judge found Mr. Jamieson guilty of contempt of Court, and sentenced him to the payment of a fine. I regret to say that, much as I desire to maintain the uniformity of law and practice in South Africa, I cannot agree with the learned Judge that in a case of a charge of purely constructive contempt of Court, the *bona fides* of the accused is not a good defence to the charge. No question of *bona fides* can arise where there is an act of wilful disobedience of an actual order of the Court, or where there is a direct insult to a Judge while acting in his judicial capacity, but where it is attempted to construe an act which, on the face of it, shows no disrespect to the Court, into a contempt of Court, it appears to me that the *mala fides* of the alleged offender is an essential ingredient of the offence. I quite agree with the learned judge that it is in the interest of the public that every one should have free access to the Courts of Justice, and that the authority of the Court should be fully maintained, but it is equally in the interest of the public that judges themselves should not exceed the powers entrusted to them, by fining or imprisoning people without appeal or review, and without the intervention of a jury or other usual procedure, except in those rare cases in which the due administration of justice absolutely requires such an abnormal mode of procedure. Under the Roman-Dutch system the powers of judges in this respect were always carefully limited, as would clearly appear from the excellent summary by Melius de Villiers in his Treatise on Injuries (p. 166), and, although in the process of time those powers may have been somewhat enlarged in this colony, I am not prepared by one leap to adopt a doctrine of constructive contempt which is neither countenanced by our law nor required by the necessities of the case. If the deportation of the applicants had

been found to be illegal, the Court would certainly have directed the respondents to facilitate their return, and if they refused, there would have been a clear case of punishable disobedience. If, on the other hand, in consequence of such order of Court, the applicants were restored, they would have been entitled to full compensation for the injury done to them. In this way the authority of the law would be vindicated, and the respondents made to suffer, not for a supposed contempt of Court, but for the illegality committed by them in deporting the applicants. As it is, however, the Court finds, on the evidence, that the deportation was not illegal, and consequently there will be no order either for the restoration of the applicants or for the punishment of the respondents. There will be no order as to costs.

Hopley, J., concurred.

[Appellants' Attorney: C. Brady.]

## APPEALS.

SMIT V. PHILLIP. { 1906.  
Dec. 10th.  
„ 20th.

Magistrate's Court—Civil jurisdiction—Liquid and illiquid claims in the same action.

*In an action in a Magistrate's Court for damages for £20, the defendant filed a counterclaim for £4 10s. and another counterclaim for £20, both being illiquid. The Magistrate, after dismissing the counter-claims, on the ground of want of jurisdiction, gave judgment for the plaintiff and decided that the second counterclaim could not be sustained on the merits.*

*Held, that a plaintiff may in the same action include liquid and illiquid claims, provided that the total sum of the liquid claims does not exceed the Magistrate's jurisdiction in liquid cases and the total sum of the illiquid claims does not exceed his jurisdiction in illiquid cases.*

*Held further, that as the total sum of the illiquid counterclaims in this case exceeded £20, the Magistrate would not have had jurisdiction if the*

*defendant had been the original plaintiff.*

*Held further, that it would have been competent for the Magistrate to allow the defendant to elect to proceed on one of the counter-claims, and that as he had given a decision on the second counterclaim after dismissing both counter-claims and without hearing the defendant's evidence thereon, the case should be remitted for the purpose of a decision, after due evidence, on the second counter-claim.*

This was an appeal from a judgment of the Resident Magistrate of Prince Albert in an action for damages brought against the appellant by respondent.

Respondent had sued appellant in the Court for below for £20 damages alleged to have been sustained by reason of the defendant's failure to supply plaintiff with water for domestic purposes, though repeatedly requested so to do by the plaintiff, on the Market-square, Gilletville, in the division of Prince Albert. Defendant in reconvention claimed £4 10s., charges for water alleged to have been supplied, and also claimed £20 damages by reason of the defendant in reconvention having sunk a cess-pool on the ground. At the hearing, exception was taken by defendant to the summons on the ground that it was vague, by reason of no copy of the conditions of sale on which the alleged claim was based having been served with the summons and supplied to the defendant. A further exception was taken by the defendant that the matter was beyond the Magistrate's jurisdiction, in that future rights were involved.

The Magistrate had found for plaintiff for £2 damages and costs. He refused to hear either of the counter-claims, and said that there was in point of fact only one claim for £24 10s., and that it had been collusively split into two claims in order to bring the matter within the jurisdiction of the Court. As to the exceptions raised by defendant, he overruled the first since the section of the conditions of sale defendant was alleged to have failed in was set forth in the summons. The second exception was, he held, entirely without ground. The alleged breach by the plaintiff of the 18th section of the conditions was proved at the trial to have been bogus. The 12th section of the conditions made it compulsory upon the defendant to lay water for domestic purposes on the Market-square. This he had failed to do.

Mr. J. E. R. De Villiers for appellant. Dr. Greer for respondent.

Mr. De Villiers submitted that the Magistrate was wrong in upholding plaintiff's exception, as it was clear law that defendant could counter-claim for the two sums of £4 10s. and £20 in one summons. In support, he cited the cases of *Van der Heever v. Van Rooyen* (11 J., 51), *Dale v. Windship* (9 J., 509), and *Joffe v. Fraser* (T.S.C., 1903, p. 104). The Magistrate could not dismiss both counter-claims. He had to try at least one of them. The case should be remitted to the Magistrate to try the counter-claims on their merits.

Dr. Greer said that with regard to the Transvaal case cited, the jurisdiction of the Magistrate differed in the Transvaal from what it was here. In the case of *Dale v. Windship*, the counter-claims both arose out of the same cause of action, but here the counter-claims arose from different causes. He cited Joubert and Jones's Book on the Resident Magistrates' Court Act (p. 24).

*Cur. Adv. Vult.*

*Postea* (December 20th).

De Villiers, C.J.: This is an appeal from a judgment of the Resident Magistrate in an action for £20 damages, alleged to have been sustained by the plaintiff by reason of the defendant's failure to furnish a supply of water in the Market-square of Gilletville, to which the plaintiff, as an erf-holder, claims to be entitled under certain conditions of sale. Two exceptions were taken to the summons, but they were overruled, and there is no appeal against this part of the judgment. The defendant filed a counter-claim for £4 10s. for water rates, alleged to be due to him under the conditions of sale, and also a counter-claim for £20 as and for damages alleged to have been sustained by the defendant by reason of the plaintiff having sunk a cesspool on his erf in contravention of one of the conditions of sale. The plaintiff excepted to the counter-claim as being beyond the jurisdiction of the Court, and the Magistrate allowed the exception. Against this judgment the defendant has appealed. In support of the appeal the defendant's counsel has mainly relied upon the decision of this Court in *Van der Heever v. Van Rooyen* (11 S.C.C., 51), the contention being that the effect of that decision would be to allow the defendant if he had been the plaintiff to join in the same action two separate demands, even if they exceed the sum of £20, provided only that there has been no improper splitting of claims. I have read and re-read the judgment in that case, and I confess I am unable to follow the reasoning which leads to such a conclusion. The summons in that case was on a promissory note for £174, in respect of which the Magistrate would have jurisdiction, but inasmuch as there was a further disputed account claimed

by the plaintiff, but not in that summons, the defendant objected that there had been an improper splitting of claims. The Court held on appeal that as the two claims were based on different causes of action there was no objection to the plaintiff proceeding separately on each. In the course of my judgment I said: "No Court would allow a plaintiff his costs in two actions if he could have the disputes settled in one action, and the Supreme Court has sometimes exercised the power of compelling a plaintiff to amalgamate different suits against the same defendants, although arising out of different causes of action. It does not follow that the bringing of different suits in a Magistrate's Court against the same defendant in respect of separate causes of action can be objected to on the ground of want of jurisdiction." My language may perhaps have been somewhat too general in its terms, but I certainly did not mean to express the opinion that a plaintiff can, in a Magistrate's Court, include in one and the same action two or more liquid claims, which, taken together, would exceed £250 or two or more illiquid claims, other than for the price of goods sold and delivered, which, taken together, would exceed £20. Under the Magistrates' Courts' Acts these Courts have civil jurisdiction in three classes of cases, viz., in cases founded on liquid documents, in which the sum demanded does not exceed £250, in illiquid cases in which the debt or damages demanded does not exceed £20 (with an exception in the case of claims for the price of goods sold, where the limit is £100), and in cases of ejectment. There can be no objection to cases falling under these three classes being included in the same action, provided only that in none of these classes the jurisdiction be exceeded. Let me illustrate my meaning by a few examples. A is the holder of two overdue promissory notes made by B for £125, he has also a claim for £30 against B for goods sold, a claim for £30 for damages sustained, and a claim for ejectment. There is no objection to A suing B in the same action for the amount of the promissory notes, for the price of the goods, and for ejectment, but if A were to include in the action the claim for damages, the Magistrate would have no jurisdiction, because in illiquid cases, except for the recovery of the price of goods, the jurisdiction is limited to £20. In the case of *Falconer v. Behr and Co.* (11 S.C.C. 48), it was held that a seller of goods is not entitled to include a percentage chargeable against the defendant for collection in an action for the price of the goods, if the amount demanded exceeds £20. The reason for this decision is obvious. The jurisdiction of Magistrates' Courts in illiquid cases is limited to £20, and a plaintiff cannot take advantage of the circumstance that he is

suing for the price of goods by adding another illiquid claim, forming no part of the price of goods, and thus increasing his claim in a case which is not wholly for the price of goods to over £20. It must be observed that no exception was taken in that case before the Magistrate to his jurisdiction. It was only on appeal that the objection was raised, and as the Court could not affirm a judgment in excess of the Magistrate's jurisdiction, the only course left was, in accordance with previous decisions, to affirm the judgment to the extent of the jurisdiction. As to the sum in excess of the jurisdiction, the Court gave absolution from the instance, so as to enable the plaintiff to proceed afresh for that amount. The case is certainly no authority for the view—as is suggested in Sir H. Juta's *Selection of Leading Cases* (p. 243)—that an exception to his jurisdiction could not have been validly taken before the Magistrate. All the case decides is that, as no such exception was taken, the Supreme Court would not set aside the judgment altogether, but, as the two claims together exceeded the jurisdiction in illiquid cases, the Court would affirm the judgment to the extent of the jurisdiction, and give absolution for the balance. It would have been different if the additional claim had also been for the price of goods, for then the Magistrate would have had jurisdiction up to £100. In the case of *Joffe v. Fraser* (T.S.C. for 1903, 104), Mr. Justice Solomon correctly pointed out the distinction between that case and the case of *Falconer v. Behr*. In the Transvaal case several claims had been joined in the same action in a Magistrate's Court, but the liquid claims, taken together, did not exceed the jurisdiction in liquid cases, nor did the illiquid claims, taken together, exceed the jurisdiction in illiquid cases, and it was held on appeal that the Court below had properly overruled an exception to its jurisdiction. In the present case both the counter-claims are illiquid, and as the total sum claimed is in excess of £20, the Magistrate would have had no jurisdiction to entertain them both if the defendant had been the original plaintiff.

Different considerations, however, arise where a defendant, having been brought into court, seeks to set up counter-claims to the plaintiff's demand. As defendant, he may make an unliquidated demand in excess of £20, in case the plaintiff's action, being for the price of goods sold or on a liquid document, is in excess of that sum. Where the plaintiff's claim is for not more than £20, the defendant cannot himself make an unliquidated claim for more; but if he does so upon different causes of action, the practice has been not to dismiss his claims altogether, but to allow him to proceed upon one or other of

them. Thus, in the case of *Dale v. Winship* (9 S.C.C., 509), the defendant being sued for rent, filed a counterclaim for £20, and afterwards seems to have stated in his plea that he was claiming a further sum of £100 as damages. On the ground that these counterclaims existed, the Magistrate held that he had no jurisdiction, but as both of them were for unliquidated demands, he was not precluded from hearing the plaintiff's case. There is, however, a degree of inconvenience, if not of injustice, in giving judgment for the plaintiff, and ignoring altogether a defendant's claim which is within the jurisdiction, even if it be unliquidated. Accordingly, as the defendant elected to proceed on the first counterclaim, the Court remitted the case to the Magistrate with the direction that he should try the claim in convention as well as the first counterclaim. In the present case, although the Magistrate gave no choice to the defendant to proceed with one or the other counterclaim and dismissed both of them, he proceeded to take evidence on the second counterclaim, and decided that it was a bogus claim. This was most unfair to the defendant, who was precluded from giving evidence on the counter-claims because they had been dismissed before he gave his evidence. The only course therefore for this Court will be to remit the case to the Court below, with a direction to the Court to try the counter-claim for £20, and hear the evidence in support thereof. The question as to costs in this Court, and as to all the costs in the Court below, is also remitted to the Court below.

Hopley, J.: I have had an opportunity of seeing the Chief Justice's judgment, and I concur.

[Appellant's Attorneys: Dempers and Van Ryneveld. Respondent's Attorneys: C. and A. Friedlander.]

#### DE VILLIERS V. MOLLENDORF.

Acknowledgment of debt—Promissory note—Exception—Misdescription.

*The plaintiff sued the defendant in a Magistrate's Court for £37, said to be owing "by virtue of a certain acknowledgment of debt or promise to pay." The document put in was, in effect, a promissory note, and the exception was taken that "the plaintiff was not entitled to succeed, as the document had not been described in the summons to be a promissory note."*

*Held on appeal, that the description in the summons was sufficient and that there was no valid ground for the exception.*

This was an appeal from a judgment of the Resident Magistrate of Prince Albert in an action brought by appellant against respondent to recover a sum of £37, with interest.

The summons called upon defendant in the Court below to show cause why he should not pay plaintiff £37, with interest from the 17th January, 1903, which the said plaintiff complained that defendant owed upon and by virtue of certain acknowledgment of debt or promise to pay, signed by the defendant on the 17th January, 1903, for the said sum, of which document the plaintiff was the legal holder. Defendant excepted to the summons that, firstly, the promissory note had not been stamped as by law required, and, secondly, that the action was wrongfully brought, the document sued upon being a promissory note and not, as stated, an acknowledgment of debt, or promissory note. The second exception was sustained with costs, the Magistrate holding that the plaintiff had sued upon a promissory note and that the action should have been founded upon a promissory note, and not an acknowledgment of debt, or promise to pay.

Dr. Greer was for appellant, D. D. de Villiers; Mr. Sutton was for respondent, J. W. Mollendorf.

Mr. Sutton submitted that the exception was good, seeing that the plaintiff had not called the document by its right name, and that he had not applied for an amendment to the summons. He also contended that the document should have been stamped at the time when the note was made, and that it was not sufficient that it should be stamped subsequently. Plaintiff had made a mistake in his summons, and if he wanted to proceed with his action he must proceed anew.

Without calling upon Dr. Greer,

De Villiers, C.J.: The plaintiff sued the defendant in the court below for the sum of £37, which he complained was owing to him upon and by virtue of a certain acknowledgment of debt or promise to pay, signed by the said defendant to the said plaintiff at, etc. The document was put in, and it certainly is a promissory note. There is a promise to pay on the part of the defendant to the plaintiff, and if the Magistrate had based his judgment upon the fact that this note was not stamped—well, different considerations would have arisen. But the Magistrate upheld the exception, not that it was not stamped, but the exception that it was a promissory note, and, therefore, the plain-



tiff cannot sue, because he had stated in the summons that it was an acknowledgment of debt or promise to pay. It is certainly an acknowledgment of debt, and because the summons fails to state that it is also a promissory note, therefore the plaintiff was found not entitled to recover the amount due to him. As to the question of the stamp, that is a different question. It would probably require a stamp, and it would not be admitted as evidence unless it were stamped, but it had a stamp placed upon it at the time when it was produced, and it seems to have been admitted as evidence. The whole argument proceeded on the assumption that the document which was before the Court had been duly admitted as evidence. I think this exception, which is really only a quibble, ought not to have been allowed, and the Court will allow the appeal and enter judgment for the plaintiff for the amount claimed, with costs in this court and the court below.

Mr. Sutton applied for the case to be remitted to the Magistrate, to be determined on the merits. He said that his client had not pleaded to the claim, and it was possible that he had a good defence.

De Villiers, C.J.: It seems a pity that there should be further expense, but I see there has been no plea. Under these circumstances, I think it is better to remit the case. The appeal will be allowed, with costs, in this court and the court below, and the case will be remitted to the court below to be tried on the merits.

*Ex parte* LIPSCHITZ AND ( 1906.  
TOOCH. ) Dec. 10th.

Lease—Transfer of property—  
Interdict.

*The applicant, who stated that he had hired certain property from the respondent at £1 per annum for 20 years, applied for an interdict to restrain the transfer of the property to a purchaser who was not a party to the application.*

*Held, that as there was no proof of a refusal on the part of the purchaser to recognize the lease, and as the applicant might have secured himself by a registration of the lease in the Deeds Office, there was no ground for the application.*

Mr. Benjamin moved as a matter of urgency, on the petition of Maurice S.

Lipschitz and Adolf Tooch, trading as Lipschitz and Tooch, for an interdict restraining the respondent Sarah Samson, otherwise Sarah Salomon, from passing transfer of certain land at Dyzeldorp, division of Oudtshoorn, pending result of an action to be brought by petitioners to have a certain lease between the parties established. Petitioners alleged that the respondent had agreed to lease the land to them for a period of 20 years at £1 per annum, upon payment of £20 down, and that a collusive arrangement had been entered into between respondent and one Mendel Sapiero to defeat the just rights of the applicants, and escape the respondent's contractual obligations to them, the intention being to give transfer to the said Sapiero.

[De Villiers, C.J.: You could bring your action against Sapiero to recognise your lease.]

Mr. Benjamin: The peculiar position is that the lease has not been executed; it had only reached the stage of being agreed upon.

[De Villiers, C.J.: Did the purchaser (Sapiero) know of your right of lease?]

Mr. Benjamin: We say that there was collusion between him and the respondent.

De Villiers, C.J.: The Court is not inclined to grant this order. If the applicant in this suit and the purchaser are in collusion in the matter, then the applicant would have a remedy against them hereafter. But, according to the applicant's own statement, he has made an agreement of lease for the payment of £1 per annum for twenty years for this property at Dyzeldorp, and he now seeks to restrain the respondent from transferring the property to the purchaser. It does not appear that the purchaser will refuse to recognise the lease; it is quite possible that he will, and if he should recognise the lease, then there is no ground of complaint. If he refuse to recognise the lease, then it is quite clear that he should be made a party to the action. In any case, a lease of 20 years ought to have been registered in the Deeds Office. No order will be made upon the application.

[Before the Hon. Mr. Justice HOPLEY.]

*Ex parte* BENNING. } 1906.  
} Dec. 10th.

Mr. Uppington moved as a matter of urgency for an interdict restraining the sale of certain furniture in the estate of the late Augusta Julia Chalmers, at premises in Military-road, Tamboer's Kloof, or removal of same from petitioner's premises, until his claim for rent has been satisfied. Petitioner said that the furniture was advertised for sale by public auction to-morrow (Tuesday). He



had a claim for £71 rent. The premises had been occupied by Mrs. Chalmers until her death recently, and rent was owing for November, 1904, to April, 1905, at £7 10s. per month, and for October, 1906, to December, 1906, at £6 10s. per month, and also for January, 1907, in lieu of notice. Petitioner had demanded payment from the executor testamentary, but without success. Counsel (in answer to the Court) said that his client would be satisfied if a sufficient sum were interdicted in the hands of the auctioneers to meet his claim.

Rule nisi granted, to serve as an interim interdict, restraining Messrs. Gliddon and Co., auctioneers, from parting with an amount of £100, or any less amount realised by the sale of the said furniture, pending action to be brought forthwith for the recovery of the rent and costs, rule returnable on the 1st February, 1907, and to be served on the said auctioneers and the said executor.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

*Ex parte* THE CASTLE WINE ( 1906.  
AND BRANDY CO. ( Dec. 11th.

Dr. Greer moved, as a matter of urgency, on the petition of the Castle Wine and Brandy Co., for an interdict restraining one John Marsh from disposing of or parting with certain property at Sterkstroom, pending an action to be brought by petitioners for recovery of a debt of £72. It was alleged in the petition that Marsh, who had lately carried on business at the Royal Hotel, Sterkstroom, had gone away, and that his whereabouts were unknown. His power of attorney was held by one Lorie, of Sterkstroom. Certain of the stock had been removed to the railway station. Marsh had money standing to his credit at the Standard Bank, Sterkstroom, and he was the proprietor of an erf.

Rule granted calling upon respondent to show cause on the 12th January why an interdict should not be granted as prayed, rule to operate as an interim interdict, and to be served on the Standard Bank, Sterkstroom, on Lorie, who holds respondent's power of attorney, the stationmaster at Sterkstroom, and

the Registrar of Deeds, with leave to telegraph the order, and leave reserved to respondent to anticipate the return day and apply for the discharge of the order.

### HOMAN V. BARKLY EAST MUNICIPALITY.

This was an appeal from a judgment of the Resident Magistrate of Barkly East in an action brought against appellant by the respondent municipality to recover a sum of £5 8s. 4d. as arrear rates in respect of an erf which he had occupied during 1905.

Mr. Roux was for appellant, William Homan, sanitary inspector; Mr. M. Bisset was for respondents.

The Magistrate had given judgment as prayed for the plaintiffs, with costs.

Mr. Roux said that any agreement made between the landlord and tenant as to the payment of rates had nothing to do with the municipality. According to the Act 45 of 1882, section 135, the defendant could not now be liable for these rates. The Town Clerk said that the rate became due on the 9th July, 1905. The Act said that within one month after the demand had been made the municipality must recover from any occupier liable to pay. His submission was that if the municipality wanted to recover they should have taken steps within one month from the 5th May, when they gave notice of demand to defendant. The plaintiffs only took out their summons on the 16th August, considerably over a month—therefore, after the date of demand. The section must be strictly construed, and plaintiffs were not, after the lapse of more than one month after demand had been made, entitled to sue the occupier for the rate.

De Villiers, C.J.: It is not necessary to hear Mr. Bisset. I quite agree with the learned counsel for the appellant that the fact of the tenant having agreed with the landlord to pay the rates has nothing to do with the decision of this case. But the important question is whether, under the 135th section, the defendant was liable for the payment of rates. It is true that he is only the occupier, and, therefore, he cannot be held liable unless the provisions of the 135th section have been complied with. Well, have they been complied with? The section says that when the owner of immovable property has been rated, and the rate remains unpaid for three months, the Council, through their collector, may at any time within twelve months after the making of the rate demand the amount of such rate from the occupier for the time being, and on non-payment thereof, may, after one month from the date of such demand, recover the same in like manner as rates may be recovered from any occupier liable to be rated. The dates

given by counsel for the defendant are these: The rate was made payable on the 9th July, 1905; demand was made on the 5th May, 1906, and the summons was issued on the 16th August, 1906. Therefore, three months elapsed after the demand had been made. The contention is that the action ought to have been brought within one month after the demand had been made, but that is not what the Act says, but "on non-payment thereof after one month from the date of such demand." The Legislature required that there should be the expiration of one month after the demand, and at any time after that date the action may be brought. It makes no difference whether the action were brought three months after the demand. There is a strict compliance with the terms of the 135th section, and upon that ground I am of opinion that the appellant must fail. The appeal will be dismissed, with costs.

HALL V. MASEA.

Injury by bull—*Culpa*—Damages

*One of the plaintiff's oxen, which were drawing a wagon on a public road, was gored by a full-grown bull belonging to the defendant, which had been allowed to wander abroad without a herd.*

*Held, that as a full-grown bull is ordinarily an animal with vicious propensities, there was such a degree of culpa on the part of the defendant as to render him liable in damages.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Mount Fletcher in an action brought by appellant against respondent to recover £13 damages, in respect of an ox alleged to have been gored and destroyed by defendant's bull.

The Magistrate, in his reasons for judgment, said it was admitted that the defendant's bull gored the ox. Knowing as he did the part of the road where this was alleged to have occurred, it was impossible for the bull to turn or get out of the road when met by the plaintiff's wagon and oxen. He believed the defendant's witnesses when they said that the bull was cornered by the ox. There would be absolution from the instance.

Mr. Watermeyer was for appellant; there was no appearance for respondent.

Mr. Watermeyer submitted that a bull was an animal which must be kept in by the owner, and if it escaped and did damage, then the owner was liable.

Should the Court be against him on that point, he submitted that there was ample evidence of negligence in this case. The bull was a trespasser. The leading case was *Parker v. Reed* (14 C.T.R., 720), in which one horse had inflicted injuries upon another while standing outside a farrier's shop. Counsel also cited *Beattie v. Donnelly* (1876, Buchanan, 57), *Spires v. Scheepers* (3 E.D.C., 173), *Le Roux v. Fick* (1879, Buchanan, 29), but he relied more particularly upon *Graham v. Viljoen* (1878, Buchanan, 127), and submitted that if a dog were held to be an animal which must be kept in at the owner's peril, as in that case decided, much more so was it the case in regard to a bull. A bull was a much more dangerous animal than a dog, and much more likely to inflict damage and injury. A bull, he contended, was clearly *ferae naturae*. The bull in this case was a trespasser on the public road, and an element of *culpa* attached to the owner. Addison on Law of Torts (5th Ed., 110) was quoted. There was evidence on the record that defendant was negligent in allowing the bull to be roaming about without a herd on what was admitted to be a dangerous road.

[De Villiers, C.J.: What became of the carcase?]

Mr. Watermeyer: The plaintiff is a transport rider, and I understand that he had to leave the carcase behind.

[De Villiers, C.J.: Is there any evidence of his giving notice to defendant that the carcase was there for him to take possession of?]

Mr. Watermeyer said he could find no evidence on that point on the record.

[De Villiers, C.J.: If the ox were worth £13, the meat must have been worth something. The question is, has plaintiff done anything to minimise the damage?]

Mr. Watermeyer said it appeared from the record that plaintiff's driver made efforts to find a herd and ascertain who was the owner of the bull. Appellant, he contended, was at least entitled to have the judgment of absolution from the instance set aside.

De Villiers, C.J.: It is to be regretted that there has been no appearance on behalf of the defendant on appeal. I am bound to say, upon the evidence, after hearing the reasons of the Magistrate read, that I find it impossible to support this decision. A full-grown bull is ordinarily an animal with vicious propensities, and if the owner allows it to wander abroad and injure the cattle of others on a public road there is such a degree of *culpa* on his part as to render him liable for damages. It appears that the plaintiff's wagon was passing peacefully and lawfully along the road, and, whilst so passing, this bull, which had not trespassed upon the road, but had come upon the road where it might law-

fully go, this bull there gored one of the oxen in the wagon. It is well known that a full-grown bull, however apparently tame it might be, has times of excitement, when it becomes dangerous to other animals. The bull here seems to have been annoyed on being driven, as it were, into a corner, and then in his annoyance he seems to have gored one of the plaintiff's oxen. The Magistrate apparently must have held that there was some negligence on the part of the defendant, but then he said that there was contributory negligence on the part of the plaintiff, inasmuch as the driver of the wagon did not drive away the bull. But it was all done in a moment. The driver could not have known that the bull would take it into his head to gore the ox, and there was no duty on the driver to drive away bulls on the road, and I consider that the Magistrate was quite wrong in holding that there was negligence on the part of the driver of the plaintiff's wagon in not driving away the bull. It is not everyone who would venture to drive away a bull from a road, and there certainly was no duty on the driver so to do. Anyhow, I consider that the Magistrate erred in his judgment, and that judgment ought to have been given for the plaintiff for the amount of damages which he has actually sustained. The plaintiff says that the ox is worth £13, but there is no evidence as to what was done with the carcase of that ox. It surely had some value. It is quite consistent with the evidence that the carcase may have been removed by the plaintiff, and that he might have eaten the meat, and in that case there ought certainly to be a deduction from the amount of damages to be awarded to the plaintiff. He cannot have his cake and eat it, and he should certainly not have the full £13. I consider that it would not be advisable to have any further expense in sending the matter back, and I think a deduction of £3 would be a fair deduction, and the appeal is, therefore, allowed, and judgment entered in the sum of £10, with costs in this court and the court below.

KUPER V. ZWIEGELAAR. { 1906.  
Dec. 11th.

Bills of Exchange Act (19 of 1893) — Promissory note — Presentment at place of payment — Liability of maker on non-presentment.

*The plaintiff sued the defendant in a Magistrate's Court as maker of a promissory note. The defendant was in default;*

*but as the note had not been presented at the place of payment at the time when it fell due, judgment was given for the defendant*

*Held on appeal, that as there was no averment by the defendant that the note would, if presented at the due date, have been paid; it was competent for the plaintiff at any time after the due date to present the note for payment, and the Court accordingly altered the judgment into one of absolution from the instance, so as to give the plaintiff an opportunity of presenting the note for payment before again suing the defendant thereon.*

This was an appeal from a judgment of the Resident Magistrate of George, in an action brought by appellant against respondent to recover £25 ls. 11d. with interest, upon an overdue promissory note, and £1 2s., balance of account for forage supplied.

The Magistrate gave judgment for plaintiff for £1 2s., and held that the defendant was not liable on the promissory note sued upon. He said it was the duty of the plaintiff, in order to render the defendant liable, to present the note at the place where it was made payable within a reasonable time, whereas 16 months had lapsed since the note was due, and it had not been presented at the place where it was payable. The note was invalid in consequence of plaintiff's own negligence.

Mr. M. Bisset was for appellant, who is a shopkeeper at Klipdrift; there was no appearance for respondent, Johannes Zwiegelaar.

Mr. Bisset submitted that the Magistrate, on being applied to for a postponement to enable due presentation of the note to be made at the bank, should have allowed postponement, directing plaintiff to pay the costs of the day. There would have been no prejudice to the defendant in allowing the postponement since he did not appear, although he had been personally served. The Magistrate refused the application on a wrong ground. The Magistrate held that the note was invalid because it had not been presented within a reasonable time, sixteen months having elapsed. Counsel submitted that the Magistrate had erred. In *Reitz v. Kock* (1 Menzies, 38) a promissory note was presented four years after the due date, and judgment was given upon it. As further authority, he cited *Villiers v.*

*De Kock* (2 Menzies, 285), and *Oriental Bank v. Shaw and Honey* (1 E.D.C., 187). The Magistrate, he submitted, ought at any rate, when refusing a postponement, to have given judgment of absolution to enable plaintiff to bring a fresh action.

De Villiers, C.J.: In this case the defendant did not appear in the Court below, but allowed the case to go by default. Accordingly, the defence was not set up at all that the defendant had funds at the bank on the day on which the note fell due, and the proof of presentation was not of much importance. At the same time, the law had to be complied with, which provides that where a note is in the body of it made payable at a particular place it must be presented for payment at that place in order to render the maker liable. Such is the clear provision of the 86th section of Act 19 of 1893, and the question is, whether the maker is discharged if the presentment is made at the due date. In the case, for instance, of *Oriental Bank v. Shaw* (1 E.D.C., 187), it was held that when there is no allegation that the maker of a promissory note had funds at the place of payment specified in the note, it is no defence or provision that the notarial protest showed that the note had been presented at the place named and dishonoured only after summons was issued. I am not prepared to hold that the Act of 1893 was intended to alter the practice in this respect. Before the passing of the Act presentment at the place of payment was required before the maker could be sued; but, as the sole object of the requirement was to make it clear that the note would have been dishonoured if it had been duly presented, the maker could not rely upon the non-presentment if he did not aver that there were funds at the place of payment to meet the note if presented on the day when it fell due. In the present case, as I have observed, there was no defence to the action; and yet the Magistrate seems to have given judgment for the defendant. The juster course, however, would have been to give absolution from the instance. This course would have enabled the plaintiff to present the note at the place of payment, and if upon such presentment, it appeared that the defendant had no funds there at the time when the note fell due, the plaintiff could have proceeded afresh. The Court will now amend the judgment by altering it into one of absolution from the instance. As to the costs of appeal, I do not consider it equitable that they should be borne by the defendant. He raised no objections in the Court below, nor did he defend the Magistrate's judgment on appeal, and the plaintiff should pay the costs occasioned by his omission to cause the

note to be presented at the place of payment before suing thereon.

[Appellant's Attorney: G. Trollip. Respondent in default.]

LANGE V. ABEL. { 1906.  
Dec. 11th.  
" 20th.

Pledge — Hire-purchase — *Dominium*—Delivery—Possession.

*The plaintiff delivered a cart to the first defendant on the hire-purchase system; the agreement being that the price should be payable in instalments and that the cart should become the property of the first defendant on payment of the last instalment. Before all the instalments had been paid, the first defendant, with the consent of the plaintiff, delivered the cart to S., and a year afterwards the plaintiff induced the first defendant to substitute another cart, belonging to the first defendant, for the first. The second cart was delivered to the plaintiff, and by him re-delivered to the first defendant. Thereafter the first defendant pledged this cart to the second defendant, who had no knowledge of the previous dealing with the plaintiff. The evidence shewed that the dealing between the plaintiff and the first defendant in regard to the second cart was in the nature of a pledge rather than a sale.*

*Held, that the plaintiff could not, after parting with the possession, claim re-delivery from the second, who was in possession.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Hopefield in an action brought by respondent against appellant and another in respect of restoration of a certain Scotch cart, or payment of the balance of the purchase-price (£8 10s.).

Plaintiff, in the court below, in his summons, complained "that the first-named defendant, Heydenrych, the original purchaser, held from him under the hire-purchase system a certain Scotch cart, of the value of £23, as per



contract attached, marked "a," which said cart was subsequently substituted by a second Scotch cart, with the knowledge and consent of the plaintiff, as per contract attached marked "b," which second cart the first-named defendant unlawfully, unjustly, and fraudulently, and without the knowledge and against the will of the plaintiff, sold to the second defendant (Lange) during the month of March last, or thereabouts, which said cart the second-named defendant refused to restore to the plaintiff, who was still the legal owner thereof, in terms of the above-mentioned contracts hereunto annexed." Plaintiff prayed, as against the second defendant, that he be adjudged to restore to him the said cart, or, in the alternative, against both defendants jointly and severally, one paying the other to be absolved, to pay him the value of the cart, £23, less £14 10s., already paid on account of capital and interest, together with interest from the 1st February, 1901.

The judgment of the Magistrate was for plaintiff, with costs.

Mr. McGregor was for appellant, Leopold Lange, Sen.; Mr. Van Zyl was for respondent.

Mr. Van Zyl submitted that this was not a case in which delivery of the second cart was necessary. Counsel cited *Mills and Sons v. Benjamin's Trustees* (1876, Buchanan, 115) on the doctrine of *constitutum possessorium*. If the case were decided on the documents merely—and he submitted that it should be decided upon the documents—from contract "b" it was clear that an exchange was effected, that Abel and Heydenrych agreed to substitute the old Scotch cart for the original Scotch cart, and that Heydenrych then agreed in future to hold this old Scotch cart under the same conditions, viz., as Abel's property, until the balance of £8 10s. was paid.

Mr. McGregor said that this was different from the ordinary cases. The facts must be borne in mind in considering this case. The second cart was not legally the same cart as that which was acquired by Heydenrych on the hire purchase system. The old cart was practically made into a new one, the repairs and alterations costing about £18, whereas a new cart could have been bought for £24. Counsel went on to submit that the second agreement ("b") showed that credit was given, and that it was not a case of hire purchase. Abel allowed Heydenrych to sell this cart to one Sadie, and it was not until twelve months afterwards that he told Heydenrych to bring him another cart for the £8 10s. Furthermore, he submitted that no consideration was given for the second agreement.

[De Villiers, C.J.: There was consideration in this sense, that it was

given as security, so that the plaintiff would not sue Heydenrych.]

Mr. McGregor admitted that that was so.

*Cur. Adv. Vult.*

*Postea* (December 20th).

De Villiers, C.J.: In this case it appeared that the plaintiff, who was the owner of a Scotch cart, made an agreement with the first defendant that on payment of £23 there should be a sale of the cart to the defendant, and that in the meantime the price might be paid in instalments. Before all the instalments had been paid, the first defendant, with the consent of the plaintiff, sold the cart to one Sadie. About a year afterwards the first defendant bought another cart, and the plaintiff then required that this cart should be substituted for the first cart as security for the instalment still due. The first defendant consented to this course, and, according to the plaintiff's evidence, he (the plaintiff) was in possession of the cart for two days before it was restored to the first defendant's possession. Thereafter, the second defendant paid some debts owing by the first defendant to Stephan, and it was arranged between the two defendants that certain property, including the second cart, now in question, should be sold to the second defendant, but should, after such sale, remain in the possession of the first defendant. For some reason, however, the cart seems to have been delivered by the first to the second defendant, and thereupon an action was brought in the Magistrate's Court of Hopefield against both defendants to recover the cart or its value. The Magistrate held that the same conditions attached to the second as to the first cart, and that, consequently, as the plaintiff had not lost the ownership, he was entitled to recover the cart from the second defendant.

I cannot agree with the Magistrate that the second cart stands on the same footing as the first. The plaintiff had permitted the first defendant to sell the first cart. When he afterwards found that the first defendant had another cart, he naturally wished to have it as a continuing security for the instalment still owing, but he never became the owner of the second cart, as he had been of the first. The transaction that ensued was no more than a pledge. The first defendant pledged the cart, and allowed the plaintiff to have possession for two days, but the security was lost when the plaintiff redelivered the cart to the first defendant. It is true that the transaction between the two defendants may also have been no more than a pledge, but the difference is that when the plaintiff sought to recover the cart the second defendant was in actual pos-



session. His pledge, if such it was, had been made good by delivery, and in the absence of proof of knowledge on the part of the second defendant of the plaintiff's prior claim, the second defendant cannot be deprived of his possession. The doctrine of *constitutum possessorium* has been relied upon as justifying the view that the first defendant really possessed the cart on behalf of the plaintiff, but on this point I would only refer to the views expressed in the case of *Payn v. Yates* (9 S.C., 497). The evidence in this case satisfies me that no more than a pledge was effected in favour of the plaintiff. When he parted with the second cart he enabled the first defendant to pledge it to another creditor, and without proof of such knowledge on the part of such creditor of the plaintiff's prior claim, the plaintiff has no right to claim a restoration of the cart. The appeal of the second defendant will, therefore, be allowed, and judgment for him entered, with costs in this Court in the Court below. The judgment against the first defendant will, of course, remain, but it will not be a judgment for the restoration of the cart, but for £8 10s., being the instalment owing to the plaintiff, with costs in the Magistrate's Court.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorneys: Walker and Jacobsohn.]

Before the Hon. Mr. Justice HOPLEY.]

COLLINS V. KING. { 1906.  
Dec. 11th.

This was an appeal from a judgment of the Assistant Resident Magistrate of Piquetberg in an action brought by appellant against respondent to recover the amount of his fees for preparing plan and supervising the erection of a certain residence on behalf of the respondent.

Appellant alleged that he had been employed to prepare a plan of a house at Piquetberg for defendant, and that he supervised the building operations and granted certificates from time to time. He claimed £19 12s., viz., £5 for the plan and 2 per cent. of the cost (£730) for supervision of the work.

The Magistrate, in his reasons for judgment, said that the parties were prominently associated with the A.M.E. Church. Plaintiff's own evidence made it quite clear that he did not intend to charge for his services. If he had expected any remuneration for his services, he was depending solely on the generosity of the defendant. There was no contract between the parties, and the judgment of the Court would be absolution from the instance, with costs.

Mr. Gardiner was for appellant; Mr. J. E. R. de Villiers was for respondent.

Mr. Gardiner submitted that it was clear the defendant had intended to employ an architect. Neither defendant nor his wife, for whom, it was said, the building was erected, could mention any other architect. Plaintiff's plans having been used, and he having supervised the work, he was entitled to a *quantum meruit*. Payments were made to the builder by defendants on notes of hand given by plaintiff.

Mr. De Villiers submitted that the plan had been drawn by Collins in order to oblige his friend Bell, who built the house. He supervised the work also on Bell's behalf. Collins and Bell were intimately associated in Church matters. The notes of hand given by Collins were not signed by Collins as architect. Collins was one of the sureties on behalf of Bell, and it might be that he gave these notes in protection of himself. The question resolved itself into one of credibility, and the Magistrate had believed defendant and his witnesses.

Mr. Gardiner, in reply, said that as to the question of suretyship it was significant that three notes were actually given by plaintiff before the suretyship was signed. Bearing this in mind, in conjunction with the words of the contract, "architect's note of hand," he submitted that appellant was clearly employed by respondent as architect. The Magistrate's error in this case was that he had given no force to the words of the contract, "architect's note of hand." The Court of Appeal was better able to construe a written contract than the Court below. That was the question in this case, not a question of credibility.

Hopley, J.: I think the case had better go back to the Magistrate to inquire into the following points: (1) Why three certificates, if they were certificates of surety merely, were given before the clause of suretyship was added to the agreement; (2) the exact date of the agreement; (3) for how much did the plaintiff give certificates, and why did he cease giving them. The case will be remitted to the Magistrate for further inquiry and evidence on these points.

#### REX V. BRAFF AND ANOTHER.

Hopley, J., said that two matters had come before him as Judge of the week last week from the Magistrate's Court at Ladismith, in which two sisters called Aletta and Sanna Braff respectively were each charged on a separate indictment, with the theft of a lamb belonging to a Mr. Vosloo. The women said that they picked up these lambs on a farm where they were living with their father, and on which Vosloo

had stock running. They said that Vosloo's mark had been put upon them because he had agreed to buy them from these women, but had backed out of the bargain. After a while these lambs were sold to other people. The Magistrate did not believe their explanation, and he found the accused guilty. The part that he (the learned Judge) had to comment upon was the sentence. The accused were each sentenced to six months' imprisonment, with hard labour, and to pay a fine of 7s. 6d., or in default another fortnight's imprisonment. There was no evidence as to the value of these lambs. The only evidence was that the lambs were sold to the people in whose possession they were found by these women for 6s. Section 2 of Act 7, 1905, authorises the Magistrate, in all cases in which the stolen stock has not been recovered or has been reduced to half its original value, in case the owner does not proceed under Section 8 of Act 35 of 1893 for compensation, to impose on every person convicted of such theft a fine not exceeding the full market value at the time of the theft; and Section 4 provides for imprisonment in default of payment of the fine. In the cases now under review, however, the stock has been recovered. In each of these cases the lamb was found, and it is only for the owner to re-claim his property. The lambs have been recovered, and they had not deteriorated, according to the Magistrate's own finding, by more than half their value. That portion of the sentence must be quashed. For the rest, both the sentences will be confirmed.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.                      { 1906.  
   { Dec. 12th.

Mr. Sutton moved for the admission of Deneys Reitz as an attorney. He stated that the applicant was an enrolled attorney of the Supreme Court of the Transvaal.

Application granted, oath to be taken before the Resident Magistrate of Aliwal North.

Mr. De Waal moved for the admission of Jan Bartholomeus Kruger as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Burgersdorp.

### PROVISIONAL ROLL

LAWRENCE AND CO. AND OTHERS V. KOPELOWITZ AND BERMAN.

Dr. Greer moved for the provisional order of sequestration of the defendants' estate to be made final.

Order granted.

WALKER V. BUTCHINSKY.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BLEIBERG AND CO. AND OTHERS V. GETZ.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. Lewis moved, at a later stage, for the appointment of Edward J. Fitzpatrick as provisional trustee in the insolvent estate, with power to realise the stock and collect outstanding accounts. Defendant had carried on business as a retail draper, and it was to the interests of the creditors that the stock should be offered during the Christmas season, without waiting until the creditors' meeting.

Mr. Fitzpatrick was appointed provisional trustee, with power to sell the stock and collect outstandings.

BATE AND CO. AND ANOTHER V. ROCHESTER BRICK CO.

Mr. Benjamin moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

RUST V. LEVI.

Mr. Benjamin moved for a provisional order of sequestration to be made final.

Defendant appeared, but did not oppose.

Order granted.

VACUUM OIL CO. V. SANDHAND.

Mr. M. Bisset moved for provisional sentence for £255 11s. 1d., balance due on a mortgage bond, £12 13s. 3d. interest, and interest on the balance claimed from the 1st November, bond due on

notice given; counsel also applied for the property hypothecated to be declared executable.

Order granted.

LOTZ V. BRAAF.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £240, with interest from the 1st September, 1903, bond due by reason of non-payment of interest; counsel applied for the property hypothecated to be declared executable.

Order granted

DIVINE V. SALIE.

Dr. Greer moved for provisional sentence on a mortgage bond for £2,900, with interest from the 1st July, less £73 10s. 6d. paid, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

OLIVIER V. GOOSEN.

Mr. Swift moved for provisional sentence on a judgment of the Rand High Court.

Mr. Roux (for defendant) applied for a postponement until next term.

Ordered to stand over until later in the day.

Later on Mr. Roux read an affidavit in support of the application for a postponement to the effect that the defendant claimed to have paid the debt.

Mr. Swift opposed the application, and said that this appeared to be merely a ruse on the part of defendant to gain further time. Defendant had only satisfied a portion of the judgment, and now he had removed out of the jurisdiction of the Rand High Court, and was living at Mafeking.

The case was postponed until January 12, costs to be costs in the cause.

VAN NIEKERK V. LE RICHE.

Mr. Pohl was for plaintiff; Mr. Benjamin was for defendant.

This was an application for provisional sentence on certain promissory notes.

The matter was ordered to stand over to enable plaintiff to file replying affidavits.

Later on Mr. Pohl applied for a postponement until the 12th January, and urged that defendant should be ordered to pay the costs of the day.

Mr. Benjamin asked that the case be postponed until the first day of next

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term. He opposed the application for costs.

Postponed until the 1st February, costs to be costs in the cause.

FEATHERSTONE V. TRUSTEES OF EAST LONDON ANGLING SOCIETY AND PEEL.

Mr. Louwrens moved for provisional sentence against the first and second defendants upon a mortgage bond for £431 11s. 5d., with interest at 8 per cent. from the 7th July, 1905, and against the third defendant upon a deed of suretyship for £414 3s. 5d., with interest, cession of action being tendered to him (Peel) by plaintiff. Counsel also applied for the property specially hypothecated to be declared executable.

Mr. W. Porter Buchanan (for defendant Peel) said that the claim was on account of non-payment of interest on the bond. Peel had signed simply as surety *in solidum*, but that did not make him a co-principal debtor, and accordingly, as the principal debtors had not been excused, and as the property which was specially mortgaged had not been executed upon, the plaintiffs could not now get their judgment against him. He applied that the case against Peel be dismissed, with costs. Counsel read an affidavit by E. J. Boyes, of Buchanan and Boyes, attorneys, Cape Town, who said he found that the trustees for the time being had not yet been excused, and that the said Peel had not renounced the benefits of excussion under the bond, nor did it appear that he was a co-principal debtor. The property had not yet been declared executable.

Mr. Louwrens submitted that the fact that the property hypothecated had not yet been declared executable was not a ground for refusing provisional sentence.

[Hopley, J.: Not so far as the two first defendants are concerned.]

Mr. Louwrens: I am speaking as to Pee. I submit further that there has been a renunciation of the benefits. Peel is surety *in solidum*, and I submit that that would cover renunciation of the benefits of excussion.

Hopley, J., said he did not take it that "*in solidum*" meant anything of the kind. Provisional sentence would be granted as against the trustees in their capacity as such, and the property hypothecated would be declared executable. Judgment would be given for defendant Peel, with costs. As to costs other than Peel's, plaintiffs would have costs against the trustees.

ESTATE COUTTS V. FREDERICK.

Mr. Payne moved for provisional sentence on a mortgage bond for £120, with interest from the 24th March, 1884, Counsel also applied for the property

hypothecated to be declared executable. He stated that defendant had not been heard of for many years, and he was now being sued by edictal citation, the citation having been published in the "East London Dispatch." No interest had, as a matter of fact, been paid on the bond ever since it was issued.

Hopley, J., said that, of course, the Court could not grant judgment for a greater amount of interest than the capital of the bond. There would be provisional sentence for the amount of the bond and for an amount of interest not exceeding the capital, and property declared executable, with costs.

#### SEELIGER V. JACOBS AND OTHERS.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £750, less £300 realised under sale of the property, together with interest. Judgment was applied for as against the third and fourth defendants only (the sureties), the first and second defendants being insolvent.

Order granted.

#### FLETCHERS' WHOLESALE V. BASSON.

Mr. Inchbold moved for provisional sentence on a mortgage bond for £600, with interest from the 1st November, 1904; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### BAX V. ABRAHAMS AND CO.

Mr. Pohl was for plaintiff; Mr. Benjamin was for defendant.

Mr. Pohl said that affidavits had been filed in another matter, which contained certain statements dealing with this matter.

Hopley, J., said that separate affidavits must be filed relating to the matter before the Court only, and not encumbered by references to other matters.

Mr. Benjamin said that his client had a defence on the merits, but he also repudiated the signature, and counsel, therefore, applied for a day to be fixed for hearing evidence as to the genuineness of the signature.

The Court fixed the second Friday in February for hearing evidence.

#### STRUBEN V. LOEWENSTOCK.

Mr. Struben moved for provisional sentence on a mortgage bond for £700, less £150 paid on account, with interest, bond due by reason of the non-payment of interest. Counsel also applied for

the property and rents to be declared executable.

Order granted.

#### WILLIAMS V. EIDELBERG.

Mr. Swift moved for provisional sentence on a mortgage bond for £500, with interest, from the 1st July, and for £1 11s. 6d. insurance premiums, bond due by reason of non-payment of interest; counsel also applied for the property to be declared executable and rents attached.

Order granted.

#### WHITE RYAN AND CO. AND OTHERS V. ABRAHAMSON.

Mr. Payne moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### WILLIAMS V. SWART.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### CELLIERS V. BADEROEN.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

#### GORDON MITCHELL AND CO. V. HEIBERG.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Defendant admitted insolvency, but said that he disputed a certain claim.

Order granted.

#### COSMELLI, MEYER AND CO. V. TAYLOR AND MYLES.

Mr. Bailey moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

Mr. Bailey applied for the appointment of J. M. P. Muirhead as provisional trustee pending the election of a trustee.

Mr. Muirhead was appointed provisional trustee, with power to sell the perishables.

#### VAN BRED A V. BOOYSEN.

Mr. Louwrens moved for provisional sentence on a mortgage bond for £500, with interest from the 1st January.

1900, less £4 paid on account, bond due by reason of non-payment of interest.

Ordered to stand over for proof of service.

Later on Mr. Louwrens produced proof of service, and moved for judgment, and applied for the property hypothecated, and rents accruing, or to accrue to be declared executable.

Order granted.

#### HARCOMBE AND ANOTHER V. COSAY.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £25,000, with interest from the 1st January, 1905, less £64 12s., paid on account of interest, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Defendant applied for an extension of time.

Hopley, J., said that he must grant an order, but he suggested that the defendant should have an interview with the creditors, and see if they would not be a bit merciful towards her. Judgment would be granted.

#### HARCOMBE V. GROWAN AND SCHWALBE.

Mr. P. S. T. Jones moved for provisional sentence on a mortgage bond for £2,000, with interest from the 1st July, 1905, less £22, paid on account, bond due by reason of non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ESTATE NOBLE V. TOMS.

Mr. Palmer moved for provisional sentence on a mortgage bond for £48 0s. 8d., being amount of interest overdue, and for the rents to be declared executable.

Order granted.

#### ESTATE VAN RYN V. RIKIN.

Mr. Inchbold moved for provisional sentence for £76 10s., being interest due on a mortgage bond, and for rents to be attached.

Order granted.

#### JUTA AND CO. V. MARTO, ALIAS MUNRO.

Mr. Bailey moved for the final adjudication of the defendant's estate as insolvent. He stated that defendant had clandestinely left the Colony, and that substituted service had been effected

by fixing the summons on the door of the Supreme Court, and publication in the "Gazette."

Order granted.

#### HIDDINGH V. EXECUTORS OF ESTATE MERRINGTON.

Mr. Gutsche moved for the final adjudication of the defendant estate as insolvent.

Hopley, J., said that service had only been effected on one of the executors, and that the summonses to both defendants had been left with him. Mr. Hopkirk apparently had not been found. He thought counsel should look into the question of whether this was good service.

The matter was ordered to stand over.

Hopley, J., once more urged attorneys to regularly brief counsel with particulars as to service.

Later on Mr. Gutsche said he was informed that service had been effected upon both the executors.

His Lordship said he found that there were two summonses, and that service had been made upon both defendants.

A final order would be granted.

#### NORWICH UNION V. REYNOLDS AND OTHERS.

Dr. Rainsford moved for provisional sentence on a mortgage bond for £1,200, with interest from January 6, and premiums of insurance, bond due by reason of non-payment of interest. Counsel also applied for the property hypothecated to be declared executable.

Order granted.

#### ESTATE DE WET V. DE WET AND ANOTHER.

Mr. De Waal moved for provisional sentence on a mortgage bond for £2,000, with interest from January 1, 1906, and £4 insurance premium. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

#### ROUX AND OTHERS V. DE LANGE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £300.

Defendant confessed judgment.

Order granted.

#### LIBERMAN AND ANOTHER V. GELB.

Mr. Lewis moved for a provisional order of sequestration to be discharged.

Provisional order discharged.



**WILSON AND MILLER V. JACKSON.**

Mr. Close moved for provisional sentence on a Resident Magistrate's Court judgment for £20 4s. 10d., less certain sums paid on account, leaving a balance of £5 7s. 8d. A writ had been issued in the Resident Magistrate's Court, Simon's Town, and a return of *nulla bona* had been made. Application was made for a certain pension to be declared executable.

Defendant said that in the summons he was described as of Waterloo Green, Wynberg, and late of Muizenberg. He had not removed from Muizenberg, and had not lived at Waterloo Green. The Resident Magistrate of Simon's Town, therefore, had full jurisdiction, and the proceedings in this court were unnecessary.

Mr. Close submitted that in any event the plaintiff was entitled to come into this Court. Plaintiff sought to attach certain pension money becoming due to defendant, and such an order could not be obtained in the Magistrate's Court when the pension was still in the hands of a third party. Summons had actually been issued in the Resident Magistrate's Court, Simon's Town, and then it was found that defendant had gone to Observatory-road.

Defendant said that he had to go temporarily to Observatory-road. He had offered plaintiffs £2 in cash and 10s. per month towards the discharge of the debt. If his pension were attached he should have to surrender his estate, in consideration of the arrangement he had made with his principal creditors.

Mr. Close said his clients had an answer to this.

Hopley, J., advised the plaintiffs to consider the position, and ordered the matter to stand over until to-morrow. He suggested that the parties should meet and see if they could not come to an agreement. If necessary, however, they must have the facts put on affidavit, and have all the expenses of a contest over this wretched debt.

**ESTATE WELLS V. ROBERTSON.**

Mr. Van der Byl moved for provisional sentence on a mortgage bond for £500, with interest from the 1st April, 1906, bond due by reason of the non-payment of interest; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**BAETHAKE V. WOLFAARD.**

Mr. Bailey moved for provisional sentence on a mortgage bond for £800, with interest from the 1st July, 1906, bond due by reason of notice having been given; counsel also applied for the

property to be declared executable and the rents attached.  
Order granted.

**THORNE V. WOLFF.**

Mr. Russell moved for provisional sentence on a mortgage bond for £1,800, with interest from the 1st January, 1906; counsel also applied for the property hypothecated to be declared executable.

Order granted.

**PICKARD V. KAROW.**

Mr. De Waal moved for provisional sentence on a mortgage bond for £800, with interest from the 30th September, 1905, bond due by reason of non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**COHEN BROS. V. LEVINE.**

Mr. Sutton moved for provisional sentence on a promissory note for £85 15s. 11d.

Order granted.

**GROENEWALD V. HALL.**

Mr. De Waal moved for a provisional order of sequestration to be made final.

Order granted.

**GUTTOCH AND CO. V. KRESER.**

Mr. Bailey moved for a provisional order of sequestration to be made final.

Order granted.

**SWART V. SWART AND CO.**

Mr. Upton moved for provisional sentence on a promissory note for £398 16s. 2d., with interest, and for commission for collection, at 5 per cent., as stipulated for in the note.

Hopley, J., granted an order as prayed, except as to the claim of £19 8s. 9d. for commission, which he declined to allow.

**BENJAMIN V. VISSER.**

Mr. Rowson moved for provisional sentence on a dishonoured cheque for £100, with interest and costs.

Order granted.

THORNE V. PINKERS.

Mr. W. Porter Buchanan moved for provisional sentence on a mortgage bond for £1,200, with interest from the 31st December, 1905, and £4 12s. premium of insurance, bond due by reason of non-payment of interest; counsel also applied for the property especially hypothecated to be declared executable. Order granted.

ILLIQUID ROLL.

TURNER V. TURNER. 1906.  
Dec. 12th.

Mr. Van Zyl moved for an order of separation in terms of consent paper.

Hopley, J., said that he did not approve of this method of obtaining a judicial separation, but he supposed that as the Court had granted an order in such circumstances before, he should now have to do the same.

Order in terms of consent paper.

LEVIN AND ANOTHER V. GORDON.

Mr. Roux moved for leave to sign judgment against plaintiff (Gordon) for not proceeding with his action within the time stipulated by the 25th Rule of Court.

Order granted.

PURCELL, YALLOP AND EVERETT V. DE PAARLSCHIE KUIP MAATSCHAPPY.

Mr. Van der Byl moved for judgment under rule 329d for £308 16s. 4d., less £100 paid on account, for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

VAN NOORDEN V. MATTHEWS.

Mr. Payne moved for judgment under rule 329d for £191 11s., proceeds of sale of certain stock sold by defendant on account of plaintiff, with interest and costs.

Order granted.

WELT V. HAUMANN.

Mr. Lewis moved for judgment under rule 329d for £135 12s. 5d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

DE WIT V. VAN GERWE.

Mr. Bailey moved for judgment under rule 329d for £221 16s. 6d. for profes-

sional services, with interest *a tempore morae* and costs.

Order granted.

VAN DER BYL AND CO. V. CHRISTIASEN.

Mr. Van der Byl moved for judgment under rule 329d for £627 10s. 1d., goods sold and money disbursed on account of defendant, with interest *a tempore morae* and costs.

Order granted.

INSOLVENT ESTATE BITTER V. MACKINTOSH.

Mr. Pyemont moved for judgment under Rule 329d for £89 18s., balance of rent due, and in arrear, with interest, *a tempore morae*, and costs of suit.

Order granted.

CASCIO V. PRIDEAUX.

Mr. Van der Byl moved for judgment under Rule 329d for £50, money lent and advanced, with interest and costs.

Order granted.

CROWTHER AND ANOTHER V. GILES.

Mr. Lewis moved for judgment under Rule 329d for £25 9s. 2d., goods sold and delivered, with interest, *a tempore morae*, and costs.

Order granted.

PEDERSEN V. WILKIE.

Mr. Lewis moved for judgment under Rule 329d for £18, money lent, with interest, *a tempore morae*, and costs.

Order granted.

MAXWELL V. FILLIS.

Mr. Douglas Buchanan moved for judgment under Rule 329d for £147 2s. 6d., less £75 paid on account since issue of summons, with interest, *a tempore morae*, and costs.

STEPHAN V. CADSWELL.

Dr. Greer moved for judgment under Rule 329d for £225, as commission, with interest, *a tempore morae*, and costs.

Order granted.

CARTER V. RYDER.

Mr. Sutton moved for judgment under Rule 239d for £61, rent collected by defendant as plaintiff's agent, and for

an account of rent collected during certain period and debate of same. Counsel (in answer to the Court) said that he had authority for an application of this kind under Rule 329d.

Order granted.

#### DOLD AND VAN BREDA V. KATZ.

Mr. Lewis moved for judgment, under Rule 329d, for £32 8s. 2d., balance of account for professional services and moneys disbursed, with interest and costs.

Order granted.

#### WATSON AND ANOTHER V. FREEMASONS' CLUB, MIDDELBURG.

Mr. Swift moved for judgment, under Rule 329d, for £241 4s. 2d., balance of account for work and labour done and moneys advanced, with interest *a tempore morae*, and costs.

Order granted.

#### ESTATE BOSMAN V. KEYZER.

Dr. Greer moved for judgment, under Rule 329d, for £440, being purchase price of certain share in sale of land, in the district of Stellenbosch, or, alternatively, for cancellation of the sale. Counsel said that service had been made upon defendant by leaving the summons at the Masonic Hotel, Stellenbosch, where he appeared to have been staying for some time.

Hopley, J., read a letter by the defendant's attorney, who said that Kaiser would shortly be returning to this country from England. This matter had not been brought to defendant's notice.

Dr. Greer said that, in face of this letter, he felt that he could not ask for judgment at this stage, and he applied for the case to stand over until the 12th January.

Ordered to stand over *sine die*.

#### PURCELL, YALLOP AND EVERETT V. VOGES.

Mr. Van der Byl moved for judgment, under Rule 329d, for £61 8s. 6d., less £20, goods sold and delivered, with interest *a tempore morae*, and costs.

Order granted.

#### ZEEDERBERG AND DUNCAN V. SWART AND CO.

Mr. W. Porter Buchanan moved, under Rule 329d, for judgment for £1,170 2s. 2d., being balance of amount due by defendants to plaintiffs upon an account rendered of charges for goods sold and delivered to defendants at their

special instance and request, from the month of September, 1898, to date, together with interest at the rate of 7½ per cent., as would more fully appear from statements rendered from time to time and from the statement annexed, and for costs of suit.

Hopley, J.: I do not think that judgment should be given for interest brought into an account like this in a bald sort of way, as being a sufficiently liquidated claim to meet the requirements of Rule 329d. If the summons had stated that interest was charged according to agreement between the parties or anything like that, which would have liquidated the claim, it is quite possible that judgment would have been given, although I do not think previous cases have gone so far that it is only necessary to say "and interest at 7½ per cent." That claim does not seem to me to be sufficiently liquidated without any evidence being called. This rule is to facilitate judgment for things that appear on the face of documentary evidence produced to be liquidated without any further evidence. This 7½ per cent. interest might be charged upon an account, but that is a matter that seems to me to require some evidence, some proof, and therefore the plaintiff may take judgment for the amount of the goods sold and the exchange, and in fact everything claimed except the interest, but the interest on both sides of the account must be struck out, and for the amount of balance arrived at judgment will be given. You may still bring your action for interest. Of course, interest *a tempore morae* will be allowed.

#### LOTZ V. LOTZ.

This was the return day of a summons calling upon the defendant to show cause why he should not be declared of unsound mind and incapable of managing his own affairs, and why a *curator bonis* should not be appointed.

The case presented some peculiar features. Mr. Nicolaas Cornelis van der Hoeven had early in November been appointed provisional *curator bonis* of Mr. Lotz, another aspirant for the office being Mr. Snyman. The curatorship was evidently a matter of strife still. It was now stated by Mr. Buchanan that Mrs. Lotz did not desire to have Mr. Van der Hoeven appointed *curator bonis*, while, on the other hand, it was alleged that she was the prey of the last person who made a request to her.

The question arose as to Mr. Buchanan's position in the case, seeing that Mrs. Lotz was the plaintiff in the action, and his lordship said that he would treat Mr. Buchanan as an *amicus curiae*.

Sir H. Juta, K.C., was for plaintiff, Mrs. Lotz; Mr. W. Porter Buchanan

also appeared for Mrs. Lotz; Mr. De Waal appeared as *curator ad litem* of the defendant, Jan Coenraed Lotz, of Prince Albert.

Evidence was led by Sir H. Juta.

Dr. Luttig said that Mr. Lotz was 79 years of age, and Mrs. Lotz was about 70 years of age. Mr. Lotz was suffering from senile dementia. His memory had failed, his speech was affected, and he had delusions. Mrs. Lotz was infirm physically, and would not be able to look after her husband. She was not a strong-minded woman, and was easily persuaded. Snyman was living on Mr. Lotz's property, and, as far as witness knew, he was without property. Van der Hoeven was a man of good position in Prince Albert.

Nicolaas C. van der Hoeven, farmer and landed proprietor, said that he was the owner of considerable property, and was executor under the will of Mr. and Mrs. Lotz. Snyman was working two erven on the halves belonging to Mr. Lotz. Mr. De Beer was constantly present when witness had an interview with Mr. and Mrs. Lotz.

Mr. Neethling, Mayor of Prince Albert, also gave evidence.

Sir H. Juta observed that it was a pity his lordship did not hear a libel case which recently came before the Court, and in which some interesting sidelights were thrown upon this matter.

Mr. Buchanan: I think it is a pity, too.

Mr. De Waal, as *curator ad litem*, reported that Mr. Lotz was not fit to manage his own affairs. He had had two private interviews with Mr. Lotz, but on other occasions De Beer was always there, both when he saw Mr. Lotz and Mrs. Lotz.

[Hopley, J.: Why didn't you order him out of the room?]

Mr. De Waal: I did, eventually. As regarded the two names mentioned, Mr. De Waal said that Mr. Snyman was not to be compared to Mr. Van der Hoeven as *curator bonis*. Counsel added that Mrs. Lotz's only fear seemed to be that if Mr. Van der Hoeven were appointed, he would chase away certain tenants, but that idea seemed to have been suggested to her by others.

Mr. Van der Hoeven (recalled) said that if he were appointed, he should consult Mrs. Lotz in anything that he did to the estate.

Mr. Buchanan read affidavits in support of his application for the appointment of Mr. Snyman as curator.

Hopley, J., granted an order that Jan Coenraed Lotz be declared of unsound mind and incapable of managing his affairs, that Nicolaas Cornelis van der Hoeven be appointed *curator bonis* to the estate of the said J. C. Lotz, with power to manage the joint estate of the said Lotz and his wife, the said N. C. van der Hoeven to give security to the satisfaction of the Master, and to receive such commission as the Master

shall allow, costs of the applicant and respondent to come out of the estate. He added that that, of course, would not include the costs of the *amicus curiae*.

Sir H. Juta said that his learned friend would enjoy the honour of having occupied that position, and he urged that the costs to which he had been put in this matter should not be borne by the estate.

Mr. Buchanan said that he was quite willing to enjoy the honour thrust upon him, but he submitted that the costs of the affidavits should be borne by the estate.

[Hopley, J.: I think the history of the whole case rather seems to me—well, I don't like to say exactly what about these affidavits, but it seems to me there has been a good deal of scheming going on.]

Mr. Buchanan: On both sides, my lord.

Hopley, J., said that the costs of the applicant, respondent, and *curator ad litem* would come out of the estate, but there would be no order as to the costs, if any, of the *amicus curiae*.

## SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

### ILLIQUID ROLL.

FALCONER V. WILLIAMSON. } 1906  
(Dec. 13th.)

Mr. W. Porter Buchanan moved for judgment, under Rule 329d, for immediate delivery of certain furniture ordered and purchased by plaintiff from defendant, or, alternatively, for a refund of the sum of £100 paid for same. Counsel applied for an amendment of the defendant's name in the summons in accordance with notice given to him by registered letter. Service had been made upon one "Harry Williams," the name given in the summons. The address at which the summons was served was the same as that to which the registered letter had been sent giving notice of application to amend the summons.

Hopley, J., said it would have been better if the letter had been delivered personally into the defendant's hands, and an affidavit had been made to that effect. Application granted and judgment as prayed.

## REHABILITATIONS.

Mr. Bailey applied for the discharge from insolvency of Johannes George Kuun.

Granted.

Mr. Lewis applied for the discharge from insolvency of Christopher Green or Hodgson.

Granted.

Mr. Van Zyl applied for the discharge from insolvency of Andries Petrus Johannes Smit.

Granted.

Mr. Howes applied for the discharge from insolvency of Arthur de Jong.

Granted.

Mr. Howes applied for the discharge from insolvency of Meyer Goldberg.

Granted.

Mr. De Waal applied for the discharge from insolvency of Nicolaas van der Merwe.

Granted.

## MARAIS V. MARAIS AND KLOPPER.

This was an action to have the first-named defendant, Maria Helena Petronella Marais, declared incapable of managing her own affairs, and *curator bonis* appointed.

Mr. P. S. T. Jones (for plaintiff) read affidavits in support of the application, and a report by the *curator ad litem*.

Order granted declaring the first-named defendant, M. H. P. Marais, of unsound mind, and incapable of managing her own affairs, and appointing Ernest Jacobus Marais and Frans Krige Siebert as *curators bonis*.

## GENERAL MOTIONS.

COOKE V. COOKE.

{ 1906.  
{ Dec. 13th.

Mr. Swift moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. Counsel, in answer to the Court, said that plaintiff was residing in England, and her husband was residing in Cape Town.

Hopley, J., said that, as far as he remembered, he granted a rule upon the authority of previous orders made under similar circumstances. He added: Plaintiff had better be very careful if she re-marries in England, because they may prosecute her for bigamy. She gets a divorce here on grounds that would not be sufficient in England. I suppose you must have your order; it is a very good order, so far as this Colony is concerned. Decree of divorce granted, with costs.

## BRINK V. BRINK.

Mr. Lewis moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights.

Decree granted, with costs.

## RICKETTS V. RICKETTS.

Mr. Bailey moved for a decree of divorce, in default of defendant's compliance with an order of restitution of conjugal rights. Defendant had been served in Kimberley with the order of the Court. Plaintiff prayed for custody of the minor children.

Decree granted, with costs, plaintiff to have custody of the minor children.

## RUMSEY V. RUMSEY.

Mr. P. S. T. Jones moved for a decree of divorce in default of compliance by defendant in reconvention (the wife), with an order of restitution of conjugal rights. Plaintiff prayed for a declaration that defendant had forfeited all benefits under the ante-nuptial contract.

Decree granted with costs, and defendant declared to have forfeited all benefits under the marriage conferred by the ante-nuptial contract.

## KUPKE V. KUPKE.

Dr. Greer moved for a decree of divorce in default of defendant's compliance with an order of restitution of conjugal rights. Plaintiff also prayed for an order that defendant had forfeited benefits under the marriage.

Decree granted, with costs, and defendant declared to have forfeited any benefits accruing from the marriage.

*Ex parte* ESTATE STUMKE.

Mr. Bailey moved for a certain rule *nisi*, under the Derelict Lands Act, to be made absolute.

Rule absolute.

*Ex parte* ESTATE HARTZENBERG.

Mr. De Waal moved for a certain rule *nisi*, under the Derelict Lands Act, to be made absolute.

Rule absolute.

*Ex parte* ESTATE RANKIN.

Mr. Inchbold moved for a certain rule *nisi*, under the Derelict Lands Act, to be made absolute.

Rule absolute.



*Ex parte* FISH.

Mr. Sutton moved for a certain rule *nisi*, authorising the issue of a certified copy of mortgage bond to be made absolute.

Rule absolute.

SHEAR V. SELLEY AND SOKOLICH.

Mr. Roux moved to make absolute a certain rule *nisi* calling upon respondents to show cause why moneys due to them in the hands of the Colonial Government should not be paid in satisfaction of the judgment obtained by petitioner against respondents, in the Resident Magistrate's Court, Uniondale.

Rule absolute, with costs.

PATERSON AND CO. V. HARTMAN.

Mr. Sutton moved to make absolute a certain rule interdicting respondent from removing furniture and machinery from premises situate at 119, Bree-street, pending an action to be brought by applicants for £106 8s. 1d., rent owing.

Respondent, who appeared in person, said that he only owed about £89, and that petitioners must have been under a misapprehension when they applied to attach the property. The furniture was presented to respondent after the bankruptcy proceedings. The machinery, which was a printing plant, belonged to another party. Patersons themselves had sold the machinery to a third party.

Mr. Sutton applied for a postponement to enable applicants to reply to the respondent's allegations.

On its eventually transpiring that one of the applicants was also in court, his lordship decided to hear evidence at two o'clock to-morrow (Friday), his lordship, however, urging the parties to endeavour to come to a settlement and thus avoid further costs.

*Ex parte* ESTATE JOSEPH.

Mr. Russell moved for the appointment of a *curator ad litem* to represent certain minor children in an action to be instituted by Jenny Joseph to determine construction of a will.

Order granted appointing Mr. Benjamin as *curator ad litem* of the minors, question of costs to stand over.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

*Ex parte* MNZOYI. { 1906.  
Dec. 14th.

Mr. Howes moved for a certain rule *nisi*, authorising petitioner to sue *in forma pauperis* for restitution of conjugal rights to be made absolute.

Rule absolute, Mr. Howes to be counsel, and Messrs. Wahl, Fuller and De Klerk attorneys for the petitioner.

*Ex parte* SUMMERFIELD.

Mr. Palmer moved for a certain rule *nisi*, authorising petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights to be made absolute.

Rule absolute, Mr. Palmer to be counsel, and Messrs. Fairbridge, Arderne and Lawton attorneys for the petitioner.

*Ex parte* TOWNSEND.

Dr. Rainsford moved for a certain rule *nisi*, authorising petitioner to sue her husband *in forma pauperis* for restitution of conjugal rights to be made absolute.

Rule absolute, Dr. Rainsford to be counsel, and Mr. C. E. Bradfield attorney to the petitioner.

*Ex parte* MAREE.

Mr. Roux moved for leave to petitioner, who resides at Aliwal North, to sue her husband, Ignatius J. Maree, *in forma pauperis*, and by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Petitioner stated that her husband deserted her some years ago. Counsel said he was prepared to certify *probabilis causa*. He asked that the citation be made returnable at the Circuit Court.

Upon counsel certifying *probabilis causa*, rule granted calling upon respondent to show cause on January 12 why petitioner should not be allowed to sue *in forma pauperis*, and by edictal citation, rule to be served personally on respondent, failing which one publication in the "Volkstem."

*Ex parte* GROBBELAAR.

Mr. Howes moved for leave to petitioner to sue her husband, Johannes

Jacobus Grobbelaar, *in forma pauperis* for restitution of conjugal rights, failing which a decree of divorce. Petitioner resides at Graaff-Reinet, and respondent resides in the division of Clanwilliam.

Upon counsel certifying *probabilis causa*, rule to issue calling upon respondent to show cause on the 12th January, personal service to be effected.

De Villiers, C.J., commenting on the fact that applicant did not appear personally, said that there was need for greater strictness in regard to these applications, and that lax practice seemed to be creeping in.

#### *Ex parte* ESTATE GIBSON.

Mr. M. Bisset moved on behalf of the executors in the estate Gibson for an order authorising the Registrar of Deeds to pass transfer of certain property forming part of the Park Estate, Observatory-road. The Registrar of Deeds, in his report, said that the matter was purely one of arrangement between the executors of Wrensch's estate and the petitioners. Counsel said that the authority of the Court was necessary in order to eliminate certain words from the general plan. There was a possibility that Mr. E. J. Sherwood might feel that his rights were affected in connection with certain adjoining ground owned by his wife. Other persons might possibly be interested.

Rule granted calling upon all persons concerned to show cause on the 12th January why the prayer of the petition should not be granted, rule to be published once in a Cape Town newspaper.

#### *Ex parte* DU PREEZ.

Mr. Pohl moved for leave to petition to mortgage certain property to enable her to stock a wine farm.

Order in terms of master's report.

#### *Ex parte* DOUALLIER.

Mr. M. Bisset moved for leave to petitioner to raise a loan on mortgage of certain property. The matter had previously been before the Court (16 C.T.R. 1043), and had been ordered to stand over for further information. Counsel now read an affidavit by the petitioner's attorney, who said the petitioner and her husband were in such poor circumstances that they could barely support themselves, and the loan was necessary in order to put the property in repair.

Ordered to stand over until next term pending production of an affidavit by petitioner.

#### *Ex parte* ESTATE BOUWER.

Mr. Gutsche moved on behalf of the executors of estate Bouwer for conformation of a sale of certain estate property in Bedford.

Order granted.

#### *Ex parte* ESTATE SCHOEMAN.

Mr. Louwrens moved on the petition of the executor of estate Stephanus J. Schoeman, Sen., of Oudtshoorn division, for leave to sue one Henry Nourse, of Johannesburg, by edictal citation, for balance of the purchase price of a certain farm in the division of Colesberg.

Petitioner said that Mr. Nourse had paid a portion of the purchase price, but that there was still a balance of £586 13s. 9d. owing, with interest. He applied for leave to attach certain movables on the farm, and tendered to pass transfer against payment of the balance.

Ordered that the property be attached *ad fundandum jurisdictionem*, and leave granted to sue Henry Nourse by edictal citation, returnable on January 12. citation to be served on Nourse personally.

#### WORCESTER MUNICIPALITY V. COLONIAL GOVERNMENT.

This was an application upon notice by the Worcester Municipality to the Secretary for Agriculture representing the Colonial Government and the Worcester Agricultural Society, for an interdict restraining the Government issuing a grant in favour of the Agricultural Society of a certain piece of land alleged to be Crown land, or disposing of or alienating any portion of such land or commonage land, save and except, subject to, in terms of, and in conformity with the requirements of sections 160-163, inclusive, of the Municipal Act, No. 45, of 1882.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.) was for applicants; Mr. Searle, K.C., was for the Colonial Government; Mr. Burton was for the Worcester Agricultural Society.

Mr. Schreiner said that the whole question of the right of the Worcester Municipality to the commonage of the municipality was incidentally involved in this application. It was a matter of what, one might say, first-rate importance, with regard to the rights of municipalities in regard to commonage lands. The land was admitted throughout the proceedings to be commonage, and the Government had acted on the basis, putting it shortly, that, notwithstanding that this was commonage land, they were entitled under the Crown Lands Disposal Act, with the authority of Parliament, and without reference to the municipality, to make a grant of a piece

of that land to the Worcester Agricultural Society. Counsel said that the Government appeared to have acted with what he might call a "high hand." He expressed the opinion that the matter was one that could be decided on motion without the necessity of going to trial, as all the facts which were necessary to decide the case had been set forth on affidavit.

Mr. Searle said that he did not think the matter could be disposed of by the Court on affidavit.

Mr. Burton, speaking as counsel for the Agricultural Society, said that he was of a like opinion, but, a moment later, he informed the Court that his clients thought the matter could be disposed of on affidavit.

De Villiers, C.J.: The order I make is that, the Colonial Government undertaking not to dispose of the land mentioned in the notice of motion, pending final decision of the Court thereon, the case be postponed until next term. As far as I can judge, from reading the notice of motion and from what counsel has stated, I am satisfied that this is a case that could be heard on motion. More than that I cannot intimate at present; I have not sufficient information. Costs will be costs in the cause.

Mr. Schreiner applied for leave to any of the parties to file further affidavits.

[De Villiers, C.J.: Any of the parties will be at liberty by consent of the opposite party to put in further affidavits.]

*Ex parte* STEYN.

Mr. De Waal moved for release of petitioner from his appointment as curator of the estate of F. H. Muller of Swellendam, and the appointment of F. Reed in his stead.

Order granted as prayed.

*Ex parte* INSOLVENT ESTATE KRUMMECK BROS.

Mr. Watermeyer moved for an order authorising transfer to one Truter, of certain property in the district of Beaufort West. Mr. Truter was one of the trustees in the insolvent estate, and his co-trustee joined in the petition.

De Villiers, C.J., said he would sanction the sale of the first property mentioned in the petition, but not the sale of the two other properties, the prices for which were wholly inadequate, even with the low price of property as it was at present. The matter might be mentioned again on the 12th January in regard to the other two properties. The order would be that the sale of the property in paragraph (a) would be allowed, but refused as to the other two properties, with leave to petitioners to produce independent evidence as to their value, and as to the probability or

otherwise of better prices being obtained for the same in case a further sale by auction takes place. His lordship added that he thought it was a wrong principle for trustees to buy properties in respect of which they were trustees.

*Ex parte* ESTATE VORSTKE.

Mr. Swift moved on behalf of petitioner, who is executor in the estate of his parents, for an order authorising transfer of certain of the estate property to the petitioner.

Order granted as prayed.

VAN DYK AND MARAIS V. ABRAHAM AND CO.

This was an application to have a certain order of Court set aside, so as to enable an execution by petitioners to be carried out.

Mr. McGregor was for applicants; Mr. Benjamin was for respondents.

Mr. Benjamin said that the real respondents were the creditors of Abraham, who were well-known firms in Cape Town.

De Villiers, C.J., suggested that some *modus vivendi* should be devised, pending an action to be brought by Abraham.

Mr. Benjamin urged that the matter might well stand over until the 1st February, and that, meanwhile, the portion of the order restraining respondents from dealing with their property in the meantime should be set aside. The applicants would be amply secured.

Mr. McGregor said that the respondent had already threatened sequestration twice, and there was nothing to show that the estate might not even yet be sequestrated.

De Villiers, C.J., ordered that the rule of the 6th November last be discharged, on condition that the respondent goes to trial next term in the action instituted by him, and that in the interval there should be no sequestration of his estate, question of costs to be reserved.

ROSSOUW V. ROSSOUW.

Mr. Inchbold moved for a certain rule nisi to be made absolute authorising petitioner to obtain transfer of certain property without the assistance of respondent.

Rule absolute.

ERLANK V. ERLANK.

Mr. Burton applied for this matter to be postponed until the 12th January. The application, he said, was to set aside an order granted by Mr. Justice Buchanan in September last, upon the motion of the present respondent, on

the ground that the parties were domiciled in the Orange River Colony, and that the order, therefore, should not have been obtained. The applicant (Mrs. Erlank) had died since the proceedings were commenced.

Mr. Upington (with him Mr. Douglas Buchanan) appeared for respondents, and opposed the application.

Mr. Burton said that respondent fled from writs of civil imprisonment in the Orange River Colony, and came over the border, and he had then commenced an action in the Supreme Court to obtain payment of £500 from his wife under the ante-nuptial contract, and had got leave to sue by edictal citation, and had had a sheep lease attached. The estate, Mr. Burton added, claimed that the case should be tried in the Orange River Colony and that applicant must go there with his suit. Respondent was a man of straw.

De Villiers, C.J., suggested that the question of domicile might well be decided upon exception when the action came on, and the affidavits might then be produced which had been filed for the purposes of the present application.

Mr. Upington said that the domicile of origin was the Cape Colony, the parties were married here, and the ante-nuptial contract was registered here, and he was perfectly clear on the point that this Court had jurisdiction.

De Villiers, C.J.: I understand that the learned judge has granted leave to sue by edictal citation, and I am asked now to make an order setting aside that order already made. I consider that the better course will be, for the convenience of both parties, that there should be no order upon the present application, and that, therefore, the action instituted by respondent should proceed, but with leave to the applicant, in case he should except to the jurisdiction of the Court, to produce evidence on affidavit as to domicile before any evidence on the merits is given, costs to be costs in the cause.

#### HANNAY V. HANNAY.

This was an application brought by Alice Adelaide Hannay, calling upon her husband, Robert F. Hannay, to show cause why he should not provide her with funds to institute an action against him for divorce, and for alimony *pendente lite* and custody of the child.

Mr. Upington was for applicant; Mr. Russell was for respondent.

De Villiers, C.J., said that only matters that would not brook delay should be set down for the 12th December and the 12th January. It appeared to him that there was no real urgency in this matter.

Mr. Russell explained that respondent had made a certain offer to the applicant.

De Villiers, C.J., said that, unless the terms offered by respondent were accepted, the application would have to stand over until next term.

Mr. Upington said that he had no authority to accept the respondent's offer.

The matter was ordered to stand over until next term.

#### INSOLVENT ESTATE VAN DER MERWE V. THORNE.

Mr. J. E. R. de Villiers moved for an order compelling respondent to show cause why he should not proceed with an objection he had lodged with the Master to the liquidation and distribution account framed by the trustee in the insolvent estate of Andries P. van der Merwe, of Graaff-Reinet, or why he should not withdraw the same.

Mr. J. E. R. de Villiers was for applicant, R. A. Jansen; Mr. M. Bisset was for respondent, Sidney Herbert Thorne.

The respondent disputed an allowed claim by the applicant for a lien by the Graaff-Reinet Board of Executors upon a certain farm in the insolvent estate. Applicant is secretary of the Board.

De Villiers, C.J.: It would appear that in this case the respondent's reason for not proceeding at once was that he wished to obtain some further information from the trustee which was not very quickly forthcoming. Upon the whole, I think that this case had better stand over until next term, with leave to the applicant to file replying affidavits, and the question of costs to stand over.

#### CHAMBERS V. ROSE AND OTHERS.

Mr. Van Zyl moved for a certain award of arbitrators to be made a Rule of Court in terms of the award.

Order granted accordingly.

#### RETIEF AND ANOTHER V. LOTTER AND ANOTHER.

Mr. Douglas Buchanan moved for a certain award of arbitrators to be made a Rule of Court, costs to be borne by the parties in equal portions.

Order granted accordingly.

#### STEPHEN V. ESTATE CROUT.

Mr. Douglas Buchanan moved for a certain award of arbitrators to be made a Rule of Court, costs to be paid by the parties in equal portions.

Order granted accordingly.

*Ex parte* MANNELLY.

Mr. Swift moved for an order authorising the amendment of petitioner's name in an ante-nuptial contract and the Debt Registry.

Order granted as prayed.

[Before the Hon. Mr. Justice HOPLEY.]

PURCELL V. VAN ZYL AND ( 1906.  
BUISSINNE. } Dec. 14th.

Mr. Schreiner, K.C. (with him Mr. Gardiner), moved for the appointment of a *commission de bene esse* to take the evidence of the plaintiff, and her son-in-law, Dr. J. A. S. Witty, in London.

Sir H. Juta, K.C., opposed the application.

It appeared that applicant had instituted an action against respondents to recover a sum of about £2,000, which it was alleged that they illegally detained. The respondents claimed that the money had been properly retained by them.

Affidavits having been read and counsel having been heard in argument on the facts,

Hopley, J., ordered the matter to stand over until February 14, and directed that in the meantime medical evidence be obtained as to whether Mrs. Purcell was or was not fit to make the journey out to the Cape, so as to enable the Court to decide whether she should give her evidence in court. He suggested that further information should also be given as to whether her son-in-law would be able to come out to give his evidence.

GREEN BROS. V. ZACKS.

Mr. Rowson moved for an order calling upon plaintiff in the action (Zacks) to find security for costs, plaintiff being a general dealer, residing in London, England, and having no business or domicile in this colony. The respondent, counsel said, appeared to have taken no notice of this application.

Order granted requiring respondent to furnish security to the satisfaction of the defendant, or failing that, satisfaction to the Registrar of the Supreme Court, proceedings to be stayed in the meantime, costs to be costs in the cause.

*Ex parte* ERASMUS.

Mr. Alexander moved for an order authorising the Master to pay out certain moneys for the purpose of petitioner's farming operations in the Orange River Colony. Petitioner de-

sired to avail himself of a favourable opportunity of purchasing the farm.

Ordered that the sum of £950 be paid out of the Guardians' Fund for the acquisition by the minor of the property described, and payment of incidental expenses, as prayed.

*Ex parte* HARVEY.

Mr. Inchbold moved for leave to petitioner, who resides at Woodstock, to sue her husband, Alfred B. Harvey, by edictal citation for restitution of conjugal rights. Respondent was stated to have been lately residing in Essex, England, but to have recently removed.

Leave to sue granted, citation to be returnable on the 15th April, and to be served personally, failing which, one publication in the "Daily Telegraph" (London) and "Cape Times."

*Ex parte* ESTATE HAMILTON.

Mr. Inchbold moved, on the petition of the executor testamentary, for leave to mortgage certain landed property at Claremont.

Order granted as prayed.

OLOETE V. ESTATE LEVY.

Mr. Uppington moved for the cancellation of a certain mortgage bond. Counsel said that the application was of an unusual nature. The money due under the bond had been paid to Levy long before he died. The executrix, Mrs. Levy, was residing in England, but the petitioner was in the unfortunate position of finding no one in this colony whom he could sue. Counsel suggested that the court should authorise the Master to appoint an executor dative, for the purpose of the cancellation of the bond.

Hopley, J., said that the matter might be mentioned again on Monday.

*Postea* (December 17th).

Hopley, J., granted a rule *nisi*, returnable on January 12th. Rule to be served on respondent's agent in the Colony and on the Registrar of Deeds.

*Ex parte* ESTERHUIZEN.

Mr. Watermeyer moved, on behalf of the executrix of the late M. J. Esterhuizen, for confirmation of the sale of certain farms in the division of Willowmore. The matter had previously been before the Court, and was standing over



for an amendment of the conditions of sale, for which a consent paper was now put in.

Order granted as prayed.

**LIQUIDATOR COOPER AND CO., LTD. V. COOPER.**

This was an application for delivery of possession of certain premises and goods belonging to the applicant company.

Mr. Upington (for respondent, the managing director of the company) applied for a postponement of the matter.

Mr. Pyemont (for applicants) opposed any postponement.

Mr. Upington said that negotiations had been proceeding between the respondent, and a large number of shareholders, with a view of taking over the business, and he had, as a matter of fact, paid out a considerable sum of money towards the purchase price. Counsel also took the objection that the applicant had not given due notice of the application.

Mr. Pyemont submitted that the application was in the nature of a matter of urgency.

Hopley, J., decided to hear the application.

It appeared that the company's registered office was in Sheffield, England, and that the company had been placed in voluntary liquidation, and Mr. Wood, of Leeds, had been appointed liquidator. The assets in Cape Town consisted of goods valued at about £200, lying at premises in Castle-street, and the liquidator had appointed Mr. F. R. Syfret as his agent in Cape Town.

Mr. Upington, in argument, quoted Pyemont's Company Law, p. 284.

Mr. Pyemont submitted that the liquidator should at once be put in possession of the premises and goods.

Hopley, J., granted a rule *nisi*, to operate as an interim interdict, calling upon respondent to show cause why he should not be restrained from interfering with, or retaining possession of, the premises, 20 and 22, Castle-street, Cape Town, and the goods therein, and why he should not hand over the said goods and premises to applicant, rule returnable on January 12, respondent to have his costs of appearance.

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

**BULAWAYO MUNICIPALITY  
V. BULAWAYO WATER-  
WORKS CO., LTD.** 1906.  
**BULAWAYO WATERWORKS  
CO. V. BULAWAYO MUNI-  
CIPALITY.** Dec. 17th.

In the first matter, the Bulawayo Municipality applied for leave to appeal to the Privy Council from a judgment of a full bench sitting in appeal from a judgment of the High Court of Southern Rhodesia, in an action brought by the respondents against the Municipality for a declaration of rights in respect of certain electric lighting concession. There was also a cross-motion by the Waterworks Co.

Mr. Searle, K.C. (with him Mr. W. Porter Buchanan) was for the Municipality; Mr. Schreiner, K.C. (with him Mr. Upington) was for the Waterworks Co.

The only questions raised were as to security and an amendment of the order made upon the judgment of the Appeal Court, so as to give more adequate effect to the findings of the Court.

After hearing counsel.

The Court made the usual order as to security, and directed an addition to be made by consent to the judgment in the following terms: "that the term 'actual cost of generating the light' means the actual expenditure incurred for the purpose of such production and distribution, and includes depreciation and insurance."

**HOULDER BROS. V. COLONIAL GOVERNMENT.**

This was an application for leave to appeal from a judgment of a full bench, sitting in appeal, from a judgment given by Mr. Justice Buchanan, sitting as a Divisional Court, in an action brought by the present applicants against the Government for demurrage of certain colliers in Table Bay.

Sir H. Juta, K.C. (with him Mr. Close and Mr. Struben) was for applicants (Houlder Bros.); Mr. Schreiner, K.C. (with him Mr. Searle, K.C., and Mr. Burton) was for respondents (the Colonial Government).

Mr. Schreiner said that there was no objection to the order being granted, the only point for the consideration of the Court being as to security. The order of the Court of Appeal effected a reduction in the amount of the judg-

ment of the Court of first instance, which reduction would entitle the Government, if Houlder Bros. did not appeal to the Privy Council, to a refund of not less than £2,697. It might be a larger sum, but not less. He suggested that the applicants should give security *de restituendo*.

[De Villiers, C.J.: Have the defendants paid?]

Mr. Schreiner replied that the Government had paid. The plaintiffs had got the money and, therefore, they asked for security for the margin between the judgment of the Court of first instance and the judgment of the Court below.

Sir H. Juta said that he did not raise any objection.

Application granted, Houlder Bros. to give security for costs and £2,700.

#### REX V. HOOD.

This was an appeal from a judgment of the High Court of Southern Rhodesia, sitting in appeal from a judgment of the R.M.'s Court, Umtali.

Appellant was charged in the R.M.'s Court, Umtali, with having stolen on the 2nd January last 10s. 6d. sterling, the property, or in the lawful possession of a native, named Madanza. The money was alleged to have been removed from the counter at the Post Office by Hood, whilst the complainant was about to deposit it in the Savings Bank. Appellant pleaded not guilty to the charge, but he was convicted, and sentenced to pay a fine of £2, or seven days' imprisonment. The case was taken in appeal to the High Court, Southern Rhodesia, where the judgment of the Court below was upheld.

Mr. J. E. R. de Villiers was for appellant (Alexander Young Hood); Mr. Pyemont appeared for the Attorney-General of Southern Rhodesia.

Mr. De Villiers said that this Court was in as good a position to decide the matter as the High Court of Southern Rhodesia, and he submitted that the appeal would, therefore, be treated as if it had come direct from the Resident Magistrate's Court. He admitted that a question of fact was involved, and that, looking at the evidence, there seemed to be a *prima facie* case of theft against accused. But when one remembered the strong presumption existing in favour of innocence under our law, and when one analysed the evidence shortly, he thought it would be possible to see that there was not such conclusive evidence as was necessary in law to found a conviction of theft.

[De Villiers, C.J.: Is your suggestion that the native was lying, and that he may never have had the money?]

Mr. De Villiers: He may have had the money, but the native himself may have taken it.

[De Villiers, C.J.: When could he have taken it?]

Mr. De Villiers: It is not easy to discover, but it is equally difficult to discover when my client may have taken it.

[De Villiers, C.J.: But what could have been the native's motive?]

Mr. De Villiers admitted that he was not aware of any motive that the native may have had to trump up a charge against accused. Counsel, having examined the evidence in detail, submitted that the story of the native was not corroborated, and said it was a question of the native's oath against Hood's.

Without calling upon Mr. Pyemont,

De Villiers, C.J.: The learned counsel has urged many arguments in favour of the accused, which, no doubt, were urged before the Magistrate who tried the case, but, after all, it is a question of credibility in this case. If the Magistrate believed the witnesses, then there can be no doubt as to the guilt of the accused. Now, quite independently of Madanza's statements, there are circumstances in the case which might lead one to suppose that the only person who could have committed this offence of taking the 10s. was the accused, supposing that Madanza did place the money on the counter, and why should not Madanza be believed when he says that he did place the 10s. there? If Madanza had been sent by his master to deposit the 10s., and had come back and said to his master that he had lost the money, then there would be some motive proved on the part of Madanza to swear that somebody had taken the money, but it has not been suggested that he did not go with his own money, which he appeared honestly to have done. But, then, there comes the statement of Madanza, who says that he saw the accused take the money. Well, it is said, why didn't he there and then claim the money back? But he explains it as a native would. The Magistrate heard the witnesses, saw the witnesses, and there can be no reason why he should prefer the evidence of the Kafir to the white man. That is the conclusion that he arrived at, and it would be exceedingly dangerous if this Court now were to alter that decision. The appeal must be dismissed.

[Before the Hon. Mr. Justice HOPLEY.]

#### GENERAL MOTIONS.

*Ex parte* WARD. { 1906.  
Dec. 17th.

This was an application for the appointment of a *curator ad litem* to represent petitioner's husband, an inmate

of Valkenberg Asylum, in an action to have him declared of unsound mind, and a *curator bonis* appointed. The matter had been standing over with a view of ascertaining whether a less expensive process was not possible, but Mr. Upington said that, as the value of the estate exceeded £500, he did not think there was any way of achieving the object in view, except by the customary proceedings.

Mr. Van der Byl was appointed *curator ad litem*, summons to be returnable on January 12, and to be served on the *curator ad litem* and the alleged lunatic.

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*Ex parte* GILLANDERS.

Mr. Upington moved to make absolute a certain rule *nisi*, calling upon the Peiserton Diamond Mining Co. to show cause why petitioner should not be granted leave to sue them *in forma pauperis*. Petitioner was proposing the institution of an action against the company to recover £5,000 damages for the loss of her husband through falling down a shaft, left unfenced, it was alleged, owing to the negligence of the defendants or their servants.

Mr. Burton appeared for the respondent company to show cause, and produced affidavits by Mr. F. Wiener (chairman of the company) and by the proprietor of Claridge's Hotel, to the effect that applicant had been staying at the hotel with her children since July last. The second deponent, however, admitted that she had paid no money to him since September last.

It was also alleged that she had received an inheritance from her father's estate, and that a portion of this had been paid to her, and that she was not entitled to sue *in forma pauperis*.

Mr. Upington presented replying affidavits by applicant, in which she said that she had no means to prosecute her action, that her late husband had mortgaged her expectancy under her father's will, and that she had removed her children from the hotel. She repeated that, apart from wearing apparel, she was not possessed of property of the value of £10.

Mr. Burton said that the company had no desire to be unreasonable with the applicant, but they did not wish advantage to be taken of an opportunity of speculating in an action against them.

The matter was ordered to stand over pending further information as to whether applicant was married under ante-nuptial contract, as to the amount of the inheritance, etc.

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COSMELLI, MEYER AND CO. V. TAYLOR AND MILES.

Mr. Payne moved for leave to amend a certain summons calling upon defend-

dants to show cause why their private estates should not be sequestrated. Counsel said that the partnership estate of the defendants had been finally adjudicated, but it was desired to also have their private estates finally adjudicated, and he applied for an amendment of the summons accordingly. He added that the provisional order embraced the private as well as the partnership estate.

The papers in the provisional case were produced, and it was found that the partnership and private estates had been provisionally sequestrated.

Hopley, J., remarked that there had apparently been an omission on the part of the plaintiffs' attorneys.

Leave granted to plaintiffs to issue fresh summonses upon defendants, calling upon them to show cause on the 12th January why their private estates should not be sequestrated, respondents not to be liable for wasted costs.

Hopley, J., said that the respondents or their estates must not be charged with the costs occasioned by the inadvertence.

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LABUSCAGNIE V. LABUSCAGNIE.

Mr. Pohl moved for the appointment of a commission *de bene esse* to take the evidence of plaintiff and his witnesses at Jamestown, division of Wodehouse, in an action instituted by him against his wife for restitution of conjugal rights, failing which, a decree of divorce. Petitioner said that the nearest Circuit town was Dordrecht, about 24 miles distant.

Hopley, J., said that it seemed very absurd to bring an action and then apply for a commission, when the case could have been taken in the first instance to the Circuit Court, only a comparatively few miles away.

Mr. Pohl said that there were precedents for this application.

Hopley, J.: I do not think this is a case in which any circumstances have been shown to justify the Court in granting a commission *de bene esse*. If the application were on notice to the respondent to show cause why this case should not be heard on Circuit, either at Aliwal North or Dordrecht, whichever was more convenient, then, of course, the Court would grant it at once, because that is the natural course to take in a case of this kind. The affidavits made in this application may be used, in that if you give the respondent notice that you are going to make such an application. No order will be made.

*In re* THE EAST LONDON DAILY NEWS  
PRINTING AND PUBLISHING CO. (IN  
LIQUIDATION).

Dr. Greer presented the first report of the official liquidators. He specially called the Court's attention to the following paragraphs: "The liquidators have received from Messrs. Davis and Sons, Natal, an offer of £3,600 for the whole of the machinery and plant, stock and furniture, which cost, as shown, £6,450. This offer was submitted to a meeting of the Cape Town creditors held on the 29th November, who unanimously decided in favour of its acceptance. Attached hereto is also a list of the principal creditors in East London, representing claims amounting to £1,027, who have notified their approval of the acceptance of the offer. The only dissenting creditor is the landlord of the premises, whose claim for damages owing to the breaking of the lease, which has still a little over nine years to run, at the rate of £60 per month, has not yet been lodged with the liquidators. As the landlord was also a director, the liquidators are investigating his connection with the company and his claim for cancellation of the lease. Expert opinion has been taken as to the value of the offer and, according to Mr. Timberlake, general manager in South Africa of Messrs. John Dickenson and Co., printing material merchants, the offer of £3,600 is a good one considering the great difficulty that now exists in disposing satisfactorily of machinery and plant. . . . It should also be pointed out that the longer the premises are occupied the greater will be the landlord's preferent claim for rent. A further recommendation in favour of the acceptance of this offer is the fact that the terms offered are cash within one month from date of delivery. The liquidators now wish to apply for the sanction of the Court for the exercising of the necessary powers under section 149, and especially its sanction to enable them to accept the offer of Messrs Davis and Sons of £3,600 without first submitting the assets mentioned to public competition." The liquidators also asked for power under section 151 to appoint Messrs Sauer and Sanden, of Cape Town, as their legal advisers. Dr. Greer said that he was not aware of any authority for asking the Court to sanction the sale before the report had lain for inspection. It was desirable that the liquidators should have power to at once close with this offer, as there appeared to be a danger that it might be withdrawn if not accepted within a very brief time.

Hopley, J., said that if he sanctioned the sale at the present stage, it seemed to him that it would be very much like granting a final order on an *ex parte* application.

Dr. Greer pointed out that all the creditors except one, who had not yet

filed his claim, had consented to the proposed sale.

Hopley, J., said that he could not grant an order sanctioning the sale at the present stage, but he might express informally his opinion in such a way that it would be of some assistance to the liquidators. It would be ordered that the report lie for inspection at the Master's office for 14 days, and that publication be made in the "Cape Times," "South African News," and "East London Dispatch." He added: All I can say is that I think it is very desirable that such a bargain should be concluded on the evidence of the experts before me, but that this is not the stage at which to finally consent to such matter, and I think the liquidators would be safe under the circumstances in provisionally accepting the offer. The right time to make an order, however, will be when the report has lain for its normal time.

*Ex parte* ATTENBOROUGH.

Mr. Gutsche moved for leave to petitioner to sue her husband, Louis H. Attenborough, by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Respondent had, in November last year, left the applicant, and he was now believed to be in New South Wales. The parties were married in England, and came out to this Colony in 1901.

Hopley, J., said that a letter had been sent by respondent to his wife couched in very affectionate terms. He did not seem to have left his wife with the intention of deserting her.

After hearing counsel further,

Hopley, J., said that he did not see any reason why this application should be granted at present. The application might be renewed later on if there were good grounds for it. There was also a question as to whether the parties were domiciled in this colony.

*Ex parte* ESTATE THORNE.

Mr. Gutsche moved, on the petition of Gus. Trollop, as agent of the executrix testamentary, for leave to sell certain property at Bedford.

Order granted in terms of Master's report.

*Ex parte* INDWE MUTUAL BUILDING  
SOCIETY.

Mr. Watermeyer moved for leave to petitioners, the trustees of the Society, to obtain transfer of certain erf at Indwe, which they had purchased at public auction. The petitioners had granted certain first and second bonds

to one Gert Johannes Botha, who had fallen into arrear with his capital and interest. They claimed to be entitled in terms of the bond to sell the property hypothecated by reason of the failure of Botha to pay the instalments of the capital and the due interest. Counsel applied for a rule similar to that which was granted in the case of *Cape of Good Hope Permanent Building Society v. Rode and Others* (9 C.T. Reports, 198).

Hopley, J: It seems to me from the reported cases in this matter, that the proper course for secured mortgagees with a clause like this in their mortgage bonds, is not that they should have the right to sell at once the property hypothecated, but that they should come to the Court and ask leave to sell the property, and then the Court safeguards the position of the debtors by granting only a rule *nisi* asking these debtors to show cause why their property shall not be sold, and if they do not show cause, then the rule is made absolute. Then the creditors have the right to sell, and I suppose the Registrar of Deeds would probably have no difficulty in granting transfer. You may take a rule *nisi* calling upon the respondent to show cause why this property shall not be sold and transferred in due course, rule to be returnable on January 12.

#### *In re* THE EQUITABLE FIRE AND TRUST CO.

Mr. Searle, K.C., presented the official liquidators' report and applied for the usual order as to lying for inspection, and also as to publication.

Report ordered to lie 14 days at the Master's Office, and publication once in the "Cape Times" and "South African News."

#### *In re* THE ORANGE RIVER IRRIGATION CO., LTD.

Mr. Sutton presented the liquidators' report, and moved for the usual order as to lying for inspection and as to publication.

Report ordered to lie for inspection for fourteen days at the Master's Office, publication once in the "Cape Times" and "South African News."

#### *In re* THE RECREATION SYNDICATE, LTD.

Mr. Struben presented the official liquidators' report, and applied for the usual order.

Similar order granted to that in the previous case,

#### EAST LONDON DAILY NEWS PRINTING AND PUBLISHING CO. (IN LIQUIDATION) V. GOULDEN.

Mr. Benjamin moved for leave to the liquidators to sue one Wm. Goulden, of Johannesburg, by edictal citation, and for the attachment of a certain landed property at East London *ad fundandam jurisdictionem*. Petitioners proposed to institute an action against respondent for payment of £87 10s., in respect of unpaid calls on shares. Counsel (in answer to the Court) said that he did not apply for leave to serve the intedit with the citation.

Leave to sue by edict granted, and property attached *ad fundandam jurisdictionem*, citation and notice to be served together, personal service, returnable on the 12th January.

*Ex parte* ESTATE HOFMEYR. { 1906.  
Dec. 17th.  
" 20th.

"Master" of Supreme Court—  
Moneys of minors paid into his hands—Ord. 105 of 1833, Secs. 26 and 31.

*The applicant, being the surviving spouse and executrix of the late H., administratrix of his estate and guardian of their minor children, had paid over to the Master of the High Court, and through him to the Master of the Supreme Court certain moneys to which the minor heirs were entitled, she acting under Sec. 26 of Ord. 105 of 1833. The Master had invested these moneys in the Guardians' Fund, from which applicant now wished them to be withdrawn, in order that they might be invested in another trust company. The Master having reported unfavourably.*

*Held, that the Court had power under Sec. 31 to sanction such re-investment.*

Mr. McGregor moved, on behalf of the executrix testamentary, for an order authorising the payment of certain moneys deposited to the credit of the minors in the Guardian's Fund, in order that the same may be reinvested by the petitioner as administratrix. The money had been put into the hands of the Master by the petitioner for investment, and she now applied to withdraw



it for reinvestment as she might chose. Counsel submitted that the petitioner had not parted with her control of the money when she deposited it in the Guardian's Fund, and that she had a right, when she elected, to require that the money be paid out to her by the Master. The new investment proposed by petitioner was estimated to produce about £37 per annum more than the fund did at present. The Master reported that the course suggested would introduce a very inconvenient practice.

The application was ordered to stand over.

*Postea* (December 20th).

Mr. McGregor again mentioned this matter, and cited a number of cases and quoted Voet and Grotius, but he admitted that he had been unable to find any authority touching the specific point raised in the present case.

Hopley, J.: This application raises a point of some importance with regard to the administration of moneys which reach the Master's hands by virtue of the 26th section of Ordinance 105. The applicant is the surviving spouse and the administratrix of the estate of her deceased husband and guardian of the minor children of their marriage. She herself inherited one-half of the estate, and as to the other half she is administering it for the minors, whose guardian she is. During the years after her husband's death, from 1901 to 1903, liquidation and distribution accounts were filed, and under those accounts various sums were paid in to the credit of the minors to the Master of the High Court of Griqualand, in whose jurisdiction the property had been realised. The amounts come, roughly, to somewhere between £900 and £1,000 to each child, and the Master of the High Court has, in due course, passed on these moneys to the Master of the Supreme Court, who, under the 26th section of the Ordinance, is authorised to receive such moneys. That section says, as far as it affects the present case, "it shall and may be lawful for any tutor testamentary or curator nominate to whom it shall seem expedient so to do . . . to pay over to the Master of the Supreme Court any money belonging to the person or estate under the guardianship of such tutor or curator, and which by law such tutor or curator might lend out on interest." Under that section the tutor paid in and the Master received this money. It will be observed that the section says "pay over to the Master of the Supreme Court," not deposit it with the Master of the Supreme Court temporarily, or any words of that sort, but to pay over to him, and then, in the 27th section, it talks of a ward book, which the Master must start for all such moneys as have come into his hands, moneys under this 26th section, and in such ward book to open

an account, with a debit and credit side to it, in the name of each person interested in moneys which come into his hands. Therefore, not only is money paid over to him, but he is at once told that he must administer these moneys and keep an account, and he is vested, it seems to me, with such responsibilities that, as far as the immediate administration of these moneys is concerned, he is the only person to whom by the act of the testamentary guardian or administratrix these moneys have been confided. There is nothing in the Ordinance, however, which would preclude the Court from dealing with moneys like these and authorising a more advantageous investment than the one afforded by the Guardians' Fund, which, though absolutely safe, provides only an interest of 4 per cent. on such capital as comes into their hands, and I think that the words of the 31st section, which section gives the Master power to prohibit or to veto any expenditure of such moneys as are in his hands, show that there is a way by which moneys like that may be got if the Supreme Court is petitioned, and the Supreme Court or some judge thereof makes an order directing the payment to be made to the tutor of any moneys in his hands. Now, in a case like this, where it is suggested that a more advantageous investment has been found, the proper course, is, we think—and I have spoken on the subject to the other judges of the Court who are at present in Cape Town—to petition the Court and to show that it is a better investment and to ask the Court, on referring the matter to the Master of the Court, to sanction the change of the investment, that is, to authorise the Master to pay the money out of the Guardians' Fund, and to invest it in this other new investment, which the administratrix apparently has found. I think in the present case that might be done, and such an order might be made. It is suggested that the money might be invested with the Paarl African Trust Company, Limited, who are ready to receive it, and to give 5 per cent. interest, which is one per cent. more than the present fund produces. At the same time the Master points out that this would raise an inconvenient practice; he is not against this on any other grounds, except the precedent so established. I do not think there is any great inconvenience if only it be borne in mind that the Supreme Court is to be approached by petition before such reinvestment and alteration of investment can be made. At the same time once the moneys have come into the Master's hands, and under the guardianship of the Court as upper guardians of minors, it is incumbent upon us, in authorising such reinvestment, to investigate the scheme and the stability of the institution in which

it is proposed to put the moneys, and, therefore, while in this particular case not being unwilling to authorise reinvestment, and without saying a single word as to the stability of the company mentioned—about which the Court knows nothing—as a matter of precedent we think it ought to be subject to the satisfaction of the Master as to the absolute security afforded by the company, or such security given by the company or by others as will satisfy the Master that the moneys will be absolutely safe in the new investment to which it is proposed to divert them. The Court, therefore, authorises the Master to pay these moneys or reinvest them in the said company, provided that the said Master is satisfied by the security of such investment, or receives ample security outside the assets of the company for the securing of such moneys as are so reinvested. It would leave the Master open, I suppose, to make any inquiries that he might feel necessary in the circumstances.

Mr. McGregor: I take it that, pursuant to the order, if there should be any difference, the parties are always at liberty to come to the Court?

His Lordship: Yes, they may.

[Applicant's Attorneys: Michau and De Villiers.]

#### GROENEWALD V. NEWMARK.

Mr. Louwrens moved, as a matter of urgency, for leave to applicant to appeal *in forma pauperis* from a decree of civil imprisonment granted against him by the Resident Magistrate of Bredasdorp, in an action brought by the present respondent. Applicant resides at Napier, division of Bredasdorp. Counsel said that he was prepared to certify *probabilis causa*.

Rule *nisi* granted, calling upon respondent to show cause on the 12th January why leave should not be granted as prayed, the order for civil imprisonment to be stayed meanwhile.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

### GENERAL MOTIONS.

*Ex parte* ESTATE GROBBE- { 1906.  
LAAR. } Dec. 18th.

Mr. Pohl moved for leave to the petitioner to mortgage certain property in which minors are interested.

Order granted as prayed.

#### *Ex parte* ENGEL.

Mr. Lewis moved, on the petition of Eliza Engel, for leave to sue her husband, William Adolf Max Engel, by edictal citation for restitution of conjugal rights, failing which a decree of divorce. Petitioner alleged that while she was temporarily absent in Johannesburg, respondent deserted her, and that he was now believed to be living in Dresden, Germany. The parties were married in London.

Leave to sue by edict granted, citation to be returnable on the 28th February, and to be served personally.

#### *Ex parte* ROWE.

Mr. Struben moved for fresh directions as to service of citation upon petitioner's wife, Alice Rowe, in an action to be brought by petitioner for an order of restitution of conjugal rights, failing which a decree of divorce. The matter had recently been before the Court on an application for an extension of the return day, when Mr. Justice Hopley declined to make an order. The rule had been published in a Melbourne newspaper. Counsel called his Lordship's attention to an extension of return day granted on the 7th December on the petition of the Union-Castle Co., Ltd., although the actual return day was the 14th November (16 C.T.R., 1098). He submitted that there would be no necessity now to give further publication in a Melbourne newspaper and that it would be sufficient if the citation were published in the "Government Gazette" and "Cape Times," and sent by registered letter to a certain person in Victoria, who knew the respondent, but who declined to disclose her whereabouts. The respondents had, no doubt, already been made acquainted with the citation.

[Maasdorp, J.: What is the difficulty in the way of having a further publication in a Melbourne newspaper?]

Mr. Struben: It is a matter of funds.

Maasdorp, J., directed the citation to be published once in the "Government Gazette," "Cape Times," and a Melbourne newspaper, as on the previous occasion, return day to be extended to the 14th April.

#### *Ex parte* ROWAN AND ANOTHER.

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* to represent a certain minor in an action to be instituted by applicants concerning the construction of a will.

Mr. M. Bisset (for the executors of the estate) consented subject to the appointment of Mr. Benjamin as *curator ad litem*.

Order granted appointing Mr. Benjamin *curator ad litem*, costs to be costs in the cause.

THOMPSON V. BATAYI.

Interpleader—Execution on pledge in the hands of a third person.

*N., a native woman, married by Christian rites in community to respondent, had obtained a loan of money from plaintiff, for the repayment of which one M. signed a promissory note as surety, and N. delivered to him certain cattle, part of the joint estate of her husband and herself as security that she would pay the note. There was no proof that respondent had consented to these arrangements. Thereafter appellant sued N. and M. jointly and severally on the note, and obtained judgment against M. only, who thereupon handed over the cattle to be sold in execution. In an interpleader suit brought by N. and respondent, the Magistrate gave judgment against appellant.*

Held on appeal, that the cattle were not executable.

This was an appeal from a judgment of the Resident Magistrate of King William's Town in an interpleader action brought against appellant by respondent to determine the ownership of certain cattle.

It appeared that respondent and his wife are natives married according to Christian rites. Nowillis Batayi (the wife) had contracted certain obligations under a promissory note to the plaintiff, and this note had also been signed by a native headman named Johnny Mpaffa, as surety. In consideration of this, Nowillis had handed certain cattle belonging to herself and her husband over to the headman. Plaintiff sued in the Magistrate's Court upon the promissory note, but the Magistrate only gave judgment as against the headman, and held that Nowillis could not be sued alone, and that she must be assisted by her husband. The cattle were, however, seized in execution of the judgment against Mpaffa. Respondent then brought an interpleader to have the cattle declared his property, and the Magistrate found in his favour.

Mr. Burton was for appellant (John Thompson); there was no appearance for respondent.

Mr. Burton said that the Magistrate seemed to have been induced by ethical rather than legal grounds to come to this decision. He did not appear to like the 2s. 6d. per £1 per month interest. He thought that this was an ignorant and improvident woman, and that she had been rather taken advantage of. Counsel (in answer to the Court) said that the appellant had not obtained judgment against the respondent's wife. Mr. Burton having been heard further,

Maasdorp, J.: It seems that in this case Nowillis obtained certain moneys by way of a loan from Thompson, and gave him in return a promissory note, signed jointly by herself and a man named Mpaffa. Mpaffa seems to have come forward in this matter merely as surety for Nowillis's debt, and in order to secure Mpaffa, Nowillis handed over to him certain cattle belonging to herself and her husband. There is no proof that the husband was a consenting party to these proceedings. When the promissory note fell due, Thompson sued Nowillis and Mpaffa, and obtained judgment against Mpaffa, but failed against Nowillis, on the ground, as given by the Magistrate, that Nowillis had not authority to deal with the joint estate or to appear in Court on her husband's behalf. After the judgment was given, Mpaffa seems to have handed over the cattle to be sold in execution for the satisfaction of the debt, and upon a claim being set up by the wife on behalf of the joint estate of herself and her husband, the parties went into an interpleader suit. The Magistrate found in that interpleader suit that the property was that of her husband, Sentsi Batayi, and that it was consequently not executable. It seems to me that it is quite probable that, if the proper proceedings had been taken, it might have been found that there was some claim upon the wife in respect of the promissory note, and that there was some claim against the property in respect of the judgment debt. It so happens that the Magistrate gave judgment in favour of the wife. She gave her property in security for the debt. The Magistrate has declared that she is not liable for the debt, and consequently the property cannot be taken in execution in satisfaction of a debt in respect of which the Magistrate has declared the wife not to be liable. It has been pointed out also by Mr. Burton that Mr. Thompson himself seems to have seen the difficulty of the position in this case, and that, when he found that the question was raised as to the liability of the property for the debt, he renounced his claim by giving back the property to Mpaffa, who held

it as security for the debt for which he had intervened on behalf of the wife. It seems difficult to understand why Mr. Thompson should have taken up subsequently the position that he was entitled to have the cattle sold in execution, when he had previously intimated his intention of making no claim in respect of them. Upon the whole, I think there are grounds for supporting the finding of the Magistrate that the property is not executable, and the Court will not interfere with that finding. The appeal will be dismissed.

[Appellant's Attorneys: Syfret, Godlouton and Low. Respondent in default.]

#### LANGEVELD V. LANGEVELD.

**Magistrate's jurisdiction—Specific performance—Ejectment—Act 20 of 1856, Sec. 10.**

*A R.M. Court summons issued at the instance of the proprietor of a certain erf called upon the occupier thereof to vacate it. A notice was endorsed on the back of the summons, calling upon the defendant to produce certain documents.*

*Held on appeal, that as this notice was no part of the summons, it could not oust the Magistrate's jurisdiction as a claim for specific performance.*

This was an appeal from a judgment of the Resident Magistrate's Court of district Hay, held at Griquatown, in an action brought by appellant against respondent for an order to forthwith yield and deliver up to plaintiff's possession a certain erf No. 123, situated at Griquatown, of which plaintiff was registered owner, and which defendant unjustly retained from plaintiff.

In the Court below defendant excepted to the Magistrate's jurisdiction, on the ground that the action was for specific performance, and this the Magistrate upheld. He said it appeared to him that he had no jurisdiction, inasmuch as the action was for specific performance, viz., the production of a certain original deed of grant, with diagram annexed, and also deed of transfer. He had the record produced of a previous case between the parties, and he considered that the action should have been brought in a higher court.

Mr. J. E. R. de Villiers was for appellant; there was no appearance for respondent.

Mr. De Villiers submitted that under section 10 of Act 20, 1856, the Magis-

trate clearly had jurisdiction in this case, which was an action of ejectment at the suit of the registered owner against an occupier of the land. He said, however, that this was an action for production of an original document. Defendant admitted that the erf was his owner's property, but said that he had a claim for £180 improvements. He said that he had been allowed by his brother to occupy the ground for a considerable period. The so-called "specific performance," counsel said, was a notice endorsed on the back of the summons calling upon defendant to produce the documents. This was nothing more than a notice to produce the documents. The Magistrate had shown no reason why he should not grant plaintiff an order of ejectment.

Maasdorp, J.: In this case the registered proprietor of a certain erf sued the occupier in an action for ejectment. Now, it appears that there is a special provision for such proceeding under section 10 of the Magistrates' Court Act, jurisdiction is given to the Magistrate to try such issues, and as far as the summons is concerned, this is all that the plaintiff now claims—that he, as the registered proprietor, should be put in possession of this property and that the defendant, who is now in occupation, should be ejected. It is quite possible that certain defences may be set up and exceptions may be raised even within the terms of the 10th section. It is provided, however, that the Magistrate shall have jurisdiction unless questions of title are in dispute, or unless the defendant is in a position to prove that the right of occupation which he claims is of a greater value than £40, so it is quite possible that the defendant in this case may have sound exceptions to raise to this summons, or may have some special plea which he is in a position to set up. But the exception raised in this case is that the matter is substantially one for specific performance. Now, that exception must be overruled, because it is not one which affects the claim of the plaintiff in this case, as it is stated upon the summons. The Court will, therefore, overrule that exception, and order the Magistrate to proceed with the case. The order will not be now that the Magistrate shall proceed with the case upon its merits, because there may be other sound exceptions which the defendant is in a position to raise, or special pleas which he may set up. The order the Court will now make is that the exception appearing upon the record must be overruled and the Magistrate proceed with the case. The Magistrate seems to have fallen into an error with reference to the meaning of the exception by interpreting it to signify that the demand endorsed upon the back for the production of documents when the trial took place was a demand for



delivery up of the documents to the plaintiff, and that that constituted an order which would amount to an order for specific performance. Well, the endorsement, as it appears on the back, is no portion of the summons. Exception overruled, with costs.

[Appellant's Attorneys: Herold and Gie. Respondent in default.]

REX V. AHAMED.—REX V. EBRAHIM.

These cases came on appeal from judgments of the Acting Assistant Resident Magistrate of Woodstock, who had convicted appellants of contraventions of the General Dealers and Other Licences' Amendment Act, No. 35, 1906, in that, being general dealers, carrying on business at Woodstock, and no hours of closing and opening having been fixed by the Municipal Council, they did, on the 29th September, keep open their shop after 11 p.m., against the terms of section 17.

The appellants carry on business respectively at shops in Queen's-road and Duke-street, Woodstock, and the two appeals were heard together, inasmuch as the evidence for the Crown was the same in both instances.

Mr. Van Zyl was for appellants, who are Indian traders; Mr. Howel Jones was for the Crown.

Mr. Van Zyl said he knew that these appeals raised questions of fact, and that the Court was always loth to disturb the findings of Magistrates on questions of fact. In these cases, however, he submitted that the evidence on the records was not strong enough to justify the findings of the Magistrate. On the one hand, they had only the evidence of the constable (Edwards), and, seeing that Edwards had had transactions with these Indians, it was conceivable that the account which the appellants gave was true, and that they did close their premises at the proper time, and that these charges were the result of personal spleen on the part of the constable, who had been refused further credit. In cases of this kind the police had great power, which could only be properly carried out if the members of the force kept themselves above suspicion. The probabilities, counsel submitted, were very much in favour of the version given by the Indians.

Without calling upon Mr. Jones,

Maasdorp, J.: I do not see how the Court can interfere in this case. The decision of the case depends altogether upon the view taken of the credibility of the witnesses. The accused is charged with having contravened the 17th section of Act 35, 1906, in having kept open his shop for the purpose of trade after eleven o'clock. The evidence against him is given by a policeman, and the case for the prosecution mainly, but

not wholly, depends upon the evidence of the policeman. The policeman states that he was on his beat, and it appears that he was on special duty that night, because he had received special instructions from his sergeant, Roodewald. Roodewald says that he had been sent out to observe certain shops, and that he (the policeman) came to report to him at about eleven o'clock. He said it might have been about five minutes before eleven, or about eleven, when the policeman came and reported to him what he had observed. He thereupon sent him off again to keep proper watch. Well, so far, therefore, the evidence of the policeman is corroborated. He said that, having made observations, he went back to his superior officer to report what he had seen, and that was about eleven o'clock. He seems to have reported to his superior officer, because, upon giving warning at one at least of these shops, he was laughed at, and met with a refusal to close at eleven o'clock. A warning was given before eleven that the shops ought to be closed at eleven, and the shopkeepers signified that they would not observe that order. The report was made to the superior officer, Roodewald, and he says thereupon, at about eleven o'clock, he sent the policeman back. That confirms the policeman's evidence that he must have gone back to the shops somewhat after eleven o'clock. It is said that in this particular case the evidence of the policeman should not be accepted, because he had a motive for giving false evidence, and the motive is alleged to be that he owed money at these shops. Now, the mere fact of owing money would rather be an inducement not to report on the part of the debtor the person to whom he is under an obligation, in so far as he received credit from him, and it is also said that it is not only the fact of his owing the money that there is due upon his evidence, but the refusal on the part of the shopkeepers to give him further credit. I may say that the policeman denies this statement. He admits that he did at one time owe money, and that he was still dealing with the other shop, but he denies the statement that he has had unpleasantness with these people. These matters were before the Magistrate, and the main point that was insisted upon before him, if one regards the evidence, was the fact that there were circumstances which would lead to the conclusion that the policeman had very strong motives for false evidence. But, after taking those circumstances into consideration, he accepted the evidence of the policeman as supported by his sergeant as credible, and I see no ground to interfere with his finding in that respect. The appeals will be dismissed.



REX V. HOLLAND AND OTHERS. { 1906.  
Dec. 18th.  
" 19th.

"Close season"—Act 36 of 1886, Secs. 3, 5 and 11—Gov. Proc. 25 of 1905.

*The term "close season" used in Sec. 3 of Act 36 of 1886 is also applicable to such close times, even should they exceed an entire year, as the Governor may proclaim under Sec. 11 of the Act, and any person contravening such Proclamation may be rightly charged and convicted under Sec. 5 of the Act.*

This was an appeal from a judgment of the Resident Magistrate of Caledon, who had convicted the appellants of having contravened section 5 of Act 36, 1886, in that on the 25th of June, 1906, and at Fransch Kraal, in the district of Caledon, they did kill certain antelopes known as steenbok, the said antelopes being specially protected in terms of Proclamation No. 25, 1905, issued in terms of section 11 of the said Act, such proclamation creating a close season for all kinds of antelope in the division of Caledon for a period of two years commencing from the 1st March, 1906. Accused were each sentenced to pay a fine of £4 sterling.

The grounds of appeal as set out in the notice to the Law Department were: That appellants were wrongly charged in that the offence referred to was not one contemplated by, referred to in, or in any way amenable to section 5 of Act 36, 1886; that the evidence adduced as to the locality where the alleged offence took place was not the best evidence, and was improperly admitted and not conclusive; that the evidence adduced was insufficient to substantiate the charge; and that there was gross irregularity on the part of the presiding Magistrate in the conduct of the said proceedings, in that the said Magistrate also acted as prosecutor.

Mr. Upington was for appellants, Holland, Van Breda, and Wrensche; Mr. Howel Jones appeared for the Crown.

Maasdorp, J., asked whether the man who signed the statement of grounds was an attorney and one of the appellants.

Mr. Upington: I think he is. One of the appellants is a European retired Civil Servant, and another is a farmer.

Mr. Upington said that the appeal was brought on three grounds: (a) The appellants had been wrongly charged, because the offence was not one contemplated by section 5 of the Act; (b) the evidence of locality was not the

best evidence and had been improperly admitted; (c) the Magistrate had acted both as prosecutor and as judge.

In support of (a), counsel said that proclamation 25 of 1905 annexed to the record was not a proclamation in terms of section 3 of the Act, fixing a close time for the district of Caledon. The proclamation was one under section 11 of the Act, proclaiming a close season for a number of years, and not under section 3, proclaiming a close season for a part of every year. So the offence, if any offence was committed, was not a contravention of section 5, but of the proclamation under section 11. Section 5 applied only to the close season referred to in section 3.

In support of (b), he said that the evidence of locality was a census map, and a quitrent register. It was not proved where the map came from, and it was not a certified map. The Magistrate said he was entitled to take judicial notice of the boundary line of the district of Caledon. He said he knew the locality and was entitled to use his own local knowledge, but he was quite wrong in doing so.

Mr. Jones said that the fifth section was the only one under which appellants could be prosecuted.

As to locality, he said the maps were properly put in. In support he cited the case of *Nichols v. Parker* (14 East, 33, 1) and Phipson's Evidence (p. 304). There was a proclamation No. 76 of 1887, and this must be the one the Magistrate must have taken judicial notice of. This mentioned the boundary lines between Caledon and Bredasdorp.

He also cited *Queen v. Adams* (10 C.T.R., 757), in which it was held that judicial notice could be taken of a proclamation without its being actually put in in evidence.

Mr. Upington was heard in reply.

*Cur. Adv. Vult.*

*Postea* (December 19th).

Maasdorp, J.: There are three cases before the Court of a similar character, and I have taken the case of *Rex v. Holland* first because that deals more fully with all the circumstances, and the decision of that case will really dispose of the other two cases. The defendant in this case was charged with contravening section 5 of Act 36, 1886, in that he did wrongfully and unlawfully kill one antelope, known as a steenbok, the said antelope being specially protected in terms of Proclamation No. 25, 1905, issued in terms of section 11 of the said Act. No. 36, 1886, the said proclamation creating a close season for all kinds of antelope in the district of Caledon for the period of two years commencing from the 1st March, 1905. Before pleading, exception was taken by the defendant in the following

terms: "The defendant excepts to the charge preferred against him on the ground that the crime or offence with which he stands charged and is arraigned, to wit the killing of certain antelope, known as steenbok, during the close season as ascertained to the division of Caledon and as defined by Proclamation No. 25, 1905, a proclamation duly issued in terms of section 11 of Act 36, 1886, is not one contemplated by, referred to in, or amenable to section 5 of Act 36, 1886, which the accused is charged with having contravened." The Magistrate dealt rather summarily with this exception and, it seems, without giving his reasons for his decision. Now, it seems to me that the point required certainly a little more consideration than the Magistrate was prepared to give it. The Proclamation in question is issued by the Governor on the 20th January, 1905, and is to the following effect: "Under and by virtue of the powers and authorities in me vested by section 11, Act 36, 1886, entitled an Act for the Better Preservation of Game, I do hereby proclaim that in the area named in the schedule hereto the animals therein described shall be protected and not destroyed during the period mentioned in such schedule, and that the said period shall be a close season for the animals in question under the provisions of section 3 of the said Act, No. 36, 1886." In the schedule the area described is the division of Caledon, and the protected animals are described as all kinds of antelope for a period of two years commencing from the 1st March, 1905. This proclamation was issued under the powers vested in the Governor by the 11th section of the Act. The question now arises whether, in contravening the terms of this proclamation, the defendant has brought himself within the terms of section 5 of this Act. In section 5 it is provided that no person shall shoot at game in any district in the Colony during the close season. It is contended on behalf of the defendant that the close season here described is confined to the period of protection granted under section 3 of this Act. Under section 3 it is made lawful for the Governor by proclamation to fix and prescribe for each district in the Colony a close time or fence season within which it shall not be lawful to kill game. Now, the contention is that it is contemplated by the Legislature that the Governor should fix for the protection of game some period annually, in his discretion, during which it shall be unlawful to kill game. Under the old law a period was fixed, running from the 1st July to the 30th November, for the protection of all game. Apparently, such a hard and fast rule was not found to be expedient, and it was, therefore, considered by the Legislature advisable to give the Governor discretion to fix periods for the protection of game, and under this section, in my opinion, the discretion is

given him to fix different periods for different kinds of game. Apparently, under this section proclamations do exist for establishing annually periods during which game should be protected, and it is contended that the section 5 only refers to the close season contemplated under section 3. Upon reference to section 11, it will appear that the powers of the Governor are extended beyond merely prescribing annual periods for the protection of game; power is given to him to fix periods, not exceeding three years, during which any kind of animal, which he, in his discretion, feels should be protected, is not to be destroyed. The term "close season" is not used in this section, but it seems to me that the absence of the term does not prevent the period which is fixed by the Governor for the protection of game, even if it should exceed the annual period contemplated in section 3, from being regarded as a close season. In section 3 it is provided that the Governor may prescribe periods during which it shall not be lawful to kill game. It was not absolutely necessary to designate that period by any particular name, but that period is called a "close season." In my opinion it would have been a "close season" even if that term had not been used in that section and it was not necessary, in order to bring that section under section 5, that the special description of the period should be given. In the same way when the Governor proclaims a certain period extending for more than one year for the protection of a certain animal, that period may properly be called a "close season" for the protection of that animal for that period, and if it may be so termed, then I see no difficulty in bringing it within the terms of section 5. It was argued by Mr. Upington that some regard must be had to the fact that this power only appears in a section of the Act subsequent to section 5, which had already disposed of the penalties respecting close season, but, although at times the position of a provision in an Act may be of some importance in the interpretation of the Act, I come to the conclusion that the period in section 11 can be called a "close season," and the fact that it is introduced in the Act later than the section providing the penalty ought not to influence the conclusion. Mr. Upington has called my attention also to the fact that not only is the power of the Governor extended to giving larger periods for protection, but his power is also extended for the purpose of embracing other animals than those called "game," and the section specially provides that with regard to those other animals they shall then be regarded as game under the other provisions of the Act. Here we have certainly one portion of the section brought specially, in terms of the section, under the other powers relative to

a close season, and I think that the word "close season" should also be extended to the period within which animals are protected under section 11. The charge is, therefore, properly laid as a contravention under section 5, which would embrace offences relative both to sections 3 and 11. After the exception was disposed of, the Magistrate proceeded to try the case, and a ground of appeal is now raised to the effect that there was no evidence that the offence was committed within the district of Caledon. Upon reference to the evidence, I find there were positive statements to that effect. We have Dyer, who knows the boundary very well, and who must have had dealings with respect to the situation of the farm in its relations to the district, stating his opinion most clearly that the whole of the farm lies within the district of Caledon, and he says he knows the boundary line between Bredasdorp and Caledon, and in his opinion the buck were killed some distance inside the Caledon boundary. It is said some better evidence might have been produced, but I do not see that it was necessary in this case, after a strong *prima facie* case had been made out, to go any further. It would have been in the power of the defendant to have produced evidence to rebut the case of the prosecution, and if that had been done then it might have been necessary to establish the point by other evidence, or the prosecution must necessarily have failed. I think these are the only two points which the Court has now to consider. Some others were mentioned, but counsel stated that he did not intend to rely upon them. The appeal, therefore, will be dismissed. The appeals in the other cases against Van Breda and Wrensch will also be dismissed.

[Appellants' Attorney: H. Wrensch.]

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## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

BRITISH FREE RIGHTS BENEFIT SOCIETY V. RUNCIMAN. { 1906.  
Dec. 19th.

This was an application upon notice calling upon respondent to show cause why applicants should not be granted

leave to sign judgment against him, with costs, for not proceeding in the cause by him against applicants, and also why the costs of the application on the 12th July, 1906, should not be paid by respondent.

Mr. Benjamin was for applicants, who are officers of the Free Rights Benefit Society, Rondebosch; Mr. Gutsche was for respondent (Wm. Runciman).

Mr. Benjamin said that this matter arose out of an action brought by the present respondent against applicants to recover £75 15s., balance due of moneys advanced to the subordinate lodge at Simon's Town. Judgment was given against the then defendants by default. Application was then made by those defendants for leave to re-open the matter on certain grounds, and his lordship granted leave accordingly, but ordered the question of costs to stand over. Subsequently, however, the plaintiff (Mr. Runciman) withdrew the summons, so that it would not be necessary now to ask for leave to sign judgment, and applicants would be entitled to costs of that application. The only question remaining to be determined by the Court was as to the costs of the previous application for leave to purge default, and enter appearance. Mr. Benjamin submitted that, the plaintiff having admitted that he had not sued the proper parties, applicants were entitled to their costs.

[Maasdorp, J.: Yes, but that is not sufficient; there may have been gross negligence on applicants' part in not taking steps more promptly.]

Mr. Benjamin submitted that plaintiff had shown an undue amount of haste in bringing the matter into court, and that he had been entirely unreasonable in his dealings with the applicants.

Mr. Gutsche contended that, if the trustees should have been sued and not the committee, the applicants themselves were to blame, because it was only after his lordship's judgment that they took steps to appoint trustees. The only question was whether the applicants were not negligent in regard to entering appearance, and thus saving wasted costs. Their conduct in that respect, counsel submitted, had certainly been very lax, and the Court would not order the respondent to pay costs wasted by the applicants' negligence.

Maasdorp, J.: It seems that the plaintiff in this case had dealings with the subordinate lodge at Simon's Town of the British Free Rights Benefit Society, and they incurred debts to him. He instituted proceedings for the recovery of these debts against the Grand Lodge of the British Free Rights Benefit Society at Rondebosch. It now appears that the plaintiff is quite satisfied that he has no claim against the lodge at Rondebosch for the debt contracted at Simon's Town, and I may go further, and say that there

seems to have been no reasonable ground which ought to have induced the plaintiff to believe that he had any such claim. When the claim was made against the Rondebosch Lodge, they were naturally taken by surprise, and they certainly would require time to make some inquiries as to the nature of the debt and why they should be held responsible for it. At the same time, it also appears that the defendants, who were regarded as the responsible officers of the lodge by plaintiff, were scattered in different districts, and it would have been necessary for them to meet and consider their position, and, when reference is made to the manner in which the service was effected, it appears that service was effected upon them at the lodge at Rondebosch. If they were the proper persons to sue for that lodge, then that would be the proper place to effect service, and the plaintiff need not have followed them up in their different residences, but there is nothing to show that they were the proper officers who should be the defendants in an action. They were entitled, under the circumstances, to separate, due and legal service upon themselves, but that was not effected. I do not now go so much into the question of the legal effect of this as to point out that here again there was a further ground entitling them to delay if they requested it. When the action was proceeding, they did represent to the plaintiff's representatives that it was impossible for them to be ready to answer the action on the day on which it was set down, and requested that it should not be pressed. In spite of that, it was pressed. The applicants were, therefore, bound to come to the Court, to ask that the judgment so obtained should be set aside; costs were incurred in that application, and costs were ordered to stand over, because the Court was not quite satisfied then that the applicants were not liable for the debt, and, perhaps, were not right in setting up technical difficulties in the way of payment; and, further, the question as to the delay and the ground of the delay upon the part of the applicants did not clearly appear. But, as the case now stands, I think it would have been only reasonable of the plaintiff to have allowed further delay in the difficulties which the defendants were then placed through his own action in the matter. As it now appears, he had absolutely no claim at all, and the fact that he made a claim against persons who were utterly ignorant of the debt should have induced him to give them time to consider their position, and not have pressed the claim and rendered the application necessary. The result will be that the costs were really incurred through the unreasonable conduct of the plaintiff in this case, and the Court will order that costs incurred be paid by the respondent, including

costs of the application for reopening the case.

[Applicant's Attorneys: Mostert and Son. Respondent's Attorney: G. Trolip.]

## SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

*Ex parte* CILLIERS. § 1906.  
(Dec. 20th.

Mr. De Waal moved, as a matter of urgency, for the appointment of T. C. W. Johnson, deputy sheriff, as provisional trustee in the insolvent estate of Jacobus Johannes Swart, a farmer, of Hoeko, Ladismith, pending the election of a permanent trustee.

Mr. Johnson was appointed provisional trustee, with power to carry on the farming operations, and to sell the perishable articles and ostrich feathers, costs of this application to come out of the estate.

NIEUWOUDT V. R.M. OF RICHMOND.

Recusation of judge — *Judex suspectus* — Enmity — Partiality — Malice.

*The appellant, on being charged with assault before a Resident Magistrate, excepted to his adjudicating in the case on the ground of personal feeling or malice in that he had before hearing the case said to the appellant's attorney, "I am going to have the accused locked up, I cannot have the public disturbed; the public must be protected." The exception was overruled and the accused was convicted and sentenced to pay a fine of £3.*

*Held, that the use of these words was not conclusive proof of enmity, partiality, or malice; and that, as the Magistrate*



*probably meant to convey no more than that if the evidence which he understood would be given was correct, then it was a case in which the man should, in the public interest, be locked up, the Court should not, on review, set aside the conviction, seeing that, according to the evidence, the assault had been clearly committed.*

This was an application for review of certain proceedings in the Resident Magistrate's Court, Richmond, in which the applicant, a European police-constable named Hermias Jacobus Nieuwoudt, had been charged with assaulting one Barend Kivido, thereby inflicting upon the said Kivido, "certain wounds, bruises, and injuries and other wrongs and injuries." Nieuwoudt had been convicted and sentenced to pay a fine of £3 or one month's imprisonment.

Applicant asked the Court to review the proceedings on the following grounds: (1) That the statement of the charge in question was not made out by the Public Prosecutor, nor were the complaints and depositions taken by him, but by the said Resident Magistrate, who thereby acted as prosecutor, and rendered himself incompetent to try the case; (2) that after accused had been charged on November 13, and an exception had been taken on his behalf had been overruled, no postponement until a further date was ordered, and the case was summarily called upon two days afterwards; (3) that the Resident Magistrate was incompetent to try the case on the ground of interest and personal feeling or malice, having prior to the hearing of any evidence expressed his opinion that the accused was guilty in the following words, viz.: "I am going to have the accused locked up; I cannot have the public disturbed. The public must have some protection," and, further, in that he wrongfully and unlawfully issued a warrant for the arrest of the accused in a matter that should have been summarily dealt with; (4) that there was not sufficient evidence against the prisoner to justify the Magistrate in convicting him."

Mr. Upington was for applicant; Mr. Howel Jones appeared for the Attorney-General.

De Villiers, C.J., said that the Court might as well dispose of the fourth ground at once, because it was a ground of appeal, and not of review.

Mr. Upington admitted that, strictly speaking, it was a ground of appeal.

Mr. Jones said that a report had been received from the Resident Magistrate dealing briefly with this case.

De Villiers, C.J., said that the case should be decided upon what appeared on the record.

Some question was raised as to whether the Magistrate had made use of the remarks set out in the third ground before or after the accused had been arrested, and at length

Mr. Jones, with the consent of Mr. Upington, read a portion of the Magistrate's report. The Magistrate said that he did not consider he was incompetent to try the case, as he had absolutely no interest, personal feeling, or malice towards accused. In the interests of law and order, in duty bound, he did make use of the words mentioned in paragraph 3, as accused only very shortly before this case disturbed the peace, and was discharged, on his (the Resident Magistrate's) recommendation, and he had given him careful warning as to his future conduct. On the affidavits he (the Magistrate) thought he had a perfect right, and was justified in issuing a warrant for the arrest of accused.

Mr. Upington submitted that there was partiality on the part of the Magistrate in taking such a personal interest in this case. It was altogether against the spirit of the times. The Chief Constable was really the public prosecutor of the district, and yet the Magistrate practically took the case out of his hands, and conducted the prosecution. He submitted that under all the circumstances it would be really impossible for the Magistrate to have given an impartial decision. Furthermore, the Magistrate's explanation as to how he came to make use of what, at the very least, was a most indiscreet expression, could not for a moment hold water.

Mr. Jones submitted that the first ground was wholly bad and invalid, and that it was perfectly regular and competent for the Magistrate to act as he had done. He thought this was the first they had heard in this court of a Magistrate showing partiality against a constable. They generally heard of the opposite thing. Counsel submitted that the words said to have been used by the Magistrate did not disclose any interest, personal feeling, or malice on his part. The complaints of irregularity in the conduct of the proceedings had not been shown to be well founded.

De Villiers, C.J.: This is an important application, and it is to be regretted that the Court has not been favoured with any authority bearing upon the important question which has been raised. The question, briefly, is this, what degree of imprudence on the part of the Magistrate in making statements before a case is heard would amount to proof of such partiality or enmity or malice as would entitle the accused to recuse the Magistrate as Judge. My own impression of the law is that frivolous causes of suspicion



would not be admissible, and that the clearest possible proof of such enmity, partiality or malice must be given. There should be no doubt in the mind of the Court, to whom an appeal is made to set aside the proceedings of the Magistrate, as to the improper motives which influenced the Magistrate in deciding the case. The question is whether, in the present case, sufficient evidence has been given to justify this Court in branding the Magistrate as a person who, in deciding this case, had been guilty either of enmity towards the accused or of malice. Well, this statement is made by the attorney of the accused that, on the morning of the 10th November, while he was standing in the office of the Clerk of the Court, the Magistrate came in and made a statement to the following effect: "I am going to have Nieuwoudt locked up; I cannot allow the public to be disturbed; the public must have some protection." That is a vague statement which cannot be considered as expressing the deliberate opinion of the Magistrate that the accused would be punished whatever the nature of the evidence against him might be. The attorney of the accused would have been the last person to whom the Magistrate would have made this statement if that were his deliberate intention. What the Magistrate probably meant to convey was this, "if the evidence, which I understand is to be given, is correct, then it is a case in which the man should be locked up, because the public interest requires that the people who are disturbed should have some protection." It is said, as proof of partiality, that the Magistrate took a very prominent part in the re-examination of the witnesses. It seems that the Magistrate understood Dutch, and that the Chief Constable did not understand Dutch. The Public Prosecutor was the Chief Constable, but the Magistrate took the examination of the witnesses into his own hands, but that does not prove that he did so in order to find evidence against the accused. He did so as a matter of convenience, and not from any malicious motive. The 5th section of Ordinance 40 of 1828 mentions among the grounds of review interest in the cause and malice. In the present case the Magistrate certainly had no interest in the cause, and as to malice, that should be more clearly proved than by evidence such as has been adduced. The application for review must therefore be refused. I am reminded that the result of the case shows that the Magistrate did not give any very deliberate meaning to the words he used, because he imposed a very moderate fine, and, judging from the nature of the assault, which was clearly proved, there was not much enmity or partiality disclosed in the final result. The application must

be refused. I am bound to add this remark, that it was certainly an indiscreet thing on the part of the Magistrate to express his opinion, and that it is in every way advisable for Magistrates to keep their minds perfectly open before they hear a case, and avoid expressing any opinion, whether to the attorney of the accused or any one, before the case actually comes into Court.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton.]

REX V. PAPERT.

Liquor licence—Condition—*Ultra vires*.

*A condition indorsed on a liquor licence that "after close of canteens no liquor be sold, delivered or supplied in any hotel bar to farm servants, labourers or to persons of the class habitually frequenting canteens,"*

*Held to be ultra vires.*

This was an appeal from a judgment of the Resident Magistrate of Stellenbosch, who had convicted the appellant, Jacob Papert, proprietor of the Grand National Hotel, Dorp-street, Stellenbosch, of a contravention of the liquor laws, in that, on Saturday, October 25, he did supply certain three coloured labourers after the hours prescribed in his licence for closing of canteens, to wit, three p.m., with liquor, contrary to a condition indorsed upon his licence. The licence stipulated that the licence-holder should not supply liquor after certain hours to "farm servants, labourers, or persons habitually frequenting canteens." Accused was sentenced to pay a fine of £25, or three months' imprisonment.

The ground of appeal was that the condition in question was *ultra vires* of the Licensing Court.

Mr. Alexander was for appellant; Mr. Howel Jones was for the Crown.

Mr. Jones, at the outset, said that he did not think he could support the conviction.

Mr. Alexander submitted that the stipulation on the licence was clearly *ultra vires*, and he cited the following cases: *Orchard v. Bredasdorp Licensing Court* (21 Sup. Co. Reports, 379), *Queen v. Transveldt* (5 Juta, 181), *Pearson v. Licensing Board of Uitenhage* (3 Juta, 363), *Rex v. Heydenrych* (2 E.D. Ct., 248), *Rex v. Robertson* (9 Juta, 299), *Municipality of East London v. Umvato* (9 Juta, 465), and *Queen v. Smith* (3 E.D. Ct., 465).

De Villiers, C.J.: The appellant in this case was charged with having, on a cer-

tain day, at his licensed premises known as the Grand National Hotel, wrongfully and unlawfully, after the hours prescribed on his licence for the closing of canteens, to wit 3 p.m., sold, delivered, or supplied, or allowed to be sold, delivered, or supplied to one Klaas Theron, a coloured labourer, two bottles of liquor commonly called Cape wine. There are two other similar counts in regard to other labourers. One of the conditions of the licence was this: "After close of canteen no liquor to be sold, delivered, or supplied in any hotel bar to farm servants, labourers, or to persons of the class habitually frequenting canteens." It appears in this case there is only an hotel bar, there is no canteen, properly so-called, attached to these licensed premises, and the Court has frequently decided that conditions of this kind cannot be imposed, which introduce class or social distinctions not recognised by the Liquor Licensing Acts. It is unnecessary to discuss the several cases in which this principle has been decided, but there is the case of *Queen v. Transveldt* (5 Juta, 181), which might, at first sight, appear to be in favour of this condition. In that case there was a condition annexed to a licence that liquor may be sold after nine o'clock up to midnight within the hotel and billiard-room to persons frequenting, and being in such hotel or billiard-room of the class commonly admitted to the table d'hôte of such hotel. There it seems a Hottentot boy had gone to get some brandy. Well, that Hottentot boy was not "frequenting and being in such hotel," and consequently the Court held that the condition so far as it affected that case, was not *ultra vires*. In that case special privileges were given to sell after nine o'clock up to midnight, and it was in emendation of this special privilege that the condition was annexed. If in that case the person to whom the liquor was sold had been an inmate of the hotel or a player in the billiard-room, but not of the class commonly admitted to the table d'hôte, the decision might have been different, and the case is certainly not an authority for holding that the condition now in question could be properly imposed. In my opinion it was *ultra vires* of the Licensing Board to introduce the condition; and the appeal must accordingly be allowed, and the conviction quashed.

Hopley, J., concurred.

[Before the Hon. Mr. Justice HOPLEY.]

## GENERAL MOTIONS.

*Ex parte* HAMP. ( 1906.  
1 Dec. 20th.

Mr. Louwrens moved on the petition of Sarah Ann Hamp for leave to sue her husband (Alfred Hy. Hamp), *in forma pauperis*, and by edictal citation for restitution of conjugal rights, failing which a decree of divorce. The matter had been before the Court previously, but had been ordered to stand over for further information as to respondent's whereabouts. Counsel now read a further affidavit by petitioner, from which it appeared that her husband was employed by a firm of drapers in Dunedin, New Zealand. He quoted *ex parte Brink* (vol. 16, part 2, C.T. Reports, 439) as authority for leave being given to sue without the usual rule being issued.

Hopley, J., said that, as defendant had gone to another country, and had left his wife apparently in a state of destitution, leave would be given at once.

Subject to counsel certifying *probabilis causa*, leave was granted to petitioner to sue *in forma pauperis*, and by edictal citation, personal service to be effected. Mr. P. S. T. Jones to be counsel and Messrs. Fairbridge, Arderne, and Lawton to be attorneys of the petitioner. citation to be returnable on March 20. with leave to serve intendit, and notice of trial with citation.

*Ex parte* INDWE MUTUAL BUILDING SOCIETY.

Mr. Watermeyer applied for leave to effect substituted service upon the respondent, Gert Johannes Botha, in the event of personal service being impossible. Counsel said he was instructed that Botha had left Indwe, and, it was thought, had gone to Johannesburg.

Hopley, J., granted leave to effect substituted service by one publication in the "Times of the Frontier" in the event of personal service being impossible.



# DIGEST OF CASES.

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**Accomplices — Arson — Brandstichting — Burning house with intent to defraud or otherwise injure Insurance Company—Ordinance 72 of 1830, Sec. 12.**

*While it is the duty of a judge presiding at a criminal trial at which accomplices give evidence against the accused, to warn the jury against convicting without corroboration on material facts, the Court will not interfere with the conviction, after such warning, if the jury believed the accomplices, and there was satisfactory evidence aliunde that the offence charged had been actually committed by some one, although there be no other corroboration.*

*On the trial of the appellant for arson, two accomplices, who had already been convicted, gave evidence that they had been employed by him to set fire to the house, and there was the independent evidence of two constables that there were clear indications of the fire having been wilfully caused.*

*Held, that there was not sufficient ground for disturbing the verdict.*

*Semble, that setting fire to a man's own house with intent to defraud or otherwise injure an Insurance Company, consti-*

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<i>tutes the crime of "brandstichting" or arson.</i>	
<b>Rex v. Hoffmann; Rex v. Saacks and Hoffmann ...</b>	679

**Accomplices—Attempt to commit arson.**

*On a trial of the appellants for an attempt to commit arson, two witnesses, who had already been convicted, swore that they had been employed by the appellants to set fire to the house. A police constable deposed that he saw one of the two witnesses at the time of the attempt enter the house with some parcels, and then come out with the parcels, which, on his being then and there arrested, were found to contain benzine, while the other witness had been watching outside; and the accused, as well as other witnesses for the defence, admitted that the offence of attempt to commit arson had been actually committed by some one.*

*Held, on a question reserved, that there was not sufficient ground for disturbing the conviction of the appellants by a jury.*

**Rex v. Saacks and Hoffman 702**

**Accomplice's evidence — Corroboration — Act 35 of 1893, Sec. 7.**

**Rex v. Diesel and another ... 158**

**Acknowledgment of debt—Promissory note—Exception—Misdescription.**

*The plaintiff sued the defendant in a Magistrate's Court for*

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<i>£37, said to be owing "by virtue of a certain acknowledgment of debt or promise to pay." The document put in was, in effect, a promissory note, and the exception was taken that "the plaintiff was not entitled to succeed, as the document had not been described in the summons to be a promissory note."</i>		<i>Illiquid cases for price of goods.</i>	
<i>Held on appeal, that the description in the summons was sufficient and that there was no valid ground for the exception.</i>		<i>In an action brought in a Resident Magistrate's Court by the part owner of a motor car against another part owner for the sum of £40, being the loss sustained by the plaintiff by reason of the defendant having wrongfully sold such car, the defendant excepted to the jurisdiction.</i>	
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„ 6 of 1861, <i>see</i> Prescription Act ...	909	<i>Where an inhabitant of a native location, who held land there under quit-rent tenure, was convicted by a Magistrate on a charge of having cultivated certain land without having obtained the permission of his headman, and without the approval of the Inspector of Native Locations, by reason whereof he contravened Sec. 2 of Govt. Notice, 642, 1899, and it was not shown that the accused had cultivated the land continuously since 1884.</i>	
„ 21 of 1869, Sec. 2, <i>see</i> Magistrate's finding on facts ...	714	<i>Held on appeal, that the regulations framed under Act 37 of 1884 were applicable (save as to hut tax), notwithstanding the fact that the appellant was a quit-rent tenant, and the appeal was dismissed.</i>	
„ 13 of 1870, <i>see</i> General dealer	755	Queen v. Mfenge (10 C.T.R., 19) distinguished.	
„ 18 of 1873, Secs. 4 and 7, <i>see</i> Master and Servants' Act ...	28	Rex v. Kobokana ...	728
„ 18 of 1873, Sec. 15, <i>see</i> Master and servant ...	59	Act 20 of 1882, <i>see</i> Totalizator ...	603
„ 18 of 1873, Sec. 7—Apprentice.		„ 22 of 1882, <i>see</i> Extradition ...	295
<i>Sec. 7 of Act 18 of 1873 applies only to servants who are not under 16 years of age.</i>			
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„ 19 of 1874, <i>see</i> Materials for railway ...	80		
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„ 28 of 1883, Sec. 75—Evidence.	
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„ 36 of 1886, Secs. 3, 5 & 11, <i>see</i> Close season ...	1144
„ 40 of 1889, Sec. 275, <i>see</i> Divisional Council ... ..	402
„ 9 of 1891, <i>see</i> “Church of England” ... ..	695
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Act 20 of 1894, Sec. 21—Sheep—Scab.	
<i>It is incumbent on an owner of sheep, who has reason for suspecting that his sheep are infected with scab, to use his best efforts to eradicate the disease and to give information to the inspector. He is not bound to dip the sheep if, owing to scarcity of water, that may not well be done.</i>	
Rex v. Van der Berg ...	216
Act 36 of 1896, <i>see</i> Harbour Board	792
„ 1 of 1897, Sec. 41, <i>see</i> Lunatic	965
„ 25 of 1897, <i>see</i> New street ...	557
„ 28 of 1898, <i>see</i> Liquor licence	218
„ 40 of 1899, <i>see</i> Water Court	599
Acts 47 of 1899 and 40 of 1896—Villages — Communal allotments—Construction of Acts.	
<i>In order to give an intelligible meaning to the expression “The several villages in the district of Elliot” used in the second section of Act 40 of 1896</i>	
<i>Held, that it was intended to refer to the “Communal allotments” in the district of Elliot mentioned in the first section of Act 47 of 1899.</i>	
Ex parte Myburgh ... ..	1037
„ 36 of 1902, <i>see</i> Totalizator ...	603
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„ 35 of 1905, <i>see</i> School Board	494
„ 40 of 1905—Review—Gross irregularity — Exclusion of evidence.	
<i>M. was employed by P. as a barman, and having during such employ sustained certain injuries, applied to a Magis-</i>	



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<i>trate to assess compensation under Act 40 of 1905. The Magistrate made an order for a weekly sum of more than 50 per cent. of M.'s regular wages. Thereafter P. applied under Sec. 14 to have the order set aside, and tendered evidence to show that his injury was due to his own misconduct and gross negligence, that his misconduct had further retarded his recovery, and that he had sufficiently recovered to be fit for work.</i>		<b>Agent—Conduct of parties—Provisional sentence.</b>	
<i>Held, that in refusing to admit evidence on these points, the Magistrate had been guilty of gross irregularity, and the case was referred back to him to take the evidence in question and decide on the merits.</i>		<i>M. applied for provisional sentence against N. for certain sums of interest due on a mortgage bond. N. asserted that he had paid the money to one H., M.'s duly constituted agent. M. repudiated the agency. It was, however, proved that up to Feb. 1st., 1908, H. was in the constant habit of collecting interest for M. On that date M. notified N. that in future his son G. M. would manage his business, and that all payments were to be made to G. M. at H.'s office.</i>	
Palmer v. Morris ... ..	373	<i>Held, that as M. had allowed H. to hold himself out as his agent, provisional sentence must be refused.</i>	
Act 44 of 1905, see Railway Company ... ..	202	Marais v. Nowak ... ..	293
Action on promissory note made before insolvency, see Insolvency ... ..	677	Agent, see Promissory note ...	835
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Admission, see Attorney ... ..	30	<b>Agent — Power of attorney — Disclosure.</b>	
Adultery, see Divorce ... ..	881	<i>The applicant having appointed the respondent as her agent under a power of attorney, revoked the power, appointed another agent, and requested the respondent to give full information as to his acts under the power to such agent. The respondent replied saying that the power was irrevocable and that he was only bound to give information to the applicant herself. In an application to compel the respondent to return his power to the applicant :</i>	
Advertisement hoardings, see Municipal regulations ...	1058	<i>Held, that the position taken up by the respondent justified the applicant in making the application, but as the respondent might require the power in support of his costs done thereunder, it was ordered to be handed over to the Registrar of the Court.</i>	
Advocate of Supreme Court—Admission.		Krynauw v. De Beer ... ..	186
<i>Those who wish to be admitted as Advocates of the Supreme Court should appear in person to take the oath of allegiance before the Court. In special cases they may obtain permission to dispense with personal appearance and to take the oath before one of the superior Courts.</i>			
<i>Ex parte Davies</i> ... ..	355		
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<b>Alien — Prohibition to enter Colony.</b> <i>An alien, who had left the Colony after being for some time domiciled here, was prohibited by the Colonial Secretary from re-entering the Colony, on the ground that while here she had harboured and been the companion of prostitutes.</i> <i>Held, that she could not claim the right to re-enter the Colony, but as she had some property here she was allowed to land for the purpose of realizing her property upon her finding her personal security that in two months she would leave the country.</i> Belmont v. Colonial Secretary	231
Amendment, <i>see</i> Criminal summons ... ..	907
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<b>Appeal — Remitting case for further evidence — Resident Magistrate's Court.</b> <i>On an appeal in a criminal case from a Magistrate's Court, it appeared doubtful whether the proceedings were in accordance with real and substantial justice.</i> <i>Held, that the Court had the power to remit the case for further evidence as if the case had been laid before the Court by a Judge under the 48th Sec. of Act 20 of 1856.</i> Rex v. Jebins ... ..	706
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<b>Appeal to the Court of Appeal—</b> <b>Extension of time—Good and sufficient cause shown.</b> <i>On an application for an extension of time within which the appellant shall prosecute his appeal under the last proviso of Sec. 24 of Act 35 of 1896, it appeared that he could not be ready within the time fixed, that there was a bona fide intention on his part to appeal, and that the delay was not due to any culpable neglect on his part.</i> <i>Held, that good and sufficient cause had been shewn for extending the time.</i> Hotz v. Standard Bank ...	1066
<b>Appeal from a Divisional Court—</b> <b>Extension of time—Jurisdiction of Divisional Court—</b> <b>Copies of record.</b> <i>Any judge sitting in the Supreme Court, whether sitting in Chambers or as a Divisional Court, has power to grant an extension of the time prescribed by the Rules of Court for prosecuting an appeal to the Court of Appeal.</i> <i>Where an appellant had not printed copies of the record ready within the time prescribed, a Divisional Court granted an extension of time.</i> Searle v. Warner ... ..	749
Apprentice, <i>see</i> Act 18 of 1873 ...	1
<i>Aqua erumpens in suo, see</i> Water	173
<b>Arbitration — Award—Objectionable and separable part.</b> <i>A furrow running over the applicant's land, to the use of which the respondents were entitled, having been destroyed by floods, the parties referred the question as to the best mode in which the furrow should be re-constructed and as to the course it should take to an arbitrator who, in his award, directed the course which the</i>	

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<i>new furrow should take, and also increased the maximum width of the furrow from six to nine yards. By a previous contract between the parties the width of the furrow had been fixed at six yards and the terms of the reference did not authorize any widening of the furrow.</i>		<b>Articled clerk—Breach of continuous service—Matriculation.</b>	
<i>Held, that the applicant was entitled to set aside the award as it stood, but that, as the objectionable part was separable from the rest of the award and did not affect the validity of the whole award, the award should not be set aside if the respondents would accept the award with the objectionable part expunged.</i>		<i>The Court granted applicant three months' leave of absence to prepare for the matriculation examination, but directed that after passing the said examination he should serve two years continuously.</i>	
<b>Sapiero v. Ferreira and others</b>	122	<i>Ex parte Rogers</i> ...	821
<b>Arbitration, see Railway Company</b>	202	<b>Articled clerk—Breach of service—Matriculation.</b>	
<b>Architect, see Pleading</b> ...	534	<i>The Court granted two months' leave of absence to an articled clerk to enable him to prepare for the matriculation examination, on condition that he should serve an additional four months after the expiration of articles.</i>	
<b>Arrear rates, see Divisional Council</b> ...	704	<i>Ex parte Geldenhuys</i> ...	856
<b>Arson, see Accomplices</b> ...	679	<b>Articled clerk—Breach of continuous service—Football.</b>	
<b>Article guaranteed for specific purpose, see Sale and purchase</b>	96	<i>The Court granted five months' leave of absence to an articled clerk, to enable him to proceed to England with a football team. Applicant to serve an additional period equal to that of his absence. (See also Ex parte Jackson).</i>	
<b>Articled clerk—Break of service—Matriculation examination.</b>		<i>Ex parte De Villiers...</i> ...	748
<i>The Court refused leave to an articled clerk to break his service for the purpose of pursuing his studies for the matriculation examination.</i>		<b>Articles of association, see Director</b> ...	665
<b>Fourie v. Incorporated Law Society</b> ...	541	<b>Attachment, see Messenger of Court</b> ...	673
<b>Articled clerk—Service.</b>		<b>Attachment, see Ship</b> ...	635
<i>The Court condoned a breach of service during 20 months occasioned by applicant's illness.</i>		<b>Attachment of inheritance—Judgment debt—Right of debtor.</b>	
<i>Ex parte De Jager</i> ...	301	<i>A. obtained judgment against the applicant and an order for the attachment of the inheritance coming to him from the estate of his grandmother. B. obtained a judgment against the applicant and an order for the attachment of the inheritance coming to him from the estate of his father. It appeared that there was no inheritance coming to the ap-</i>	
<b>Articled clerk—Breach of service—Matriculation examination.</b>			
<i>Ex parte Fairbairn</i> ...	751		

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<i>plicant from his mother, who died before his father, and that on the death of his father there was no inheritance due from his estate to the applicant. Although the executor of the father had notice of the order at the suit of B., he paid the money over to A.</i>	
<i>Held, that the applicant was entitled to an order on the executor to pay the money to the Deputy Sheriff in execution of the judgment at the suit of B.</i>	
Theron v. Estate Theron ; Glynn v. Estate Theron and another ...	...1036
Attempt to commit arson, <i>see</i> Accomplices ...	... 702
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Attorney and client — General agency work — Taxation of costs.	
<i>No provision is made by the Rules of Court for the taxation of costs between attorney and client. It is however, the practice for the taxing officer to tax such costs if requested to do so by the attorney, and should the attorney proceed to sue for his costs without having had his bill taxed, the Court can order this to be done, provided that the items in the bill relate either wholly or chiefly to litigious business and not to matters of general agency.</i>	
Walker v. Syfret, Godlonton and Low ...	... 814
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<i>The Court admitted an articled clerk who, during the absence of his principal, had dis-</i>	

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<i>charged purely nominal duties without salary, as acting secretary to a Divisional Council for a period of three months.</i>	
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Bail—Charge of murder.	
<i>The Court admitted a woman charged with murder to bail; the Crown consenting thereto.</i>	
<i>Ex parte Van Litsenborgh</i> ...	... 687
Benefit of creditors, <i>see</i> Com- pulsory sequestration ...	... 926
Benefit Society—Constitution— <i>Ultra Vires.</i>	
<i>A majority of members of a benefit society which had received its charter from the Grand Lodge of Free Gardeners in Scotland resolved to return the charter and apply for a fresh charter from the Grand Lodge in England.</i>	
<i>Held, that the applicants, who had received a certificate of membership in connection with the Grand Lodge of Scotland and who had voted in the minority, were entitled to an order declaring the resolution to be null and void, and interdicting the payment of any of the funds of the society for the purpose of obtaining the charter from the English lodge, in the absence of any rules authorizing such a fundamental alteration of the constitution.</i>	
Coates and Cottrell v. S. John's Benefit Society ...	... 37
Bequest of property to be free from control of husband, <i>see</i> <i>Fidei commissum</i> ...	... 410
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Bills of Exchange Act (19 of 1893) — Promissory note — Presentment at place of pay-	

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ment—Liability of maker on non-presentment.		Breach of contract—Damages.	
<i>The plaintiff sued the defendant in a Magistrate's Court as maker of a promissory note. The defendant was in default; but as the note had not been presented at the place of payment at the time when it fell due, judgment was given for the defendant</i>		Drummond v. Wood ...	165
Held on appeal, that as there was no averment by the defendant that the note would, if presented at the due date, have been paid; it was competent for the plaintiff at any time after the due date to present the note for payment, and the Court accordingly altered the judgment into one of absolution from the instance, so as to give the plaintiff an opportunity of presenting the note for payment before again suing the defendant thereon.		Breach of contract, see Demurrage	103
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McDonald v. African Banking Corporation ...	529	Break of service, see Articled clerk ...	541, 301
Bills of lading, see Lien ...	404	Builder—Retention—Insolvency.	
Bond—General clause.		<i>In an action by the trustees of an insolvent to eject the defendant from a portion of certain buildings which he had built by contract for the insolvent, it was proved that he still had the keys of the rooms in his occupation, and that the amount still owing to him for the building of those rooms was £2,000.</i>	
<i>V. sold to O. Bros. a certain property, and as security for the purchase price accepted a "first mortgage bond upon the said property."</i>		Held in a charge to the jury, that the defendant was entitled to retention of the rooms until that sum was paid.	
Held, that such bond was not to be construed as including the general clause.		Liquidators of Royal Hotel Co. v. Rutherford... ..	179
Semle: had the parties merely agreed that a bond should be passed to secure the purchase price without specifying the property to be bonded, the vendor might have insisted upon the insertion of the general clause in accordance with the usual custom.		Cancellation of sale—Purchase and sale—Ejectment.	
Vosper v. Osburn Bros. ...	586	<i>The plaintiff sold certain farms to the defendant and one R. under a deed of sale, which fixed the price and the terms of payment and provided that occupation should at once be given to the purchasers. Part of the price was paid by the defendant and R., but R. became insolvent, and his trustee abandoned the purchase. Now defendant brought an action against the present plaintiff, to compel transfer of one half of the farms on payment of half the price, but an exception to the declaration was allowed by the Court (14 C.T.R., 861). The defendant remained in possession of the farm, and the plaintiff brought the present action to eject him.</i>	
Breach of contract, see Table Bay Harbour Board ...	615		



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Held, that as the plaintiff did not claim the cancellation of the sale, he could not eject the defendant.	
Neser v. Delport ...	300
Cape Town Municipality—Owner's rate—Act 26 of 1893—Legal title.	
<i>The defendant bought certain premises in Cape Town from the official liquidators of a company, and the purchase was confirmed by the Court on the 19th February, 1906. On the 1st March, 1906, the defendant took occupation, and on the 15th March, 1906, the owner's rate for that year became payable. Through no wilful neglect the defendant had not obtained transfer on the 15th March, 1906.</i>	
Held, that the defendant was not liable under the last proviso of the 102nd section of Act 26 of 1893, to the payment of the rate which became due and payable on the 15th March, 1905.	
Cape Town Town Council v. Royal Hotel Co., Ltd. (1906) ...	1054
Carrier—Negligence—Way bill.	
<i>F. had undertaken to carry certain grain for D. by wagon, a distance of some 80 miles. F. had signed a way bill, admitting that he had received the grain in good order and condition, and undertaking to deliver it in like condition. On delivery, the grain proved to have been damaged by rain.</i>	
Held, that the terms of the way bill did not render F. liable as an insurer, and that the fact of the grain having been damaged was not per se proof of negligence.	
Fumba v. Dickerson...	253
Cemetery, see Public Health Acts	705

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Children under 16, see Master and servant ...	28
Church of England—Church of the Province of S. Africa—Amendment of title deed—Act 9 of 1891.	
<i>Certain persons having subscribed towards the purchase of ground and the cost of the erection of a church at K., received transfer of this land to the Rector and Churchwardens of S. John's, W., in trust for the parish of S. John's. Applicants now desired to have inserted into the title deed the words "subject to the provisions of Act 9 of 1891, and according to the rites and ceremonies of the Church of England as by law established." The Court granted a rule nisi, calling upon all persons interested to show cause why the words "S. John's Church, W.," should not be substituted for "the parish of S. John's," and why "subject to the provisions of Act 9 of 1891" should not be inserted.</i>	
Lindley v. Jones (Archbishop of Cape Town) and Rector and Churchwardens of St. John's, Wynberg ...	695
Civil imprisonment—Act 20 of 1856, Sec. 13.	
<i>A Magistrate in district A. had issued a writ of execution against the movables of G. These movables were all in district B. The Magistrate of district B. indorsed the writ, and on a return of nulla bona having been made, issued a warrant for civil imprisonment.</i>	
Held, that a Magistrate cannot grant a decree of civil imprisonment on the judgment of any other R.M. Court.	
Haworth & Co. v. Graham ...	3
Civil jurisdiction, see Magistrate's Court ...	1100

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"Close season"—Act 36 of 1886, Secs. 3, 5 and 11—Gov. Proc. 25 of 1905.	
<i>The term "close season" used in Sec. 3 of Act 36 of 1886 is also applicable to such close times, even should they exceed an entire year, as the Governor may proclaim under Sec. 11 of the Act, and any person con- travening such Proclamation may be rightly charged and convicted under Sec. 5 of the Act.</i>	
Rex v. Holland and others	1144
Claim in reconvention, <i>see</i> Magis- trate's Court ... ..	752
Colonial produce, <i>see</i> General dealer ... ..	755
Colourable imitation, <i>see</i> Trade mark ... ..	580
Colourable agreement, <i>see</i> Lease	244
Communal allotments, <i>see</i> Act 47 of 1899 ... ..	1037
Community of property, <i>see</i> Griqualand ... ..	362
Company—Debentures.	
<i>The members of a partnership gave the following undertaking to the G. Company "in con- sideration of your having ceded your concessions from the Cape Government to the T. Company, we hereby agree to pay all debts, including 1,700 deben- tures, and to undertake all the liabilities and engagements of the Company, on condition that no debentures or shares are issued after this date with- out our sanction in writing." After the date of this under- taking, 1,000 additional of £100 each were issued by the Company with the sanction, in writing, of the members of the partnership, but only £700 worth of these debentures were lawfully issued.</i>	
<i>Held, that the plaintiff, as the official liquidator of the Com-</i>	

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<i>pany, was entitled to claim payment concurrently with the other creditors from the re- ceivers of the partnership the amount of the 1,700 debentures, but not more than £700 of the face value of the remaining 1,000 debentures.</i>	
Official Liquidator of Grand Junction Railways v. Re- ceivers of Grand Junction Railways ... ..	865
Company — Winding up — Con- tributories — Fully paid-up shares—Companies Act (No. 25 of 1892), Sec. 97 — Es- toppel.	
<i>The owner of a manufactory sold his business to the pro- motors of a company, and one of the terms of the agreement was that he should receive a certain number of fully paid-up shares in the company. The company was floated, but the agreement was not filed with the Registrar in terms of the 97th section of Act 25 of 1892. Thereafter the company was ordered to be wound up.</i>	
<i>Held, that as the company had issued the scrip for such ren- dor's shares as being fully paid up, the liquidators were not entitled to place the names of bona fide purchasers of such shares, without notice of any illegality, upon the list of contributories in respect of such shares.</i>	
<i>Held further, that directors who had obtained such scrip without giving value for them, or purchasers who had notice of the illegality, were liable to be placed on the list.</i>	
<i>Ex parte The Liquidators of the Reynolds' Vehicle and Harness Factory, Ltd. ...</i>	1048
Company—Winding up—Inability to pay debts—Unrealizable assets.	
<i>In an application by certain debenture-holders of a company for its winding up, on the</i>	

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<i>ground of its inability to pay its debts, it appeared that the assets were valued at £145,000 and its liabilities at £95,000, that the Standard Bank, with which it dealt, refused to grant it further banking facilities, and that in consequence the company found great difficulty in satisfying current liabilities; but the Court, not being satisfied that the company did not possess sufficient realizable assets for the payment of its debts or that sufficient efforts had been made to get the company out of its difficulties, Held that under the circumstances, the application should be refused.</i>	
<i>In re Collisons, Ltd.; Ex parte Collison ...</i>	...1069
<i>Company, see Director ...</i>	... 665
<i>Compensation, see Materials for railway ...</i>	... 80
<b>Compulsory sequestration—Benefit of creditors.</b>	
<i>On an opposed application to have a provisional order of sequestration made final, the Court would not grant the order in case of collusion between the plaintiff and the defendant for the purpose of obtaining a sequestration which would not be obtainable on the petition of the defendant himself; but it would lie on the party opposing to prove that there was such collusion, or that the sequestration could not benefit the creditors.</i>	
<i>Sellar Bros. v. Forsyth ...</i>	... 926
<b>Conditional acknowledgment of debt, see Provisional sentence</b>	516
<b>Consolidation of actions—Leave to appeal.</b>	
<i>Two companies instituted separate actions against a Harbour Board for damage done, through the defendant's negligence, to certain vessels belong-</i>	

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<i>ing to the two companies respectively, but in order to save expense, it was agreed between all the parties that, as the same evidence would have to be taken in both cases, the two actions should be consolidated, which was accordingly done. The amount claimed by one of the companies was less, and the amount awarded was less than £500.</i>	
<i>Held, that the Board was not entitled, by reason of such consolidation, to appeal to the Privy Council, as if the amount claimed had exceeded £500.</i>	
<b>East London Harbour Board v. Caledonia Shipping Co. and another ...</b>	...1064
<b>Construction of contract of sale—Demurrage.</b>	
<i>The plaintiffs, by letter dated from London, offered to supply the defendant with 5,400 tons of coal for Cape Town at a certain price per ton c.i.f. on monthly shipments for six months, and stipulated that the defendant was "to accept delivery immediately on arrival in Table Bay at the rate of 120 tons per day, or the defendant to be liable for demurrage at 4d. per nett registered ton per day." The coal was conveyed in ships chartered by the plaintiffs in unequal shipments, so that in the first two months less than 9,000 tons per month, and in the 4th and 5th months more than 9,000 tons were delivered and accepted. Under the charter parties the coal was to be received at the average rate of 120 tons per day, but the lay days were to commence 24 hours after notice of arrival of ship, and the rate of demurrage was to be 3d. per nett registered ton per day.</i>	
<i>Held in an action for demurrage for the 4th and 5th months at 4d. per ton per</i>	

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day, that according to the true construction of the contract the defendant was liable only for the rate of demurrage payable by the plaintiffs themselves not exceeding, however, 4d. per ton per day.	
Held further, that after accepting the cargoes of the ships which arrived in excessive quantities during the 4th and 5th months, the defendant was not relieved from paying the demurrage for which the plaintiffs were liable in respect of those ships, whatever damages the defendant might claim for failure to deliver the cargo in equal monthly shipments.	
Colonial Government v. Houlder Bros. and Co., Ltd. ...	983
Contempt of Court, see Law agent	360
Contempt of Court—Interdict—Personal attachment.	
Hodgson v. McKay & Co. ...	26
Contempt of Court, see Immigration Act ...	1101
Contempt of Court, see Messenger of Court ...	673
Contraband of war, see Horse ...	730
Contract—Construction—Supply of electric current—Actual cost—Depreciation of plant—Generating light.	
Under a contract between W. and M., the former obtained a concession to supply the inhabitants of B. with electric light, and M. stipulated that W. should light the public streets on condition, inter alia, that W. "shall work the generating plant and maintain the light in all the street lamps for an average of six hours per night on two hundred and fifty nights per annum, to be fixed by" M.	
Held, affirming the decision of the High Court of Southern	

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Rhodesia, that the parties must be presumed to have intended that there shall be a corresponding obligation on M. to take and pay for the light and that it was for M. to fix the 250 nights when the lamps should be lit.	
In consideration of the undertakings given by W., M. undertook and agreed to pay W. at such rate as would yield to W. a return equal to ten per cent. over the actual cost of generating the light.	
Held, that the cost of generating the light included the cost of generating the electric current as well as transmitting the current to the lamps, and that "actual cost" did not include interest on capital, but did include depreciation of plant and machinery as well as rents, rates and taxes, so far as they relate to the electrical works.	
Bulawayo Municipality v. Bulawayo Waterworks Co. ...	941
Contract—Removal of materials—Interdict.	
One of the conditions of a contract entered into by the respondent with the applicant Council, was that all the materials brought by the contractor on the works should be deemed to be the property of the Council and should not be removed during the progress of the works without the written order of the Municipal engineer. Before the completion of the work, the respondent, without the consent of the engineer, removed a pulsometer from waste land of the Council to a shed some distance off, and kept the key of the shed in his own possession.	
Held, that there had been a breach of the condition.	
Kalk Bay Municipal Council v. Collie ...	38

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Contract of sale of mining rights —Warranty of title—Red- hibitory action—Measure of damages.	
<i>The defendants sold to the plaintiffs all their right and title to the concession of certain mining rights in Portuguese Africa, guaranteeing the ex- istence of such rights, and that there would be no obstacle to the passing of legal transfer to the plaintiffs. The defendants, however, possessed only pros- pecting rights for a short period and were unable to pass legal transfer of title author- izing the purchasers to exercise the full mining rights pur- chased. The purchase price was not paid, but before the plaintiffs discovered that the defendants would not be able to give full title, they had incurred certain expenditure in Portuguese Africa for the protection of their interests in connection with the purchase, including the expenses of a drill which, under the contract, the plaintiffs had to buy and maintain.</i>	
<i>Held, that the plaintiffs were entitled by means of the redhibitory action to be placed in the same position as if the sale had not been effected and were consequently entitled to have the sale cancelled and to claim as damages the expendi- ture reasonably incurred in connection with the purchase.</i>	
<i>Inhambane Oil and Mineral Development Syndicate, Ltd. v. Mears and Ford ...</i>	379

Contract, see Medical attendant...	527
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Contract of sale — Estoppel — Novation.	
<i>The plaintiff sold to the defen- dant, for future delivery, certain sleepers of different kinds of Australian wood, in- cluding red mahogany. Before the arrival of the sleepers, the defendant, on discovering that</i>	

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<i>the plaintiff intended to deliver white instead of red mahogany sleepers, gave notice to the plaintiff that the former could only be accepted at a reduced price. The plaintiff raised no objection beyond asking the defendant to reconsider the matter, and thereafter not only delivered the white mahogany sleepers, but received the re- duced price and signed vouchers prepared on behalf of the defendant, which shewed the deduction on the face of the account.</i>	
<i>Held in an action for pay- ment of the balance of the price originally agreed upon, that, although there was no express contract for a reduc- tion of price, the conduct of the plaintiff amounted to an acceptance of the terms on which the defendant had con- sented to accept white instead of red mahogany sleepers.</i>	
<i>Bergl. v. Colonial Govern- ment ... ..</i>	160
<i>Corroboration, see Accomplices' evidence ... ..</i>	158
<i>Costs, see Forum ... ..</i>	18
<i>Costs, see Insolvency ... ..</i>	832
<i>„ see Magistrate's Court ...</i>	784
<i>Costs, see Withdrawal of case ...</i>	938
<i>Costs — Attorney and client — Taxing officer.</i>	
<i>C. had been engaged by A., the managing director of a certain company, as attorney to the company, then in process of liquidation on the petition of certain creditors. The Court, in granting the order for liqui- dation, directed that all costs of opposition thereto, together with costs of the application, should be paid out of the liqui- dation. C. taxed his bill as against A., who endeavoured to recover from the liquidators : but the Court held that, in view</i>	



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<i>of its former order, A. had no locus standi, and that C.'s bill should be taxed as against the liquidators. Certain of C.'s attorney and client fees were claimed in respect of ordinary work done in connection with the liquidation, and others as extra fees for work done at late hours, costs of typing, &amp;c.</i>		<i>entitle the appellant to raise the defence of previous acquittal.</i>	
<i>Held, on review of the Taxing Officer's award, that the ordinary fees were chargeable to the liquidators, but that A. was personally responsible for all extra fees incurred without special authority.</i>		<i>Rex v. Du Plessis ...</i>	<i>907</i>
<i>McCallum v. Taxing Officer, Supreme Court and Liquidators, B.S.A. Asphalt Co., Ltd....</i>	<i>858</i>	<i>Culpa, see Injury by bull ...</i>	<i>1115</i>
<i>Counterclaim, see Magistrate's jurisdiction ...</i>	<i>92</i>	<i>Culpable insolvency, see Ord. 6 of 1843 ...</i>	<i>337</i>
<i>Counterclaim, see Magistrate ...</i>	<i>823</i>	<i>Damage to property leased, see Landlord and tenant ...</i>	<i>505</i>
<i>Creditors "in value," see Insolvency ...</i>	<i>849</i>	<i>Damage—Negligence—Landslip.</i>	
<i>Criminal summons—Amendment—Autrefois acquit.</i>		<i>A landslip having occurred on the side of a hill at an elevation above the plaintiff's house, there was a rush of water and mud which broke a water-pipe (which had been laid by the defendant Council also above the house) and destroyed the house.</i>	
<i>The appellant was charged in a Magistrate's Court with having stolen a horse from some person unknown, but upon the case being called, the police informed the Court that the owner had been discovered, and applied for an amendment of the summons by substituting the name of the owner. The Magistrate refused to allow the amendment, but allowed the first summons to be withdrawn and an amended summons to be proceeded with. The appellant having been convicted.</i>		<i>Held, that in the absence of proof that the breaking of the pipe contributed to the damage, or was caused by the defendant's negligence, the defendant Council was not liable.</i>	
<i>Held on appeal, that the Magistrate would have been justified in allowing an amendment of the original summons, and that the fact of the original summons having been withdrawn and an amended summons proceeded upon did not</i>		<i>Mills v. Cape Town Town Council ...</i>	<i>55</i>
		<i>Damage to property, see Municipality ...</i>	<i>162</i>
		<i>Debentures, see Railway Company</i>	<i>202</i>
		<i>Debentures, see Company ...</i>	<i>865</i>
		<i>Declaration—Exceptions—Non-joinder—Partners.</i>	
		<i>The declaration alleged that B. and C. were partners in a joint venture, that under a written agreement D. acquired a share in the joint venture, that B. disbursed certain amounts on behalf of C. and D. and claimed on the death of D. that his executors should pay to B. one-third share of such disbursements.</i>	
		<i>Held, that as the death of D. put an end to the partnership, the executors of D. were entitled to claim a final settlement of all partnership accounts, and that, as no reason appeared on</i>	

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<i>the face of the declaration why C. was not joined either as plaintiff or defendant, the suit at the instance of B. alone should be stayed until C. was joined.</i>	
Bell v. Estate Douglass	...1007
Declaration—Exception.	
<i>It is no ground of exception against a declaration which claims damages against the defendant for having collected water on his land and poured it on to the plaintiffs' land, that the declaration, while alleging that the defendant's predecessor in title had committed a similar injury, does not claim damages for such predecessor's acts either from him or from the defendant.</i>	
Indwe Municipality v. Colonial Government	... 407
Deed of Assignment, see Insolvency	... 188
Defamation — Malice — Animus injurandi.	
<i>The defendant having been informed, as the fact was, that his uncle, who was very old and weak in body and in mind, had given a general power of attorney to the plaintiff, asked the old man why he had given the plaintiff a power under which he could do as he liked with the property and under which he had already begun to call in debts. The old man replied that he had not given the plaintiff such a power; upon which the defendant said that if his uncle did not give the power, the plaintiff was doing what was illegal. The Court, being of opinion that the words had been spoken in the interest of the defendant's uncle, without any animus injurandi,</i>	
<i>Held that the defendant was not liable in damages.</i>	
Taute v. Odendal	...1060

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Defamation of character—Words imputing unchastity to a widow.	
<i>A statement that a man was seen coming out of a widow's bedroom through a window at night-time,</i>	
<i>Held to be defamatory and actionable.</i>	
Frahm v. Mangiagalli	...1057
Deficiency in estate, see Insolvent Ordinance	...1019
Delivery, see Execution debtor	... 656
Delivery, see Pledge	...1117
Delivery—Insolvency of seller—Interdict.	
<i>The applicant, through his agent, purchased from W. some sheep, which were to be delivered on the due date of a promissory note which was given by R. for the price. At the time of the purchase the sheep were shown to the agent along with other sheep, but they were not counted out, nor were they placed in his possession or under his control. On the insolvency of W., before delivery had been effected, the applicant obtained a rule, calling on the respondents, the trustees of W., to shew cause why they should not be interdicted from selling the sheep.</i>	
<i>Held, that the rule should be discharged.</i>	
Insolvent Estate Weymar v. Le Roux	... 242
Demurrage—Breach of contract—Novation.	
<i>The plaintiffs had contracted to supply the defendants with 54,000 tons of coal, to be delivered at Cape Town at £1 16s. 5d. per ton c.i.f., and 60,000 tons to be delivered at Port Elizabeth at £1 17s. 5d. c.i.f., on monthly shipments. Defendants were to accept delivery immediately on arrival</i>	

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<i>of the vessels in Table Bay and Algoa Bay respectively at the rate of 120 tons a day for sailing vessels and 250 for steamers, or to be liable for demurrage at the rate of 4d. per ton for sailing vessels and 6d. for steamers. The coal arrived by 18 sailing ships, but not within the stipulated 6 months; and the quantity received in certain months considerably exceeded that received in others. Eight of these vessels were not discharged within contract time, and in respect of these the plaintiffs now claimed demurrage. The defendants pleaded (1) the irregularity of the shipments and their consequent inability to take delivery as per contract: (2) novation of the original contract, inasmuch as plaintiffs had chartered vessels at a rate of demurrage less than that stipulated for in the contract and that the bills of lading of these vessels, some of them expressly incorporating the conditions of the charter parties, were transferred to, and accepted by the defendants. Held, that the original contract had not been novated.</i>		<b>Despatch of urgent order—Time of essence of contract.</b>	
<i>Held further, that plaintiffs were entitled to demurrage, less a certain sum due to defendants as damages by reason of plaintiffs' failure to despatch their vessels within the contract time.</i>		<i>Defendant on Oct. 26th instructed plaintiffs as a very urgent order to forward a quantity of chaff forthwith. The chaff was not despatched till Nov. 2nd, and did not arrive till Nov. 7th.</i>	
<b>Houlder Bros. v. Colonial Government</b> ... .. 103		<i>Held, that plaintiffs having failed to perform their contract, defendant was justified in refusing to take delivery.</i>	
<b>Demurrage, see Construction of contract of sale</b> ... .. 983		<b>Nolte Brothers v. Kramer ...</b> 819	
<b>Dental surgeon—Discovery order—Interdict.</b>		<b>Director—Dismissal by co-directors—Articles of association—Company.</b>	
<b>Bridgman v. Price</b> ... .. 360		<i>By one of the articles of association of a company it was provided that if any director should owe the company £100 or upwards, he shall forfeit his seat. The plaintiff was a director and chairman, and the defendants were his co-directors. The defendants, without giving the plaintiff previous notice, resolved at a meeting, that as he owed the company more than £100, his seat was forfeited. In fact the plaintiff owed the company less than £100.</i>	
<b>Deportation of "undesirables," see Immigration Act...</b> ... 1101		<i>Held, that the resolution should be set aside.</i>	
<b>Depreciation of plant, see Contract</b> ... .. 941		<b>Williams v. Wood and Williams, Ltd....</b> ... 665	
		<b>Discovery order—Sufficiency of affidavit of discovery.</b>	
		<b>Crafford v. Le Roux</b> ... 1017	
		<b>Discovery, see Rule 333D...</b> ... 582	
		<b>Divisional Council—Arrear rates—Receipt—Transfer of land.</b>	
		<i>The applicant, being the purchaser of land on which arrear Divisional Council rates were due, tendered payment of the rate last due, which the respondent Council refused to accept, unless all the arrears were paid.</i>	

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Held, that as the applicant did not owe the arrear rates, and only tendered the last rate, in order to enable him to comply with the 275th section of Act 40 of 1889, the respondent Council could not, by refusing to give a receipt for the money, extend the protection conferred upon it by that section beyond the last year's rate.	
Cape Divisional Council v. Marais ... ..	704
Divisional Council — Election — Irregularity—Civil Commissioner—Review—Rule 190.	
<i>A Divisional Council election for the district of F. having resulted in a public disturbance, the Civil Commissioner adjourned the further polling for three days. The applicant now applied to have this act of the Civil Commissioner brought under review under Rule 190, on the ground of gross irregularity.</i>	
Held, that as the Civil Commissioner had held no court nor made any formal enquiry into alleged irregularities, no review could be granted under Rule 190.	
Moll v. Civil Commissioner of the Paarl (7 C.T.R.. 454) followed.	
Van Wyk v. Hollander ...	256
Divisional Council — Rates — Transfer of immovable property — Tender — Receipt — Act 40 of 1889, Sec. 275.	
<i>M. purchased certain immovable property within the Division of C. The Divisional Council rates for two years, which had been levied before the date of purchase, were unpaid. M. tendered the rates for the previous year, on condition of receiving a receipt for the same; the production of such receipt being a necessary condition under Act 40 of 1889, Sec. 275, to receiving transfer.</i>	

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<i>The Council refused to receive one year's rates unless all arrears were also paid.</i>	
Held, that the Council was bound to accept and give a receipt for the last year's rates, and might proceed against the vendor of the property for other arrears.	
Smuts v. Cathcart Divisional Council (6, C.T.R., 384), distinguished.	
Marais v. Cape Divisional Council ... ..	402
Divisional Court — Appeal to Supreme Court—Security.	
<i>The question as to whether the security offered by the party appellant under Sec. 26 of Act 35 of 1896 is good and sufficient, should in the case of an appeal from a Divisional Court to the Supreme Court be decided by the Registrar of the Supreme Court, as he is also Registrar of the Divisional Court.</i>	
National Bank v. Peel ...	940
Divisional ratepayer, see School Board ... ..	494
Divorce — Adultery—Evidence—Prima facie case.	
<i>The Court granted a divorce on prima facie evidence of adultery committed by the defendant, who was in default, notwithstanding that an important witness for the plaintiff had not been called.</i>	
Fletcher v. Fletcher...	881
Document produced as evidence — Inspection.	
<i>The plaintiff in an action, having obtained a writ of arrest against the applicant, on the ground that he was making preparations to leave the Colony produced, on the motion to confirm the arrest, the envelope of a letter written to him by the applicant, from the post-mark on which it was argued</i>	

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<i>that it had been posted so as to reach the plaintiff after the applicant had left the Colony. The applicant did not then inspect the envelope minutely, but after the arrest had been confirmed, he applied to the plaintiff for an inspection, who thereupon removed the document from the Registrar's office.</i>		Ejectment, <i>see</i> Vagrancy...	862
<i>Held, that the applicant was entitled to an order that the document be returned by the plaintiff to the Registrar of the Supreme Court, to enable the plaintiff to inspect it.</i>		Election, <i>see</i> Husband and wife...	688
Stevens v. McCallum ...	113	Election of auditor, <i>see</i> Port Elizabeth Municipality ...	229
Domicile, <i>see</i> Immigrant ...	324	Estoppel, <i>see</i> Contract of sale ...	160
Dowry cattle—Native custom—Interpleader suit.		„ <i>see</i> Locatio operarum ...	125
<i>The appellant bought an ox from S., a native, who had received the ox from the respondent, another native, as dowry cattle, upon his marriage with the daughter of S.</i>		Estoppel by conduct, <i>see</i> Landlord and tenant ...	505
<i>Held, that as the marriage did take place, M. was not entitled as against the appellant to claim ownership in the ox.</i>		Eviction, <i>see</i> Landlord and tenant	847
Hoole v. Malusi ...	250	Evidence, <i>see</i> Divorce ...	881
Dowry cattle, <i>see</i> Native custom	251	Evidence, <i>see</i> Act 28 of 1883 ...	854
Drainage contractor, <i>see</i> Municipal Council ...	1022	Exception, <i>see</i> Summons...	672
Due notice of meeting, <i>see</i> Turf Club ...	237	Exception—Variance between declaration and replication.	
Duress, <i>see</i> Illegal contract ...	232	<i>The plaintiff, in an action founded on a contract, referred generally to such contract without stating that it was in writing. The defendant's plea raised several defences bearing upon the exact terms of the contract. Thereafter the plaintiff, in his replication, stated that the contract was in writing and set out some of its terms, but there was no inconsistency in other respects between the declaration and the replication.</i>	
Edictal citation, <i>see</i> Profugus ...	958	<i>Held, that there was no variance, and consequently no ground for excepting to the replication.</i>	
Ejectment, <i>see</i> Cancellation of sale ...	300	Reid & Co. v. Logan ...	1094
Ejectment—Magistrate's jurisdiction—Act 20 of 1856, Sec. 10.		Exception, <i>see</i> Acknowledgment of debt ...	1112
<i>Sec. 10 of Act 20 of 1856 gives a Magistrate no jurisdiction to try an action for ejectment brought at the suit of a trustee in an insolvent estate.</i>		Exception, <i>see</i> Summons...	245
Jansen v. Fourie ...	528	Exception, <i>see</i> Declaration	407, 1007
		Excess of authority, <i>see</i> Principal and agent ...	544
		Execution debtor — Seizure by messenger — Damages for wrongful seizure.	
		<i>The defendant, a messenger of a Magistrate's Court, finding a native, against whom he held</i>	



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<p>a writ of execution, in possession of a horse, took it in execution. The native said that it belonged to the plaintiff, but the defendant did not believe him. The defendant kept the horse for a few days, and having in the meantime satisfied himself that the horse belonged to the plaintiff, he offered to return the horse. The plaintiff refused to take it unless he got damages for the detention of the horse. The evidence showed that at the time of the seizure the defendant acted bona fide, without negligence, and that he had reasonable grounds for believing that the native was the owner.</p> <p>Held, that the defendant was not liable in damages for illegal seizure and detention.</p> <p>Cochrane v. Ngesman—Cochrane v. Nqamnqxa ... 222</p> <p>Execution debtor—Ownership—Delivery.</p> <p>Sheep bearing the mark of an execution debtor and found in his possession were attached by the messenger. P. claimed the sheep as his, on the ground that they were the progeny of sheep which 18 years before had been leased to the debtor.</p> <p>Held, that in the absence of satisfactory proof of P.'s ownership, the sheep were liable to attachment and sale in execution.</p> <p>Estate Baumann and another v. Du Plessis and another 656</p> <p>Executor—Ordinance 104 of 1833, Sec. 32—Recovery of money improperly paid by executor.</p> <p>The firm of S. &amp; Co., of which the plaintiff was a partner, was indebted to the defendant in a sum of money. The other partner died, and the plaintiff was appointed executor. The plaintiff, believing</p>	<p>the firm to be solvent, paid the debt as surviving partner.</p> <p>Held, that the plaintiff was not entitled, as executor of the deceased partner, to recover the amount from the defendant under the 32nd section of Ordinance 104 of 1833.</p> <p>Estate Shayler v. Devenish... 657</p> <p>Executor dative, see Lunatic ... 965</p> <p>Executor, assumption of, see Will 540</p> <p>Extension of time, see Appeal ...1066</p> <p>Extension of return day, see Rule of Court ... 273, 1088</p> <p>Extradition—Act 22 of 1882.</p> <p>H. had been arrested in Cape Town on a warrant issued in the O.R.C. and detained in prison, in order that he might be sent back.</p> <p>Held, that he could not be extradited until a Magistrate had enquired into his case.</p> <p>Ex parte Hoffman ... 295</p> <p>Fair comment, see Libel ... 115</p> <p>Fair report, see Libel ... 440</p> <p>False imprisonment — Malicious arrest — Malice — Want of reasonable and probable cause.</p> <p>The appellant obtained a decree of civil imprisonment against the respondent in a Resident Magistrate's Court, of which, however, the Court on the 21st day of September granted a stay of execution until the 31st of October. The record, however, by mistake mentioned the 21st of October as the day on which the stay was granted, and by another mistake the clerk of the appellant's attorney took it that the stay was until the 30th September, and he accordingly on the 6th of October applied for a warrant of imprisonment. The Magistrate, again by mistake, signed the warrant for</p>

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<i>immediate execution, although he had ordered a stay until the 31st. The respondent was lodged in gaol for one night, but released by the Magistrate in the following morning on discovery of the mistake. The respondent having obtained judgment against the appellant for damages.</i>	
<i>Held on appeal, that there had been no false imprisonment, inasmuch as the warrant was in due form and that there was not such a total absence of reasonable and probable cause as to lead to a necessary inference of malice, and the appeal was allowed accordingly.</i>	
<i>Shaskolsky v. Haupt</i> ...	336
<i>Fees, see Medical practitioner</i> ...	124
<i>Fidei-commissum residui, see Will</i> ...	65
<i>Fidei-commissum -- Bequest of property to be free from control of husband—Security—Administrator—Trustee.</i>	
<i>The testator burthened the inheritances of certain female heirs with a fidei-commissum in favour of their children, and expressed his special will and desire that the inheritances should not in any way be subject to the control of the husbands of the heirs. The defendant was appointed executor, but no direction was given that he should also act as administrator. He claimed the right to administer the property so as to be able to keep it free from the control of the husbands.</i>	
<i>Held, that as executor, he could only liquidate the estate, but that the desire of the testator to keep the property free from the control of the husbands should be carried out by making the payment of their inheritances to the fiduciary heirs conditional upon their giving security for the trans-</i>	

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<i>mission of such inheritances to the fidei-commissary heirs.</i>	
<i>Spencer and others v. Estate Hanson</i> ...	410
<i>Fidei-commissum, see Will</i> ...	700
<i>Fish-horn, see Municipal regulation</i> ...	213
<i>Fixture, see Immovable property</i> ...	1086
<i>Football, see Articled clerk</i> ...	748
<i>Foreign Asylum, see Lunatic</i> ...	879
<i>Foreign jurisdiction, see Partnership</i> ...	396
<i>Foreign plaintiff — Security for costs — Time when security can be demanded.</i>	
<i>The plaintiff, being a foreigner, sued the defendant, who filed his plea, and thereafter objected to the plaintiff filing his replication until he gave security for costs that might subsequently be incurred by the defendant.</i>	
<i>Held, that the objection was a good one, and although the replication was allowed to be filed, all further proceedings were stayed until such security should be given.</i>	
<i>Algoa Milling Co. v. Bell &amp; Co.</i> ...	781
<i>Forgery, see Guarantee</i> ...	708
<i>Forum—R.M. Court—Costs—Act 20 of 1856, Sec. 35.</i>	
<i>The plaintiff (domiciled in Cape Town) wishing to sue defendant, who was domiciled within the Magisterial District of W., for services as an expert witness in an arbitration case, asked him to accept service of summons in Cape Town. On defendant's refusal to do this, plaintiff summoned him in the Supreme Court and recovered less than £20. He now applied for specially qualifying costs in addition to the ordinary costs allowed by the Rules of Court.</i>	

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<i>Held, that as the cause of action had arisen within the district of W., plaintiff by Sec. 35 of Act 20 of 1856 was only entitled to costs on the R.M. Court scale.</i>	
Wheeler v. Logan ... ..	18
<b>Fraudulent insolvency—Anticipation of return day.</b>	
<i>Where it was alleged that certain persons whose estates had been provisionally sequestrated had fled the country and taken with them the assets of their partnership and private estates before the return day of the rule nisi, the Court amended the original rule by fixing a nearer date for the return day.</i>	
Purcell, Yallop and Everett, Ltd., and W. and G. Scott & Co., Ltd. v. Brice Bros.	612
<b>Freight and landing charges, see Surety...</b> ... ..	588
Furrow, <i>see</i> Water ... ..	639
Game of chance, <i>see</i> Totalizator	603
General clause, <i>see</i> Bond...	586
General covering bond, <i>see</i> Insolvency ... ..	85
<b>General dealer — Licence — Colonial produce—Act 13 of 1870, Sec. 6.</b>	
<i>W., having taken out a general dealer's licence in Cape Town, which, however, did not specify any place of sale, was convicted of having sold "coal" at Claremont. No attempt was made by the Crown to prove that this was not Colonial coal. Conviction quashed on the ground that there was no evidence that the appellant had committed the offence of selling imported coal without a licence and had thus contravened Sec. 6 of Act 13 of 1870, the offence with which he was charged.</i>	
Rex v. Warner ... ..	755

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<b>Griqualand — Marriage — Community of property.</b>	
<i>Under Griqua law, as it existed among the Griquas before the annexation of their territory, the survivor of two spouses was entitled to one half of the immovable property of the deceased spouse.</i>	
Fortuin's executor v. Abrahams (7 C.T.R., 30) commented on.	
Dauids v. Estate Dauids ...	362
<b>Giving time to debtor—Payment in instalments.</b>	
<i>The defendant offered the plaintiff, to whom he owed the sum of £48, to liquidate the debt in instalments of £2 a month, and the plaintiff accepted the offer.</i>	
<i>Held, that on failure of the defendant to pay one of the monthly instalments, the plaintiff was entitled to claim payment of the whole debt then still due to him.</i>	
De Kock v. Fick ... ..	905
<b>Guarantee — Forgery — Undertaking not to prosecute — Immoral consideration.</b>	
Standard Bank v. Hotz ...	708
<b>Guarantee—Power of attorney—Manager of business—Authority.</b>	
<i>During the absence of the defendant from the Colony his brother H. and another person were appointed his general agents for the management of his business in Cape Town. The plaintiff alleged that H., as such general manager, gave a verbal guarantee to the plaintiff for the payment of a debt due by one O. to the plaintiff's. The evidence was not sufficient to prove that such guarantee had been given, but :</i>	
<i>Held, that even if such guarantee had been given, H. had no</i>	

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<i>authority from the defendant, on his behalf, to guarantee the debts of third persons.</i>	
<i>Zeederberg and Duncan v. Henry ... ..</i>	427
<b>Harbour Board—Harbour Master Act 36 of 1896—Negligence <i>Ultra vires</i>—Servants' scope of employment.</b>	
<i>The 38th section of Act 36 of 1896 enacts that if it shall appear necessary to the Harbour Master of E. L., he may order any vessel to shift or change her berth to any other berth to be pointed out. The plaintiffs' vessels were duly licensed to lie up in the Buffalo River, and they were duly and safely moored in proper berths assigned to them. A regatta being about to be held in the River, the Harbour Master ordered the temporary removal of the vessels, and as he knew that they had no master or crew on board, he employed servants of the Board to attach them to a hulk lying nearer the side of the river. There was negligence in attaching these vessels to the hulk, and the Court, moreover, found that the work was done in a negligent manner. A freshet arose, causing one of the vessels to be stranded and thereby open to drift into the sea.</i>	
<i>Held, that the Board was liable for the damage.</i>	
<i>Caledonia Shipping and Salvage Co. and Colonial Fisheries Co. v. East London Harbour Board ...</i>	792
<i>Harbour Board, see Town Council</i>	970
<i>Hawker, see Sale and purchase ...</i>	416
<i>Heirs, see Will ... ..</i>	533
<i>Heirs, see Security ... ..</i>	766
<i>Hire-purchase, see Pledge ...</i>	1117
<i>Holder "in due course," see Promissory note ... ..</i>	670

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<b>Horse — Contraband of war — Trading with "enemy" — Booty—<i>Res nullius</i>.</b>	
<i>During the late war one K., a member of a hostile commando, exchanged a horse for a stallion and a sum of money with the appellant, a British subject. Appellant was afterwards ordered by the Military to send his horses to a "protection camp," when, seeing that the horse in question bore K.'s mark, they claimed it as booty and eventually sold it to one D. On D.'s death, it was sold as part of his estate to one B., from whom it was purchased by respondent, who offered to restore it to appellant on payment of a certain price. Having obtained possession of the horse, appellant claimed it as his own property, and refused to pay for it. In the Court below the Magistrate gave judgment for £32 in favour of respondent, and against this judgment appellant now appealed.</i>	
<i>Held, that inasmuch as trading with an enemy, especially in contraband of war, is illegal during time of war, appellant had not a good title to the horse; that it was legally a res nullius, and that by confiscating it as booty the Military had acquired a good title to it, and that the subsequent sales were all good in law. That appellant, having been legally divested of his former ownership in the horse, could recover the same only by purchase from the present lawful owner (respondent); and that hence the appeal must be dismissed with costs.</i>	
<i>Van Zyl v. Pienaar ... ..</i>	730
<i>Hotel lease, see Landlord and tenant ... ..</i>	847
<b>Husband and wife—Mutual will —Election.</b>	
<i>Husband and wife, married in community, directed by mutual</i>	

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will that three-fourths of the joint estate should be invested and the interest thereon paid to the survivor, and that, on the death of the survivor, the respective heirs of the testators should take their respective shares. After the death of the husband, the wife, who is plaintiff, received a fourth of the joint estate, unencumbered, and received interest on the remaining three-fourths; and she now claimed to be entitled to receive another unencumbered fourth share, and to continue to receive interest on the remainder of the joint estate.

Held, that having elected to enjoy interest on more than she was entitled to by virtue of community, she was not entitled to claim during her life-time that her full half share of the community should be paid to her unencumbered.

Probaart v. Estate Probaart 688

**Illegal contract—Agreement not to prosecute—Par delictum—Duress—Costs.**

P. stole two heifers from W., who, after incurring certain expenses in sending for them, estimated by the Magistrate at £1, found them in possession of T., to whom P. had sold them. W. consulted V., an attorney, on the subject, and P. was induced by them to hand over a horse and an ox to W., which were subsequently sold by V., in his capacity as an auctioneer, and realized £13 1s. 6d. There was a conflict of evidence as to the precise value of this consideration, but the Magistrate found, as a fact, that V. and W. led P. to believe that in consideration of the delivery of these animals he would not be prosecuted for the theft. A complaint, however, was subsequently laid by W., P. was convicted, and V., who assisted

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in the prosecution, was paid by W. £3 10s. fees out of the £13 1s. 6d. for his services in the matter. P., after serving his sentence of imprisonment, sued them for the proceeds of the sale of his horse and ox, on the ground of failure of consideration. The defendants excepted that the alleged agreement was illegal and that an action could not be founded on its breach. The Magistrate over-ruled the exception and gave judgment against the defendants, jointly and severally, for the amount claimed, less £1, which he allowed W. for his expenses as above.

Held on appeal, that the parties were not in *pari delicto*, and the respondent having been subjected by the appellants to duress, that in the circumstances he was entitled to recover from W. the proceeds of the sale, but that the liability of V. must be limited to the amount which he had received for his "professional assistance."

Held also, that in the civil cases, notwithstanding this variation of the order, the costs of appeal should be paid by appellants.

Van der Poel and another v. Du Preez ... 232

Illegal regulation, *see* School Board election ... 659

**Immigrants—Domicile.**

Salie and Mohamed v. Colonial Government ... 324

**Immigration Act (47 of 1902)—Deportation of undesirables—Notice of motion for release—Contempt of Court—Restoration to jurisdiction.**

The applicants were deported from the Colony as prohibited immigrants under the 8th section of Act 47 of 1902. Before they were actually removed, notice was served on the respondent, *viz.*: the Colo-



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<i>nial Secretary and the Immigration Officer, that an application would be made to the Supreme Court for the release of the applicants: but, as the respondents had already made all their arrangements for sending the applicants away by a steamer on the afternoon of that day, they proceeded to carry out their arrangements.</i>	
<i>Held on an application that the applicants be restored to the jurisdiction, that as the evidence shewed that the applicants were prohibited immigrants under the Act and were not domiciled in S. Africa, or otherwise exempt from the operation of the Act, the Court could not order their restoration to the Colony.</i>	
<i>Held further, on an application that the respondents be punished for contempt of Court, that, as the respondents had not disobeyed any order of the Court and had deported the applicants bona fide in pursuance of arrangements made before they were served with notice of the application for the release of the applicants and not with the ulterior object of preventing the application from being duly heard, they could not be found guilty of contempt of Court.</i>	
<i>Fein and Cohen v. Colonial Government</i> ... ..	1101
<i>Immoral consideration, see Guarantee</i> ... ..	708
<i>Immoral consideration, see Master and servant</i> ... ..	757
<i>Immovable property—Fixture—Rights of mortgagee.</i>	
<i>At the time of the execution of the mortgage of certain land there had been erected on it a corrugated iron building, forty feet by forty in size, attached by bolts to the soil, such bolts going through the foundations into the soil, the foundations being sunk for the greater part</i>	

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<i>about six inches in the soil and the building being used as a store.</i>	
<i>Held, that the mortgagee's rights attached to the building.</i>	
<i>Venter v. Graham and Muller</i> 1086	
<i>Inchoate agreement, see Partnership</i> ... ..	899
<i>Income, see Land Development Co.</i> 553	
<i>Incompetency—Marriage—Annulment.</i>	
<i>In an action by the plaintiff against the defendant for annulment of their marriage on the ground of the defendant's incompetency, it was proved, that although the parties had been married for more than three years and although the plaintiff had always been ready and willing to cohabit with him, he had never succeeded in performing his matrimonial function, so that she continued to be a virgin.</i>	
<i>Held, that she was entitled to succeed in the action.</i>	
<i>Hodgson v. Hodgson</i> ... ..	899
<i>Informality, see Licensing Court</i> 198	
<i>Injury by bull—Culpa—Damages</i>	
<i>One of the plaintiff's oxen, which were drawing a wagon on a public road, was gored by a full-grown bull belonging to the defendant, which had been allowed to wander abroad without a herd.</i>	
<i>Held, that as a full-grown bull is ordinarily an animal with vicious propensities, there was such a degree of culpa on the part of the defendant as to render him liable in damages.</i>	
<i>Hall v. Masea</i> ... ..	1115
<i>Inquiry under Sections 173 and 177 of Companies' Act, 1892—Presence of legal adviser of parties interested.</i>	
<i>A person interested in an enquiry held under Sections</i>	

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<i>173 and 177 of Act 25 of 1892 is not entitled, as of right, to claim that his legal adviser shall be present throughout the enquiry.</i>	
Williams v. Liquidator, Wood and Williams ...	897
<b>Insolvency—Preference—General covering bond—Future advances—Tacking incumbrances—Privity of debt—Privity of registration—Cession of bond.</b>	
<i>C., being a customer of the respondent bank, ceded to the bank, as security for promissory notes of M. &amp; Co. in his favour discounted and to be discounted for him by the bank, a duly registered general covering bond for £5,000, passed in his favour by M. &amp; Co. Upon the insolvency of M. &amp; Co., the respondent trustee awarded to the bank a preference over the movables in respect of debts incurred by M. &amp; Co. to C. after the date of the cession.</i>	
<i>Held, that it was no valid ground of objection on the part of the appellant, in whose favour a special covering bond, with the general clause, had been passed after C.'s bond, that the debts proved by the bank were incurred after the date of the cession.</i>	
<i>Held, however, that inasmuch as a mortgage under a covering bond only takes effect as the debts thereby covered are incurred, the bank was not entitled to a preference over the appellant in respect of debts incurred by M. &amp; Co. to C. after the date of debts incurred by M. &amp; Co. to the appellant under his duly registered covering bond.</i>	
Heydenrych v. Standard Bank and others ...	85
<b>Insolvency—Action on promissory note made before insol-</b>	

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<b>vency—Revival of right of action.</b>	
<i>The defendant, after giving a promissory note to the plaintiff, became insolvent, and afterwards promised the plaintiff that he would pay the amount in full, upon which the plaintiff returned to the defendant some articles which the defendant had pledged with him.</i>	
<i>Held in an action on the promissory note, that the promise after insolvency to pay the amount did not revive the note and that the suit should have been on the promise made after insolvency.</i>	
De Vos v. Smith ...	677
<b>Insolvency—Insolvent Ordinance, Sec. 117 — Creditors "in value."</b>	
<i>A secured creditor, when a question of voting for the discharge of an insolvent under Sec. 117 of the Insolvent Ordinance arises, may only vote "in value" in respect of such portion of the debt due to him as is unsecured by lien or other security.</i>	
<i>In re Findon (2 Searle 301) followed.</i>	
<i>In re Perel ...</i>	849
<b>Insolvency—Petitioning creditor—Trustee—Costs.</b>	
<i>The plaintiff in the Court below was the petitioning creditor for the compulsory sequestration of a certain estate. He had incurred certain taxed costs in connection with his petition. The bill of costs had been presented to defendant before his election as sole trustee of the estate. Plaintiff had filed a claim on the estate, but had not therein included the bill of costs and never had demanded payment from the trustee (defendant) after his election. Plaintiff had sued defendant for these costs, and the Magistrate dismissed the summons.</i>	

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<i>Held on appeal, that while it might have been competent for the respondent, as trustee, to have paid these costs on demand, and that while appellant might have proved for them on the insolvent estate, the respondent trustee could not be held personally liable for the same.</i>	
Wilson v. Lewis ... ..	832
<b>Insolvency—Act 38 of 1884—Interests of creditors.</b>	
<i>A provisional order of sequestration having been made upon a petition, stating that the defendant was insolvent and that it would "be in the interest of" the creditors that the estate should be sequestered.</i>	
<i>Held, that the use in the petition of the words: "in the interest," instead of "for the benefit" of the creditors, was not fatal to the order.</i>	
Du Toit v. Ajam ... ..	32
<b>Insolvency—Deed of assignment.</b>	
<i>O. had assigned his estate to his creditors and they had accepted the assignment and disposed of a portion of the estate. They now applied for the final adjudication of defendant's estate as insolvent.</i>	
<i>Held, that as it was not competent for the creditors to take advantage of the deed of assignment and then treat it as null and void, the provisional order of sequestration must be set aside.</i>	
Flemmer and another v. Oosthuizen... ..	188
<b>Insolvent estate—Preferable security—Guarantee of third person—30th Section of Insolvent Ordinance.</b>	
<i>In an action for the compulsory sequestration of the defendant's estate, it appeared that the plaintiff held a guarantee from a third person for the payment</i>	

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<i>of the defendant's debt to the plaintiff.</i>	
<i>Held, that such guarantee did not constitute a preferable security or lien upon any part of the defendant's estate, and that consequently the plaintiff was not bound, under the 30th section of the Insolvent Ordinance, to put a value on the security in the affidavit accompanying his petition.</i>	
Green & Co. v. Froming ...	875
<b>Insolvent Ordinance (6 of 1843), Sec. 127—Deficiency in estate—Assets of insolvent—Execution.</b>	
Attwell v. Botha ... ..	1019
<b>Insufficient tender—Costs—Magistrate's decision over-ruled.</b>	
Van Zyl v. Truter ... ..	372
<b>Interdict—Proof of debt—Meditatio fugæ.</b>	
<i>Where it was sought to restrain certain banks from parting with moneys, the property of the respondent, on the ground that the respondent owed money to the applicant and contemplated leaving the Colony.</i>	
<i>Held, that no interdict could be granted, as there was no proof how much the respondent owed, and if applicant could show that he contemplated leaving the Colony, applicant had his remedy under the 8th Rule of Court.</i>	
Ishmael v. Ally ... ..	266
<b>Interdict—Restraint of trade.</b>	
Nannucci v. Nannucci ...	722
<b>Interdict, see Messenger of Court</b>	673
<b>Interdict to prevent issue of summons for arrest—Defendant leaving the Colony.</b>	
<i>The applicant, having been informed that the respondent was about to issue summons for his arrest, applied to the Court for an order restraining the</i>	

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<i>issue of such summons on the ground that he had landed property in the Colony and intended to be absent for a short period only. It appeared, however, that the landed property was heavily mortgaged, and that the period for which the applicant would be absent was doubtful.</i>	
<i>Held, that, even if it were competent to make the order, there were not sufficient grounds for the interference of the Court.</i>	
Dodowitz v. Leng ... ..	763
Interdict—Contract in restraint of trade.	
<i>F. had contracted with W. and C. (then in partnership) that he would not, "within five years, after the date on which he shall leave Messrs. C. and W.'s employ without Messrs. C. and W.'s previous consent in writing, practice as an architect, &amp;c., in East London or the Eastern Provinces of the Cape Colony, &amp;c." F. left the employ of C. and W. with their written consent, and subsequently C. and W. dissolved partnership and C. secured F.'s services. W. now applied for an interdict restraining C. from employing F., and F. from practising as an architect, &amp;c.</i>	
<i>Held, that in view of the doubtful and uncertain terms of the contract, of doubts as to its reasonableness: and of W.'s failure to show that he had sustained damage: the interdict must be refused.</i>	
Walker v. Cordeaux and Farrow ... ..	19
Interdict, <i>see</i> Contract ... ..	38
„ <i>see</i> Delivery ... ..	242
Interpleader—Sale on credit—Passing of property.	
Hendricks v. Cutting ... ..	265

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Interpleader—Execution on pledge in the hands of a third person.	
<i>N., a native woman, married by Christian rites in community to respondent, had obtained a loan of money from plaintiff, for the repayment of which one M. signed a promissory note as surety, and N. delivered to him certain cattle, part of the joint estate of her husband and herself as security that she would pay the note. There was no proof that respondent had consented to these arrangements. Thereafter appellant sued N. and M. jointly and severally on the note, and obtained judgment against M. only, who thereupon handed over the cattle to be sold in execution. In an interpleader suit brought by N. and respondent, the Magistrate gave judgment against appellant.</i>	
<i>Held on appeal, that the cattle were not executable.</i>	
Thompson v. Batayi ... ..	1141
Invalid agreement, <i>see</i> Town Council ... ..	970
Irregular election, <i>see</i> Public school ... ..	22
Irregularity, <i>see</i> Act 40 of 1905 ... ..	373
Irregularity, <i>see</i> Magistrate ... ..	817
<i>Judex suspectus, see</i> Recusation of Judge ... ..	1147
Judgment by default, <i>see</i> Plaintiff in reconvention ... ..	1040
Judgment debt, <i>see</i> Attachment of inheritance ... ..	1036
Jurisdiction, <i>see</i> Transkeian Magistrate ... ..	1085
Jurisdiction, <i>see</i> Magistrate ... ..	823
Jurisdiction, <i>see</i> Water Court ... ..	599
Jurisdiction of Divisional Court, <i>see</i> Appeal from Divisional Court ... ..	749
Jury trial, <i>see</i> Pro Deo suit ... ..	694

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Juvenile offender, <i>see</i> Whipping	1	accepted T. as a co-tenant or recognized his alleged partnership with D., he was entitled to the order applied for; reserving to T. the right to bring an action for damages for eviction, if so advised.	
Land Development Co.—Income—Act 36 of 1904.		Ohlsson v. Turnbull...	847
<i>A land development Company had sold for a large amount portion of its land on a system of deferred payments running over a term of ten years, upon agreements of purchase and sale, which it was optional to the purchasers to carry out or to suffer them to become void by making default, under penalty of forfeiting, as liquidated damages, any amounts already paid by them. The company had placed the whole amount received by them on the sales against the cost of the land and had not received sufficient to pay off the capital invested.</i>		Landlord and tenant—Damage to property leased—Estoppel by conduct.	
<i>Held, that the Company was not liable to be assessed for Income Tax for the current year upon the amount of the deferred payments, as such unpaid portions of the purchase price were not income derived or received by the Company during the current year within the meaning of Act 36 of 1904.</i>		<i>G. had leased certain premises to T. from November 1st, 1904, till October 31st, 1905. T., however, held over till February 26th, 1906, on which date he tendered delivery of the premises. This G. refused to accept until he should have put them in the same good order and condition as they were in when handed over to him. T. remained in occupation for some weeks, and executed certain small repairs. G. now sued T. for rent for the whole time of his occupancy, for ejectment and for damages.</i>	
African Realty Trust, Ltd. v. Commissioner of Income Tax ... .. 553		<i>Held, that G. should have accepted delivery of the premises at the date of expiration of T.'s lease and sued him for damages.</i>	
Landlord and tenant—Hotel lease—Partnership—Eviction.		<i>Held further, that T., by consenting to remain, was estopped from claiming his right to vacate the premises and was liable for rent during the time he had remained in possession for half the cost of repairs and for damages.</i>	
<i>O. had leased certain hotel premises to D. and P., then trading in partnership. Thereafter the partnership was dissolved, and D. was accepted by O. as sole tenant. T. alleged that, for valuable consideration and with the verbal consent of O.'s manager, he had been accepted by D. as a partner. D. subsequently became insolvent, and his trustee abandoned the lease. O. now applied on motion for the ejectment of T. from the hotel premises.</i>		Greyvenstein v. Thompson... 505	
<i>Held, that as it had not been proved that O. had ever</i>		Landlord and tenant—Defective premises.	
		Hedgson v. McKay & Co. ... 147	
		Landslip, <i>see</i> Damage ... .. 55	
		Law agent—Attorney—"In practice"—Act 43 of 1885, Sec. 8.	
		<i>An attorney is "in practice," within the meaning of Sec. 8 of Act 43 of 1885, in any place where he opens an office, even although he does not per</i>	



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<i>sonally attend at that office, provided that he is always available for consultation when required.</i>	
Johnson v. R.M. of Woodstock ... ..	776
Law agent—Contempt of Court.	
Incorporated Law Society v. A. and M. Cohen ... ..	360
Lease—Arbitration—Concealment of material fact—Rule of Court—Stay of execution.	
<i>The applicants had expropriated certain property, in which was a shop, of which the respondent was the lessee, under a lease still current. The respondent's claim to compensation for disturbance was submitted to an arbitrator, whose award had, by consent, been made a Rule of Court. The applicants now asked for a stay of execution of the Rule, on the ground that the respondent had not informed the arbitrator that he had been promised the tenancy of a shop in the immediate vicinity of that which he had to quit: and that such fact was material to the arbitration proceedings.</i>	
<i>Held, that the fact was not material, and the application must, therefore, be refused.</i>	
Cape Town Town Council v. Pinn ... ..	309
Lease — Condition against sub-letting — Colourable agreement—Cancellation of lease.	
<i>The defendant was lessee of certain licensed premises under a lease which contained a condition against sub-letting and a provision that the lease could be cancelled upon breach of any condition. The defendant entered into an agreement with one F., whereby the management of the business was entrusted to F., but in fact the defendant retained no interest in the premises beyond the right to receive monthly pay-</i>	

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<i>ments from F. The agreement contained every essential ingredient of a sub-lease, although not so called.</i>	
<i>Held, that the plaintiff, as lessor, was entitled to claim a cancellation of the lease.</i>	
Curator Bonis of Watson v. Estate Petersen ... ..	244
Lease—Remission of rent—Lessee's right to quit—Lessor's failure to repair—Leaks.	
<i>In an action for rent, in which the defendant pleaded that the defective state of the leased premises justified his quitting possession during the subsistence of the lease and refusing to pay rent after vacating the premises:</i>	
<i>Held, that it lay on the defendant to prove that the defect was of so material a nature as to render the premises practically useless for the purposes for which he had, to the knowledge of the plaintiff, hired them.</i>	
Assignees Kaiser Bros. v. Hoeschen and others ... ..	1078
Lease—Transfer of property—Interdict.	
<i>The applicant, who stated that he had hired certain property from the respondent at £1 per annum for 20 years, applied for an interdict to restrain the transfer of the property to a purchaser who was not a party to the application.</i>	
<i>Held, that as there was no proof of a refusal on the part of the purchaser to recognize the lease, and as the applicant might have secured himself by a registration of the lease in the Deeds Office, there was no ground for the application.</i>	
Ex parte Lipschitz and Tooch ... ..	1113
Lessor and lessee—Sub-tenant—Novation.	
Carrol v. Van Zyl ... ..	824

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Lessor's failure to repair, <i>see</i> Lease ... ..	1078	ous statements regarding the conduct of an individual.	
Libel — Newspaper — Trading Company — Damages — Prac- tice.		Smith & Co. v. S.A. News- paper Co. ... ..	440
<i>The S.A.N. (a newspaper published in Cape Town) accused the C.T. (another Cape Town paper) of suppressing a report of a certain informal meeting of a quasi private character, in the course of which meeting certain strictures were made by one of the directors of the C.T.; and the S.A.N., in a published article, suggested that the said report was suppressed from interested motives. The C.T. now sued the S.A.N. for damages for libel, but special damage was not pleaded. The defendants applied for absolu- tion from the instance.</i>		Licence, <i>see</i> General dealer ...	755
<i>Held, that as the C.T. had not claimed to have been injured in its business, absolution from the instance must be granted.</i>		Licensing Court—Informality— Declarations of canvassers.	
<i>Semble: If a defendant intends to apply for absolution from the instance on the ground that the declaration discloses no cause of action; exception should be taken to the declara- tion.</i>		<i>R., having applied for a retail liquor licence, produced the usual declarations of canvass- ers in terms of Schedule B. to Act 28 of 1883. The names of the canvassers had been filled in by themselves at the beginning of the declarations, but they had omitted to sign their names at the end. The Licensing Court held that the declarations were informal and refused the licence.</i>	
The Cape Times, Ltd. v. The South African News, Ltd.	40	<i>Held on review, that the Licensing Court was justified in its action, but as the said Court did not oppose the grant- ing of the licence, and as the Court was satisfied that the declarations were genuine, it condoned the irregularity.</i>	
Libel—Public official—Fair com- ment on matters of public interest.		Ross v. Woodstock Licensing Court ... ..	198
Cook v. Allen ... ..	115	Lien—Stoppage in transitu—Bills of lading.	
Libel—Animus injurandi — Har- bour Board—Fair report of debate — Malice — Public body.		<i>Ex parte Nash and another...</i>	404
<i>The bona fide publication in a newspaper of a fair and impartial report of a discussion at a meeting of the Table Bay Harbour Board upon a matter of public interest is not action- able even if it includes injuri-</i>		Liquidated claim, <i>see</i> Set off ...	260
		Liquid claim—Magistrate's juris- diction.	
		<i>A summons in a Magistrate's Court on a promise to pay the sum of £44, with the feathers of certain ostriches, claimed the amount and further claimed delivery of the feathers.</i>	
		<i>Held, that although so far as the summons claimed the sum of £44, it was within the jurisdiction, yet, as it further claimed delivery of feathers exceeding £20 in value, an exception to the jurisdiction had been properly taken.</i>	
		Braude v. Louw ... ..	671

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Liquidated demand, <i>see</i> Rule 329 (d) ... ..	112

#### Liquor—Act 28 of 1883, Sec. 2.

*Three coloured men purchased from appellant some 12 gallons of wine, which they did not consume on the premises. The Magistrate treated this sale as three separate sales and convicted appellant under Act 28 of 1883, Sec. 2.*

*Held on review, that there had only been one sale and conviction quashed.*

Rex v. Havenga ... .. 833

#### Liquor Acts—Penalty.

*Under the 75th section of Act 28 of 1883, the maximum penalty for a first conviction of certain offences is £25. Under the 2nd section of Act 28 of 1898, a person convicted of breach of a condition imposed by virtue of that section is liable, on conviction, to the penalties prescribed by the 75th section of Act 28 of 1883. By the 5th section of Act 34 of 1904, the maximum pecuniary penalty under Sec. 75 of Act 28 of 1883 is increased.*

*Held, that by virtue of such increase there is not, without a special provision to that effect, a corresponding increase of the penalty for a contravention of a condition imposed under Sec. 2 of Act 28 of 1898.*

Rex v. Forsyth (1) ... .. 662

#### Liquor Law Acts—Second conviction—Appeal.

*Under the 75th section of Act 28 of 1883, the penalty for a first conviction of a certain offence is £25, and for a second conviction £50. The appellant was convicted of the offence and appealed, and before the appeal was heard he was again convicted of a similar offence subsequently committed.*

*Held, that notwithstanding such appeal, the Magistrate properly*

*treated the second conviction as subjecting the appellant to the increased penalty.*

Rex v. Forsyth (2) ... .. 663

#### Liquor licence — European employer.

*A coloured labourer having purchased liquor, thereafter gave a certain Hottentot, without consideration, a portion of this liquor. He was charged and convicted with having acted as the agent of the Hottentot in purchasing the liquor. Conviction quashed.*

Rex v. Cloete ... .. 702

#### Liquor licence—Act 28 of 1898.

*The appellant and her sons were executors in the estate of one V. Q. He had been the holder of a retail liquor licence. The appellant and her sons had been convicted of selling liquor to natives without a permit. V. Q.'s licence had not been transferred.*

*Held on appeal, that as V. Q.'s licence had not been transferred to the executors, they were not liable in a criminal case, and the conviction must be quashed.*

Rex v. Van Quickelberge and others ... .. 218

#### Liquor licence—Condition—*Ultra vires*.

*A condition indorsed on a liquor licence that "after close of canteens no liquor be sold, delivered or supplied in any hotel bar to farm servants, labourers or to persons of the class habitually frequenting canteens,"*

*Held to be ultra vires.*

Rex v. Papert ... .. 1149

#### Locatio operarum—Scab inspector—Salary—Pleading—Estoppel—Acquiescence.

*In an action brought by the plaintiff against the Govern-*

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ment for his salary for twelve months as scab inspector for the District of C., the plea was that he had been deported from C. under Martial Law, and that he was entitled to salary only until the date of such deportation. The replication was to the effect that the plaintiff was in no way to blame for the deportation, and that he was always ready and willing to perform his duties. The evidence shewed that he was ready to perform his duties, but was prevented by the Military authorities before and after his removal, whilst the Government neither dismissed him nor insisted upon his performance of his duties. Some months afterwards the Government asked him when he would resume his duties, and his answer was that he had lost a leg by an accident, but would be ready to resume work two months afterwards. He was thereupon summarily dismissed.

Held, on appeal, that the plaintiff was entitled to his salary for the period of his deportation until he became personally unfit for the performance of his duties.

At the trial it was proved that some months before the plaintiff's deportation the Government informed him, by letter, that the payment of his emoluments would be stopped from a certain date, that the plaintiff, in his answer, asked to be paid for the full month within which the notice was given, signing his name as "late inspector," that the Government thereafter tendered payment of salary up to the date of deportation, and that, but for such deportation, the Government would have paid him full salary subsequent thereto notwithstanding the Government letter. The Court below held that the plaintiff was estopped by his acquiescence

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in the Government notice from claiming salary subsequent thereto.

Held, on appeal, that as the defence of estoppel was quite inconsistent with the pleadings and raised a defence which the plaintiff might have been able to meet if pleaded, the evidence as to the Government letter should not prejudice his claim to full salary.

Lubbe v. Colonial Government ... 125

Lunatic — Death of — Executor dative—Act 1 of 1897, Sec. 41.

An application having been made to the Eastern Districts Court to have W. declared of unsound mind and a curator appointed to his estate, that Court declared him to be incapable of managing his own affairs and appointed curators to his property. Upon the death of W., the curators continued the administration of the estate under the authority of the Master, who acted under the 41st section of Act 1 of 1897.

Held, that as W. had not been declared to be of unsound mind, the 41st section did not apply, and the Master was directed to call a meeting of next of kin for the selection of an executor dative.

Estate Wright v. Wright ... 965

Lunatic—Foreign asylum.

In the absence of clear proof that it would be for the benefit of a domiciled lunatic to remove him to a foreign asylum, the Court will not authorize or direct his curator so to remove him.

Ex parte Hugo and another... 879

Lunatic Asylum — Attendant — Responsibility for injury done by patient to attendant.

The plaintiff, who was an attendant on lunatics at a

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<p><i>Government Lunatic Asylum, was suddenly attacked by one of the lunatics and had his jaw broken. There was no proof that the lunatic was dangerous or violent, except that on a previous occasion he had given another attendant a push.</i></p> <p><i>Held, that although the plaintiff had not been informed by the Asylum authorities of the previous assault, he was not entitled to claim damages from the Government in respect of the assault committed upon himself.</i></p> <p>McMorrow v. Colonial Government ... 934</p> <p>Magistrate—Irregularity—Stock theft.</p> <p>Rex v. Jebins ... 817</p> <p>Magistrate—Jurisdiction—Counterclaim.</p> <p><i>Appellants had sued plaintiff in a Magistrate's Court for £20 as and for rent. In reconvention respondent had claimed £63. The Magistrate took evidence as to the bona fides of the counterclaim, and, being satisfied therewith, dismissed the case.</i></p> <p><i>Held, that the Magistrate should have tried the plaintiff's claim and dismissed the counterclaim.</i></p> <p>Burger and others v. Burger 823</p> <p>Magistrate's Court—Judgment by default—Claim in reconvention.</p> <p><i>The plaintiff, being sued in a Magistrate's Court for a debt, was not in a fit state to appear, and judgment was given against him by default. The plaintiff had a counterclaim against the present defendant, then plaintiff, but having failed to file a claim in reconvention, he now brought an action for the amount in the Supreme Court.</i></p> <p><i>Held, that the plaintiff would be entitled to recover if he</i></p>	<p><i>clearly established his claim: but in the absence of clear proof thereof, absolution from the instance was granted.</i></p> <p>Wolfaard v. Broido ... 752</p> <p>Magistrate's Court—Costs—Taxation.</p> <p><i>A Magistrate has jurisdiction to review the taxation of costs in his court allowed by his clerk.</i></p> <p>Du Toit v. Dzingwa and A.R.M. of Matatiele ... 784</p> <p>Magistrate's Court case—Default—<i>Bona fide</i> mistake as to time of Court sitting—Costs.</p> <p><i>Where, owing to a bona fide mistake as to the time of the sitting of the Court a plaintiff makes default, he should be allowed to re-open the case on payment of wasted costs.</i></p> <p>Hilton v. Hamilton ... 531</p> <p>Magistrate's Court—Summons—Service—Assignee—Act 20 of 1856.</p> <p><i>M., who resides in E. London, was summoned as assignee of the estate of P., who resides at Mount Fletcher, to appear before the Magistrate of that district. This summons was served upon P. Exception was taken in the Court below to this service, inasmuch as personal service was not effected on the defendant. The Magistrate upheld the exception.</i></p> <p><i>Held on appeal, that the exception was good.</i></p> <p><i>Semle, such service of a summons issued out of any one of the superior Courts would have been good.</i></p> <p>Cousins and Preston v. Assignee Estate Phillips ... 418</p> <p>Magistrate's Court—Civil jurisdiction—Liquid and illiquid claims in the same action.</p> <p><i>In an action in a Magistrate's Court for damages for £20,</i></p>



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<p><i>the defendant filed a counter-claim for £4 10s. and another counterclaim for £20, both being illiquid. The Magistrate, after dismissing the counter-claims, on the ground of want of jurisdiction, gave judgment for the plaintiff and decided that the second counter-claim could not be sustained on the merits.</i></p> <p><i>Held, that a plaintiff may in the same action include liquid and illiquid claims, provided that the total sum of the liquid claims does not exceed the Magistrate's jurisdiction in liquid cases and the total sum of the illiquid claims does not exceed his jurisdiction in illiquid cases.</i></p> <p><i>Held further, that as the total sum of the illiquid counter-claims in this case exceeded £20, the Magistrate would not have had jurisdiction if the defendant had been the original plaintiff.</i></p> <p><i>Held further, that it would have been competent for the Magistrate to allow the defendant to elect to proceed on one of the counter-claims, and that as he had given a decision on the second counterclaim after dismissing both counter-claims and without hearing the defendant's evidence thereon, the case should be remitted for the purpose of a decision, after due evidence, on the second counter-claim.</i></p> <p>Smit v. Philip ... 1100</p> <p>Magistrate's decision over-ruled, see Insufficient tender ... 372</p> <p>Magistrate's finding on facts upheld.</p> <p>Smith v. Schutz and De Jager 252</p> <p>Magistrate's inference from facts over-ruled ... 308</p> <p>Magistrate's finding on credibility of witnesses overruled—Presumption of innocence.</p> <p>Rex v. Mapuceni ... 308</p>	<p>Magistrate's finding on facts over-ruled — Spoor evidence — Caning of juvenile offenders — Act 21 of 1869, Sec. 2.</p> <p>Rex v. Du Plessis ... 714</p> <p>Magistrate—Finding on facts—Tainted evidence.</p> <p>Rex v. Pretorius ... 219</p> <p>Magistrate's jurisdiction—Counterclaim — Costs — Circuit Court.</p> <p><i>In a Magistrate's Court the appellant had been sued for a certain debt and put in a counter-claim for £10 10s. 6d. as witness expenses at a certain Circuit Court trial. The Magistrate dismissed the counter-claim, on the ground that he had no jurisdiction to tax costs in the Circuit Court.</i></p> <p><i>Held, that the matter of counter-claim must be remitted back to the Magistrate to decide on the merits.</i></p> <p><i>Semble, in his decision the Magistrate should allow costs on the Circuit Court scale.</i></p> <p>Odendal v. Marks ... 92</p> <p>Magistrate's jurisdiction in illiquid cases for price of goods ... 224</p> <p>Magistrate's jurisdiction—Deputy Sheriff—Wrongful seizure.</p> <p><i>The summons in a Resident Magistrate's Court alleged that the defendant, who is deputy sheriff in the district, wrongfully and unlawfully seized the plaintiff's cattle in execution of a writ of execution issued at the suit of A. against B. in a Supreme Court action and refused to return the cattle thus seized. The Magistrate upheld an exception to his jurisdiction on the ground that as the writ of execution had issued from the Supreme Court, the High Sheriff ought to have been sued.</i></p> <p><i>Held, reversing the Magistrate's decision, that he had</i></p>

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<i>jurisdiction to try an action for the deferdant's wrongful act in seizing the plaintiff's cattle in the district and refusing to return them when thereto requested.</i>	
N'Daba v. Deputy Sheriff, Matatiele ... ..	426
Magistrate's jurisdiction—Goods sold and delivered—Act 43 of 1885.	
Shekema v. Tyekana ... ..	416
Magistrate's jurisdiction, <i>see</i> Set off ... ..	260
Magistrate's jurisdiction—Tembu-land.	
<i>By Proclamation No. 140 of 1885, Magistrates in Tembu-land have jurisdiction in all civil suits within their respec-tive districts.</i>	
Beetje v. Venter ... ..	261
Magistrate's jurisdiction, <i>see</i> Liquid claim ... ..	671
Magistrate's jurisdiction, <i>see</i> Transkei ... ..	826
Magistrate's jurisdiction—Specific performance — Ejectment — Act 20 of 1856, Sec. 10.	
<i>A R.M. Court summons issued at the instance of the proprietor of a certain erf called upon the occupier thereof to vacate it. A notice was endorsed on the back of the summons, calling upon the defendant to produce certain documents.</i>	
<i>Held on appeal, that as this notice was no part of the sum-mons, it could not oust the Magistrate's jurisdiction as a claim for specific performance.</i>	
Langeveld v. Langeveld ... ..	1142
Malice, <i>see</i> Defamation ... ..	1060
Malicious arrest, <i>see</i> False im-prisonment ... ..	336
Malpractice, <i>see</i> Attorney ... ..	877
Manager of business, <i>see</i> Guar-an-tee ... ..	427

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Marriage, <i>see</i> Griqualand... ..	362
Marriage—Special licence.	
<i>The petitioner applied to the R.M. of C. for a special licence, and in his declaration stated that he was neither a widower nor a bachelor, but had been divorced from his wife. In proof of such divorce he pro-duced a document purporting to be signed by an official of the Belgian Court of Justice, to the effect that the wife had been called upon to appear to answer in a case in which it would be decreed that a divorce should be granted. The Magis-trate having refused to issue the licence.</i>	
<i>Held, that there was no ground for holding that the licence had been improperly withheld.</i>	
<i>Ex parte</i> Mozes ... ..	170
Marriage, <i>see</i> Incompetency ... ..	899
Married woman, <i>see</i> Surety ... ..	264
"Master" of Supreme Court—	
<i>Moneys of minors paid into his hands—Ord. 105 of 1833, Secs. 26 and 31.</i>	
<i>The applicant, being the sur-ving spouse and executrix of the late H., administratrix of his estate and guardian of their minor children, had paid over to the Master of the High Court, and through him to the Master of the Supreme Court certain moneys to which the minor heirs were entitled, she acting under Sec. 26 of Ord. 105 of 1833. The Master had invested these moneys in the Guardians' Fund, from which applicant now wished them to be withdrawn, in order that they might be invested in another trust company. The Master having reported un-favourably.</i>	
<i>Held, that the Court had power under Sec. 31 to sanc-tion such re-investment.</i>	
<i>Ex parte</i> Estate Hofmeyr ... ..	1138

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Master and servant—Act 18 of 1873, Sec. 15.	
Rex v. Theron ... ..	59
Master and Servants Act—Act 18 of 1873, Secs. 4 and 7—Child under 16.	
Rex v. Cornelius ... ..	28
Master and servant—Wages—Inchoate contract— <i>Quantum meruit</i> —Immoral consideration.	
Loubser v. Estate Botha ...	757
Materials for railway—Compensation—Act 19 of 1874—Works in connection with railway.	
<i>The Colonial Government, in constructing a railway under Act 19 of 1874, took materials from the plaintiff's quitrent land, not only for the purpose of constructing and maintaining the railway itself, but for works in connection therewith; such as the building of railway stations, labourers' cottages, schools for their children and hospitals.</i>	
Held, that the plaintiff was not entitled to compensation for materials used for the railway itself, including bridges and culverts, over which the line of railway passed, but that he was entitled to compensation for materials used for building railway stations, labourers' cottages and other works in connection with the railway.	
Heathcote v. Colonial Government ... ..	80
Matriculation, see Articled clerk	
751, 821, 856	
Measure of damages, see Contract of sale... ..	379
Measure of damages, see Trespass	364
Measure of damages, see Principal and agent ... ..	979
Medical attendant—Contract.	
<i>A person's ordinary medical attendant is not by the fact of</i>	

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<i>previous attendances bound by an implied contract to continue his attendance in case of subsequent illness.</i>	
Macready v. Girdwood ...	527
Medical practitioner—Fees—Responsibility.	
Hayes v. Rhoodie ... ..	124
<i>Meditatio fugae</i> , see Interdict ...	266
Messenger of Court—Interdict—Attachment—Removal of goods—Contempt of Court—Costs.	
<i>The respondent, the messenger of a Magistrate's Court, on executing a writ against the goods of an execution debtor, was informed by the debtor that the Supreme Court had issued an interdict at the suit of the landlord against the debtor, as tenant, restraining the removal of the goods. The respondent attached and removed the goods, which were sold in execution.</i>	
Held, that as the interdict was in a suit between the landlord and tenant, the respondent may have reasonably believed that he was not bound by it, but that it was his duty not to proceed beyond attachment of the goods after being informed of the interdict against their removal, and that he should, at all events, pay the costs of the application for attachment as a penalty for contempt of Court.	
Estate Scholtz v. Carroll ...	673
Misdescription of document, see Acknowledgement of debt ...	1112
Misjoinder, see Pleading ... ..	247
Mistake ( <i>bona fide</i> ) as to time of Court sitting, see Magistrate's Court case ... ..	531
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<b>Motion—Judgment.</b>	
<i>It is not the practice of the Court to grant judgment on motion in defended cases.</i>	
Rosenberg v. Fourie ...	29
<b>Motor car — Negligence — Damages.</b>	
Godfrey v. Frank ...	62
<b>Motor car—Faulty construction—Negligent driving—Damages for personal injury.</b>	
Lawrence v. Ross ...	734
<b>Municipality — Drains — Negligence—Exercise of statutory powers—Contributory negligence.</b>	
Matare, Bruns & Co. v. Mossel Bay Municipality ...	740
<b>Municipality, see Outspan</b>	564
<b>Municipality — Town Council — Refusal to sanction plan of sub-division—Improper exercise of powers.</b>	
<i>The Town Council of Cape Town refused to give its consent to a plan of sub-division submitted to it by the plaintiff, an owner of land within the Municipality, unless a certain strip of land at a higher level than certain springs belonging to the Council were reserved from such sub-division, the sole ground of refusal being that the result of building on such strip of land would be the pollution of the springs. The Court was satisfied from the evidence that, with the ordinary precautions which would be necessary, even if the strip of land were not built upon, there would be no additional risk of pollution from the land being built upon.</i>	
<i>Held, that the further withholding of consent would be illegal, as being an exercise of a power conferred for a wholly different object from that which the Council sought to attain by</i>	

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<i>the exercise of such power, and it was declared that if the Council shall not within a definite time grant its consent, the plaintiff would be entitled to proceed to such sub-division without such consent.</i>	
<i>Held further, that the Court will not restrain a person from making an otherwise lawful use of his land, merely because at some future time negligence in such use of the land may result in damage to another.</i>	
Orangezicht Estates, Ltd. v. Cape Town Town Council	338
<b>Municipality—Owner's rate—Act 45 of 1882—Perpetual quit-rent lease — Emphyteusis — Registration.</b>	
<i>The defendant Company in 1896 sold the leases of certain erven forming part of a farm belonging to it for the purpose of founding a township, the conditions of the sale being that the persons offering the highest rental should become lessees in perpetuity with the right of redeeming the rent by payment of 20 years' rent in advance, with the right of assigning the lease and with the right of registering the lease in the Deeds Office, whilst the Company reserved the right to cancel any lease should the lessee fail to pay rent for two consecutive years. In 1898 a municipality was established for the township under Act 45 of 1882, and the lessees were always, without any objection on their part, assessed in the plaintiff Council's books as the owners liable to the owners' or landlords' rent, no tenants' rent being ever imposed.</i>	
<i>Held, that the defendant Company was not liable to the payment of owners' rate on the erven of which they had thus sold the perpetual leases.</i>	
Indwe Municipality v. Indwe Railway and others ...	279

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<b>Municipality—Street—Sanitation.</b>	
East London Municipality v. Lumsden and others ...	314
<b>Municipal Council—Drainage contractor—Disputed quantities—Variation of contract prices by Municipal engineer.</b>	
Collie v. Kalk Bay Municipality ...	1022
<b>Municipal rates — Owner and tenant — Notice—Act 45 of 1882, Sec. 134.</b>	
<i>Sec. 134 of Act 45 of 1882 provides that if an occupier's rates remain unpaid for three months, the Council may within twelve months after the making of the rate serve notice on the owner of the property and recover from him. A.'s tenant being in default, the Town Council of M. delivered a notice to their messenger, to be served on A. This was done within the prescribed twelve months. A. denied having received this notice, but admitted having received a demand for the rates within the said period.</i>	
<i>Held on appeal, that although the mere fact of a letter having been handed to a messenger is not presumptive evidence of its delivery to the addressee; the subsequent demand made upon A. was due notice in itself.</i>	
Adams v. Mowbray Municipal Council ...	371

**Municipal regulations—Ultra vires—Act 45 of 1882.**

*The Municipality of K. had framed a regulation under Act 45 of 1882, whereby every person having grazing rights on the commonage was bound to register such stock as he had there grazing and to make a "solemn declaration" that such stock was his bona fide property.*

*Held, that inasmuch as the Act gave no power to the Municipality to exact such*

*declaration, the regulation was ultra vires, and the Municipality was ordered to pay costs of appeal.*

Rex v. Nquini ... 531

**Municipal regulations—Advertisement hoardings—Interdict.**

*Under its Act of incorporation the plaintiff Council had the power to make regulations for determining and regulating the place and manner in which placards and bills should be displayed; and accordingly a regulation was made that no person should erect a hoarding on, or near, or in view of a street for the purpose of displaying placards, &c., without the written consent of the Council. After the passing of the regulation a hoarding, which had been placed near the street by the respondent on his property, was blown down, and he, without obtaining the consent of the Council, proceeded to re-erect and reconstruct the hoarding to a greater height.*

*Held, that the Council was entitled to an interdict restraining such reconstruction.*

Green and Sea Point Municipality v. Doddemeade ...1058

**Municipal regulation—Ultra vires—Fish-horn.**

*The appellant was convicted of the offence of blowing a fish-horn within the Municipality of M., in contravention of a regulation made by the Municipal Council under the 109th section of Act 45 of 1882.*

*Held, that as the mere blowing of a fish-horn by itinerant vendors of fish in ordinary course of their trade was neither a nuisance in terms of the 4th sub-section, nor interfered with the good rule and government of the Municipality in terms of the 27th sub-section,*



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<i>a regulation prohibiting such blowing, was ultra vires.</i>	
Hollam v. Mowbray Municipality ... ..	213
Municipality—Interference with natural flow of water — Damage to property.	
Juritz v. Kalk Bay Municipality ... ..	162
Murder, <i>see</i> Bail ... ..	687
Native custom—Dowry cattle.	
<i>The respondent, a native in the Transkei, delivered three head of cattle to the reputed father of his intended bride in anticipation of the marriage, but she having been informed that she had been born before her mother was married, refused to marry the respondent.</i>	
<i>Held, that as the marriage did not take place, without any fault on the respondent's part, the property did not pass.</i>	
Peacock v. Ben Rango (12 C.T.R., 545) affirmed.	
Love v. Futela ... ..	251
Native location—Private property —Act 45 of 1882.	
Rex v. Thys and others ... ..	682
Native location, <i>see</i> Act 40 of 1879 ... ..	728
Native penal code, <i>see</i> Perjury ... ..	307
Natural flow, <i>see</i> Rain water ... ..	254
Negligence, <i>see</i> Agency ... ..	910
„ <i>see</i> Bill of exchange ... ..	529
„ <i>see</i> Carrier ... ..	253
„ <i>see</i> Damage ... ..	55
„ <i>see</i> Motor car ... ..	62
Negligence—Contributory negligence—Damages.	
Webb v. Anderson & Co. ... ..	83
Negligence, <i>see</i> Harbour Board ... ..	792
„ <i>see</i> Municipality ... ..	740

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Negligent driving, <i>see</i> Motor car	734
New street—Town Council regulations—Acts 26 of 1893 and 25 of 1897— <i>Ultra vires.</i>	
<i>The applicants had acquired certain contiguous lots of land within the Municipality of C., abutting on a street 20 feet wide, which had been laid out by the then owner of the property when he divided the land into lots in 1852, but had never been taken over by the Municipality. The applicants now wished to build on certain of these lots, but the respondents refused to sanction the building plans, on the ground that under the Council's regulations framed under Act 26 of 1893 the said street, being a "new street," must be at least 40 feet wide.</i>	
<i>Held, that in terms of Act 25 of 1897, Sec. 1, the street was not a "new street," and that in so far as the Council's regulations went beyond the Act in defining a "new street," they were ultra vires, and hence that the Council had no power to insist on the widening of the street to 40 feet as a condition for passing the plans.</i>	
Woodhead, Plant & Co. v. Cape Town Town Council	557
Non-joinder, <i>see</i> Declaration ... ..	1007
„ <i>see</i> Partners ... ..	904
Novation, <i>see</i> Contract of sale... ..	160
„ <i>see</i> Demurrage ... ..	103
Ordinance 72 of 183C, <i>see</i> Accomplices ... ..	679
Ordinance 104 of 1833, <i>see</i> Executor ... ..	657
Ordinance 105 of 1833, Secs. 26 and 31, <i>see</i> Master of Supreme Court ... ..	1138
Ordinance 6 of 1843, <i>see</i> Insolvency ... ..	849

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Partnership—Interdict—Foreign jurisdiction.		<i>clant in giving its consent to such laying.</i>	
Thomas v. Cotts     ...     ...	396	<i>Held, that there was no ground for an exception of misjoinder of the defendants.</i>	
Passing of property, <i>see</i> Interpleader     ...     ...	265	Metropolitan Tramways Co., Ltd. v. Town Council and Cape Town and District Gas, Light and Coke Co....	247
Payment in instalments, <i>see</i> Giving time     ...     ...	905		
Perjury—Statement material to the issue—Native penal code.		Pledge — Hire-purchase — <i>Dominium</i> —Delivery—Possession.	
Rex v. Bushula     ...     ...	307	<i>The plaintiff delivered a cart to the first defendant on the hire-purchase system; the agreement being that the price should be payable in instalments and that the cart should become the property of the first defendant on payment of the last instalment. Before all the instalments had been paid, the first defendant, with the consent of the plaintiff, delivered the cart to S., and a year afterwards the plaintiff induced the first defendant to substitute another cart, belonging to the first defendant, for the first. The second cart was delivered to the plaintiff, and by him re-delivered to the first defendant. Thereafter the first defendant pledged this cart to the second defendant, who had no knowledge of the previous dealing with the plaintiff. The evidence shewed that the dealing between the plaintiff and the first defendant in regard to the second cart was in the nature of a pledge rather than a sale.</i>	
Penalty, <i>see</i> Liquor Acts...     ...	662	<i>Held, that the plaintiff could not, after parting with the possession, claim re-delivery from the second, who was in possession.</i>	
Perennial stream, <i>see</i> Water     ...	173	Lange v. Abel     ...     ...	1117
Personal attachment, <i>see</i> Contempt of Court     ...     ...	26	Pledge of cargo, <i>see</i> Surety     ...	588
Petitioning creditor, <i>see</i> Insolvency     ...     ...	832	Pledge of movables — <i>Traditio brevi manu.</i>	
Plaintiff in reconvention—Defendant in reconvention barred—Judgment by default.		Mathew v. Watkins and another     ...     ...	851
<i>The defendant in a suit pleaded to the declaration and filed a claim in reconvention. The defendant in reconvention, not having filed his plea in time after demand, was barred from pleading.</i>			
<i>Held, that the plaintiff in reconvention was entitled to judgment by default.</i>			
S.A. Fisheries and Cold Storage v. Zankelowitz ...	1040		
Pleading — Architect — Artistic decorations.			
Bonn v. Watson     ...     ...	534		
Pleading — Misjoinder — Negligence.			
<i>A declaration alleged, in effect, that the plaintiff had been damaged by an explosion caused by the negligent act of the second defendant, in laying a gas main through and over a disused and unventilated sewer under the control of the first defendant and by the negligent act of the first defen-</i>			

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<i>Par delictum, see</i> Illegal contract	232
Partners—Non-joinder—Amendment of summons.	
<i>The plaintiff sold certain produce to the defendant, who signed a document in his own name, acknowledging the purchase and promising to pay on delivery of the purchase. It was held in the Court below that as the plaintiff had the means of knowing that the defendant had a partner in the purchase of the produce; such partner should have been joined as co-defendant.</i>	
<i>Held on appeal, that as credit was given to the defendant, the plaintiff was entitled to sue him alone.</i>	
Torien v. Horwitz (1); Torien v. Horwitz (2) ...	904
Partnership—Agency—Giving of credit.	
<i>Before the marriage of the defendant to B., she carried on a hotel business, and after her marriage out of community she continued, ostensibly, to carry on the business in her own name; the licence was in her name and the premises belonged to her, but there was an oral understanding between B. and his wife that the business should belong to B. The plaintiff regarded B. as his wife's manager, but in the books debiting the hotel business the name of B. only appeared.</i>	
<i>Held, that as the Court found on the facts that credit had been given to the defendant, she was liable.</i>	
<i>Held further, that the defendant was not entitled to deduct from the plaintiff's claim the amount of certain "good-fors" given to the defendant by the plaintiff's partner S. for liquors supplied in the premises to such partner.</i>	
Wilson and Spurgin v. Burt	922

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Partnership—Dissolution—Errors or omissions—Bad debts—Depreciation of assets.	
<i>The plaintiff and the defendant, who were partners in trade, agreed to a dissolution upon the following terms: the defendant to purchase the plaintiff's interest for £5,000, but in case the defendant should discover any "errors or omissions" in the partnership books and accounts within six months after dissolution, such accounts shall be rectified at joint cost. It appeared that, according to the books, the value of the plaintiff's share of assets was £7,000. It appeared also that the defendant knew before the agreement was made that there were bad debts owing to the partnership, and that there had been depreciation in some of the assets.</i>	
<i>Held in an action for the balance of the purchase price, that the defendant was not entitled to deduct from the price as part of the "errors or omissions" the amount of bad debts and depreciation.</i>	
Schwaner v. Holmes...	1044
Partnership—Inchoate agreement.	
Gildemeister v. MacLachlan ...	899
Partnership—Winding-up order—Companies' Act.	
<i>A certain association, formed for the purpose of controlling the trade in imported frozen meat, applied for a winding-up order.</i>	
<i>Held, that as the association was not an ordinary partnership and had power to dissolve itself, no order could be granted.</i>	
<i>Ex parte</i> The Federal Supply and Cold Storage, Ltd.; <i>Ex parte</i> The Cold Storage Association ...	698

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Partnership—Interdict—Foreign jurisdiction.	
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Passing of property, <i>see</i> Interpleader     ...     ...	265
Payment in instalments, <i>see</i> Giving time     ...     ...	905
Perjury—Statement material to the issue—Native penal code.	
Rex v. Bushula     ...     ...	307
Penalty, <i>see</i> Liquor Acts...	662
Perennial stream, <i>see</i> Water     ...	173
Personal attachment, <i>see</i> Contempt of Court     ...     ...	26
Petitioning creditor, <i>see</i> Insolvency     ...     ...	832
Plaintiff in reconvention—Defendant in reconvention barred—Judgment by default.	
<i>The defendant in a suit pleaded to the declaration and filed a claim in reconvention. The defendant in reconvention, not having filed his plea in time after demand, was barred from pleading.</i>	
<i>Held, that the plaintiff in reconvention was entitled to judgment by default.</i>	
S.A. Fisheries and Cold Storage v. Zankelowitz     ...	1040
Pleading — Architect — Artistic decorations.	
Bonn v. Watson     ...     ...	534
Pleading — Misjoinder — Negligence.	
<i>A declaration alleged, in effect, that the plaintiff had been damaged by an explosion caused by the negligent act of the second defendant, in laying a gas main through and over a disused and unventilated sewer under the control of the first defendant and by the negligent act of the first defen-</i>	

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<i>dant in giving its consent to such laying.</i>	
<i>Held, that there was no ground for an exception of misjoinder of the defendants.</i>	
Metropolitan Tramways Co., Ltd. v. Town Council and Cape Town and District Gas, Light and Coke Co....	247
Pledge — Hire-purchase — <i>Dominium</i> —Delivery—Possession.	
<i>The plaintiff delivered a cart to the first defendant on the hire-purchase system; the agreement being that the price should be payable in instalments and that the cart should become the property of the first defendant on payment of the last instalment. Before all the instalments had been paid, the first defendant, with the consent of the plaintiff, delivered the cart to S., and a year afterwards the plaintiff induced the first defendant to substitute another cart, belonging to the first defendant, for the first. The second cart was delivered to the plaintiff, and by him re-delivered to the first defendant. Thereafter the first defendant pledged this cart to the second defendant, who had no knowledge of the previous dealing with the plaintiff. The evidence shewed that the dealing between the plaintiff and the first defendant in regard to the second cart was in the nature of a pledge rather than a sale.</i>	
<i>Held, that the plaintiff could not, after parting with the possession, claim re-delivery from the second, who was in possession.</i>	
Lange v. Abel     ...     ...	1117
Pledge of cargo, <i>see</i> Surety     ...	588
Pledge of movables — <i>Traditio brevi manu</i> .	
Mathew v. Watkins and another     ...     ...	851

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<b>Police Offences Acts—Exception—Amendment of Record.</b>	
<i>The applicant, having been convicted by the Resident Magistrate of S. of having in the main street of S. used threatening, offensive and insulting language and behaviour towards B., with intent to provoke a breach of the peace in contravention of the 10th section of Act 27 of 1882, applied to the Supreme Court for an order to have the Record amended so as to make it clear that an exception had been taken to the summons to the effect that Act 21 of 1894 ought to have been mentioned. The Magistrate denied that the exception had been taken.</i>	
<i>Held, that there was no necessity for such an amendment, for even if the exception had been on the Record, there would have been no ground for disturbing the conviction.</i>	
<b>Stowe v. Bromberg and another ...</b>	<b>939</b>

**Policy of insurance—Acceptance—Premium—Consideration.**

*The defendant, a farmer, agreed with the plaintiff, an insurance agent, for an insurance on the joint lives of the defendant and his wife, and gave to the plaintiff a promissory note for the amount of the first premium. The Company did not approve of the joint life insurance, and sent to the defendant a policy on his own life alone, crediting the agent, who had paid the premium to the Company, with the difference in the amount of the premium. The defendant returned the policy to the Company without any letter of explanation, and the Company returned it again to the defendant, who left it in his village residence and took no further notice of the matter.*

*Held on appeal in an action by the plaintiff on the promis-*

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<i>sory note, that the Court below was not bound to hold that there had been an acceptance of the policy, and that in the absence of clear proof of such acceptance the defendant was not liable on the note.</i>	
<b>Blumenau v. Neethling ...</b>	<b>676</b>
<b>Port Elizabeth Municipality—Election of auditor—Equality of votes—Determination by lot—Statutory duty of Mayor.</b>	
<i>The 86th section of Act 27 of 1897 enacts that "in case of an equality of votes at any election of auditors, the Mayor shall determine by lot which of the persons for whom an equal number of votes shall have been given shall be elected." The applicant and D. had an equal number of votes, whereupon a fresh voting took place, with the result that D. had a majority of votes.</i>	
<i>Held, that by being deprived of the benefit of a chance of being elected, the applicant was prejudiced, and it was ordered that the question be determined by lot; and that if the lot should fall on the applicant, the election of D. be set aside.</i>	
<b>Gough v. Port Elizabeth Town Council and another</b>	<b>229</b>

**Pound regulations—King William's Town Borough Act 27 of 1905.**

*At the time of the passing of the Act 27 of 1905, the Municipality of King William's Town was under the operation of the Municipal Act of 1882, and had a legally constituted pound subject to the provisions of the Pounds' Act of 1892. By the 1st section of Act 27 of 1905, the proclamation bringing the Borough under the Municipal Act was repealed, except as to acts and things done or commenced, and under the 122nd section the existing rules and*



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<i>regulations shall remain as legal as if inserted in the Act, until altered by the Council. Among the powers conferred on the Council was that of establishing pounds, appointing pound masters and making pound regulations. Before such new pound regulations had been made, the plaintiff's cow trespassed on the land of the defendant, who seized her for the purpose of impounding her.</i>		<i>plaintiff as sole agent for the sale of their goods in Cape Colony, and stated that they had forwarded samples by the same mail. Plaintiff accordingly hired show rooms and made all preparations necessary for the carrying on of the business. On July 14th, defendants wrote, treating the contract as still incomplete, and on August 1st they entirely disavowed it. Only a few samples were received, and those not till September.</i>	
<i>Held, that the seizure was legal.</i>		<i>Held, that plaintiff was entitled to damages for breach of contract, notwithstanding that the contract had not been entered into for any fixed time.</i>	
Behr v. Murray ... ..	498	<i>Held further, that the measure of damages must be estimated by the expenses to which plaintiff had been put in connection with the work of his agency, together with a reasonable remuneration for his time and labour, but that the commission he might probably have earned had defendants adhered to their contract could not be taken into account.</i>	
Power of Attorney, <i>see</i> Agent ...	186	Wood v. Oxendale & Co. ...	979
Powers, improper exercise of, <i>see</i> Municipality ... ..	338	Principal and agent—Liability of agent on contract.	
Practice—Return day.		<i>The defendant, in the capacity of a forester employed by Government, sold a tree to the plaintiff, but failed afterwards to issue the necessary licence authorizing the plaintiff to fell the tree.</i>	
<i>It is not necessary, save in provisional cases, that action should be taken on the return day.</i>		<i>Held on appeal, that the proper party to be sued was the Government, which had employed the defendant as forester.</i>	
White, Ryan & Co. v. Florida	300	Schmidt v. Barnado... ..	707
Preferable security, <i>see</i> Insolvent estate ... ..	875	Principal and agent—Excess of authority — Ratification of part of contract.	
Preference, <i>see</i> Rent ... ..	930	<i>Where an agent enters into a contract with a third person</i>	
Preference, <i>see</i> Insolvency ...	85		
Prescription, <i>see</i> Water ... ..	173		
Prescription, <i>see</i> Outspan ...	564		
Prescription Act, 1861 — Acknowledgment of debt.			
<i>An oral acknowledgment of a debt for goods sold and delivered does not take a cause of action out of the operation of the 3rd section of Act 6 of 1861.</i>			
Bell and Moore v. Swart (16, S.C.R., 404) followed.			
Maduna v. Goetsch ... ..	909		
Principal and agent—Breach of contract—Measure of damages.			
<i>Defendants had by letter, dated July 7th, 1906, appointed</i>			

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*in excess of his authority; the principal is not entitled, as against such third person, to claim the benefit of part of the contract while rejecting the rest.*

*The manager of the plaintiff Company entered into a written contract with the defendant, whereby the latter undertook to supply to the Company a certain quantity of corn at a fixed price and within a given time, whilst it was orally agreed that the manager should advance to the defendant the sum of £200 for which amount the latter was to sign his promissory note in favour of the manager to be kept in his safe as a security for such advances. The manager deposited the note with his banker as security for his over-draft, and at the due date of the note the defendant was obliged to pay part of the amount to the banker. The manager had no authority from the Company to take the defendant's note in his own favour for the advance, and there was no evidence of collusion between the defendant and the manager.*

*Held on appeal from the High Court of S. Rhodesia, that the plaintiff Company was not entitled to claim from the defendant more than the balance of the advance after deduction of the amount which he had been compelled to pay to the banker.*

**Rhodesia Consolidated, Ltd.**  
**v. Rixon** ... .. 544

**Principal liquidator—Official liquidator.**

*In a competition for appointment as official liquidator of a company that is being wound up, the provisional liquidator should, ceteris paribus, be preferred to other candidates.*

**In re Assets Realisation Association, Ltd.** ... .. 931

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**Private Bill—Interpretation.**

*A Bill promoted by the Cape Town Town Council to amend and consolidate its Municipal statutes was duly passed, and by the 110th section of the Act so passed (26 of 1893) the property in the G.P. Common was vested in the Council.*

*Held, that a strip of land which had from the beginning of the century been regarded as part of the Common, but had recently been occupied by the defendant Board, became vested in the Council notwithstanding that the Act originated as a private Bill.*

**Cape Town Town Council v. Colonial Government and Table Bay Harbour Board** 137

**Privilege, see Rule 333D** ... .. 582

**Pro Deo suit—Conditions—Jury trial.**

*The plaintiff, who had obtained leave to sue the Colonial Government in forma pauperis, now applied to have her case set down for trial by jury.*

*Held, that while the Court might attach such conditions as it pleased to the privilege of suing pro Deo, as in this case no conditions had been imposed, the plaintiff had a right to demand a jury.*

**Ochberg v. Colonial Government** ... .. 694

**Profugus — Process of Court — Edictal citation.**

*The plaintiffs brought an action against the defendant and filed a declaration to which he ultimately pleaded. Before he could be served with notice of trial, &c., he left the country without giving directions as to service, his present address was unknown and his attorneys had retired from the case.*

*The Court ordered all further process to be served by edictal citation, with substituted ser-*

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<i>vice by one advertisement in the "Government Gazette" and one in the "Cape Times."</i>		<i>in which defendant tendered to pay some £81 on condition of receiving a discharge in full; plaintiff in his summons also claimed a further sum said to be due, or alternatively that defendant should be ordered to render and debate an account.</i>	
War Department v. Duffus & Co. ... ..	958	Held, that as plaintiff should have either sued on the letter for the £81 tendered, or have gone into the principal case, provisional sentence must be refused, with costs.	
Promissory note—Consideration—Libel—Publication.		Illgner v. Winfield ... ..	516
Thompson & Co. v. Palmer, Herbert and Bright ...	191	Provisional sentence, <i>see</i> Agent...	293
Promissory note—Agent—Liability of principal—Power of attorney.		Provisional sequestration—Execution.	
Bank of Africa v. Houlder Bros. & Co., Ltd. ... ..	835	<i>No execution can be levied in any estate which has once been placed under provisional sequestration until the provisional order is discharged.</i>	
Promissory note—Holder in due course.		<i>In re Estate Melman ...</i>	526
<i>The payee of a promissory note, payable to him or order, not being able to write, got another person to sign his name on the back, which name was wrongly spelt. The payee gave this note, thus indorsed, to the plaintiff for value and before the due date.</i>		Public body, <i>see</i> Libel ... ..	440
Held, that the plaintiff was entitled to recover the amount from the maker, although the latter would have had a good defence if sued by the payee.		Public official, <i>see</i> Libel ... ..	115
Du Preez v. Du Toit ... ..	670	Public Health Acts—Cemetery.	
Promissory note, <i>see</i> Acknowledgment of debt ... ..	1112	<i>The appellants, being members of the committee of management of a cemetery which had been closed by Proclamation under Sec. 64 of Act 4 of 1883, attended the funeral of a still born child, who was buried in the cemetery.</i>	
Promissory note, <i>see</i> Bills of Exchange Act ... ..	1116	Held, that there was sufficient evidence to justify a conviction under the 65th section of the Act.	
Promissory note, signature on back of, <i>see</i> Surety ... ..	264	Rex v. Abouroff and others	705
Provisional sentence.		Public perennial stream, <i>see</i> Water	639
<i>Provisional sentence refused where the defendant denied that he was the person named in the summons.</i>		Public stream, <i>see</i> Riparian proprietors ... ..	510
Rosenberg v. Luntz, trading as Luntz Bros. ... ..	398	Public school—Committee—Irregular election.	
Provisional sentence—Conditional acknowledgment of debt—Further claims—Procedure.		<i>In 1886 the Government granted a certain piece of land as a site for a school and cemetery</i>	
<i>Plaintiff sued defendant for provisional sentence on a letter</i>			

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<i>for the use of certain German immigrants. These people, with the help of a few friends, built the school, and subsequently a German church adjoining. Government provided an annual grant towards the teacher's salary. In August, 1905, practically all the German immigrants in the neighbourhood met and decided to abandon the Government grant from January 1st, 1906, and to sever their connection with the Education Department, and they gave the Department notice of their intention. Thereafter some 9 persons who disapproved of this resolution met together and elected a new school committee without having given public notice of their intention to do so. The new committee now applied for an order of Court, calling upon the original committee to hand over to the applicants all books, papers, &amp;c., &amp;c., belonging to the said school.</i>	
<i>Held, that as the applicants had not been legally elected as a committee, the application must be refused with costs.</i>	
Springfield Public School v. Baumgarten and others ...	22
Purchase and sale, see Cancellation of sale ...	300
Purchase and sale of house—Tender of transfer—Tender of price.	
<i>In an action for the price of a house sold to the defendant, the plaintiff tendered transfer on the payment of such price. The plea was to the effect that there were mortgages on the house and that the plaintiff was consequently unable to pass transfer. The evidence showed that, although there were mortgages on the property, the plaintiff would, on payment of the price, be in a position to pay the bonds and pass transfer and that the defendant had never tendered the price; or</i>	

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<i>even expressed his willingness to pay the price on receiving transfer.</i>	
<i>Held, that the plaintiff was entitled to judgment for the price which was to be paid on his giving transfer.</i>	
Singer v. Van Gerwe ...	152
Quantity surveyor—Commission.	
Sherwood v. Howard and Scott ...	429
Quantum meruit, see Master and servant ...	757
Quit-rent lease, see Municipality	279
Railway Company—Working railway—Rights of cessionary—Arbitration—Privilegium—Debentures—Act 44 of 1905.	
<i>The plaintiff's bought a line of railway, with the right of working the same, from a syndicate which in turn had purchased the line with the same right from the official liquidators of a company who had been authorized by the Court to effect the sale in the course of the winding up of such company. The Government recognized the plaintiff's, as well as the syndicate, as owners of the line and entitled to work the same, and afterwards introduced a Bill, which became Act 44 of 1905, authorizing the Government to take over the line of railway at a cost to be settled, pending agreement, by arbitration.</i>	
<i>Held, that in estimating such cost, the arbitrators should include the value of the right of working the line of railway.</i>	
Cape Electric Tramways v. Colonial Government ...	202
Rain-water—Natural flow—Obstruction.	
<i>The owner of land is not entitled to place any obstruction in a channel by which the water would naturally flow over his land, if by means of such ob-</i>	

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<p><i>struction he injures his neighbour by throwing more water on, to and over this land than could flow there naturally.</i></p> <p><i>When, however, a channel has for 30 years or more existed on such man's land for the conveyance of rain-water collected from a neighbouring road, he is not liable if, in a storm, he diverts part of the water into such channel, even though the result should be that through the bursting of the channel the neighbour's land is injured.</i></p> <p>Dickens v. Lake ... 254</p>	<p><b>Remoteness of damages—Exception to declaration.</b></p> <p><i>The declaration in an action brought by the plaintiff against his attorney for wrongful delivery to a third party of a document delivered to the defendant by the plaintiff, for safe keeping, claimed as damages the loss sustained by the plaintiff by reason of his being subjected to a false prosecution for forgery as a result of the defendant not having retained possession of the document.</i></p> <p><i>Held, on exception, that in the absence of anything in the declaration to shew that the defendant might reasonably have contemplated that the result of parting with the document would be to expose the plaintiff to a false prosecution for forgery, the damages claimed were too remote.</i></p> <p>Drummond v. Lezard ... 121</p>
<p><b>Recusation of judge—<i>Judex suspectus</i>—Enmity—Partiality Malice.</b></p> <p><i>The appellant, on being charged with assault before a Resident Magistrate, excepted to his adjudicating in the case on the ground of personal feeling or malice in that he had before hearing the case said to the appellant's attorney, "I am going to have the accused locked up, I cannot have the public disturbed; the public must be protected." The exception was overruled and the accused was convicted and sentenced to pay a fine of £3.</i></p> <p><i>Held, that the use of these words was not conclusive proof of enmity, partiality, or malice; and that, as the Magistrate probably meant to convey no more than that if the evidence which he understood would be given was correct, then it was a case in which the man should, in the public interest, be locked up, the Court should not, on review, set aside the conviction, seeing that, according to the evidence, the assault had been clearly committed.</i></p> <p>Nieuwoudt v. R.M. of Richmond ... 1147</p>	<p><b>Rent—Preference—Tacit hypothecation—Act 5 of 1861.</b></p> <p><i>The tacit hypothecation of a landlord in respect of rent due on premises let to a company must, in case of the company being ordered to be wound up, be confined to the proceeds of goods that were on the premises at the time of such order.</i></p> <p><i>In re B.S.A. Asphalte and Manufacturing Co.</i> ... 930</p> <p><i>Res inter alios acta, see Surety</i> ... 588</p> <p><i>Res nullius, see Horse</i> ... 730</p> <p><b>Restitution of conjugal rights—Domicile.</b></p> <p><i>A wife who does not reside within the jurisdiction is entitled to a decree of restitution of conjugal rights against a husband domiciled here, who has maliciously deserted her.</i></p> <p><i>Jacks v. Jacks followed. (Cur. dubitant, whether a divorce consequent on such order would be recognized in England).</i></p> <p>Cooke v. Cooke ... 719</p>
<p>Remission of rent, <i>see</i> Lease ... 1078</p> <p>Remitting case for further evidence, <i>see</i> Appeal ... 706</p>	



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Restraint of trade, <i>see</i> Interdict...	722
Restraint of trade, <i>see</i> Interdict...	19
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Right of road, <i>see</i> Trespass ...	153
Rule of Court No. 273—Extension of return day. <i>Where a return day has already lapsed the Court will not extend the return day and proceedings must be commenced de novo.</i> <i>Ex parte Rowe</i> ...	1088
Rule 329 (d) — Liquidated demand—Forfeiture of fees by executor. <i>A claim for forfeiture of fees against an executor is a liquidated demand in terms of Rule 329 (d).</i> <i>Boezaak v. Executor Estate Calvert</i> ...	112
Rule 333D—Discovery—Privilege. <i>It is in the discretion of the Court to grant or refuse discovery orders. As a general rule, communications between an agent and his principal are not privileged unless they refer to matters to be brought forward in evidence in impending legal proceedings.</i> <i>Adams v. Moffat, Hutchins &amp; Co.</i> ...	582
Sale on credit, <i>see</i> Interpleader ...	265
Sale and purchase—Hawker. <i>Hanson v. Halfele</i> ...	416
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Scab, <i>see</i> Act 20 of 1894 ...	216
Scab inspector, <i>see</i> <i>Locatio operarum</i> ...	125
Scab—Act 20 of 1894, Sec. 21. <i>Whensoever an owner of sheep shall have reasonable grounds to suspect that any of his flock are infected with scab, he must both at once give notice to the local scab inspector and also make proper efforts to cleanse the infected sheep.</i> <i>Rex v. Van der Berg</i> (16 <i>C.T.R.</i> , 216) distinguished. <i>Rex v. Van der Walt</i> ...	782
Scab Acts—Knowledge of owner. <i>The appellant, on one of whose flock of sheep the Scab Inspector found a patch of live scab, about six inches in diameter, which, according to the inspector's evidence, would be patent to an ordinary observer, had failed to give due notice thereof to the inspector.</i> <i>Held on appeal, that the owner could not, by closing his eyes to the existence of scab, avoid liability for not giving such notice, and that the appellant had been properly convicted.</i> <i>Rex v. Cole</i> ...	334
School Board—Election—Act 35 of 1905 — Divisional rate- payer. <i>Under the 10th section of Act 35 of 1905, a lessee of land, who is also the occupier of the land and has paid the Divisional Council rates, is entitled to vote in the election of members of the School Board.</i> <i>Stutterheim School Board v. Turpin</i> ...	494
School Board election—Illegal regulation. <i>At a School Board election, the applicant, being one of the candidates, had 92 less votes</i>	

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<p>than the lowest successful candidate on the list. One of the Government regulations under which the election was held stated, contrary to the provisions of the School Board Act, that lessees would not be entitled to vote. In an application to set aside the election, about half a dozen persons who would have been qualified to vote, but whose names were not on the voters' list in consequence of the invalid regulation, stated that they had intended to vote for the applicant but did not vote at all in consequence of the regulation.</p> <p>Held, that in the absence of prima facie proof that the applicant's defeat was caused by the invalid regulation, the applicant was not entitled to the relief sought.</p> <p>De Villiers v. Philpott and others ... 659</p> <p>Scope of employment, <i>see</i> Harbour Board ... 792</p> <p>Second conviction, <i>see</i> Liquor Law 663</p> <p>Security—Heirs—Legacy of farm on condition that a sum of money be paid by legatee for the benefit of the heirs.</p> <p>By the mutual will of the second plaintiff and his wife, a farm was bequeathed to the defendant on condition that the survivor should enjoy the usufruct and that on his or her death the defendant should pay into the joint estate the sum of £700 for the benefit of the heirs. His wife died first, and the defendant induced his father, the second plaintiff, to sell his usufruct and pass transfer of the land, as executor, to the defendant.</p> <p>Held, that the first and third plaintiffs, who represented the heirs, were entitled to demand that security be given to the second plaintiff, as executor, for the due payment on the</p>	<p>death of the second plaintiff of the sum of £700, less such sum as was owing by the joint estate to the defendant at the time of the death of the testatrix.</p> <p>Becker and others v. Wolfaard ... 766</p> <p>Security for costs, <i>see</i> Foreign plaintiff ... 781</p> <p>Service of summons Bad service—Provisional sentence set aside.</p> <p>Van Rooyen v. Colonial Government ... 296</p> <p>Set off—Liquidated and unliquidated claim—Magistrate's jurisdiction.</p> <p>W. sued J. in an R.M. Court for £28 8s., due as wages for work and labour done, and also for £9 13s. in lieu of a month's notice. The claim was reduced to £20, to bring it within the Magistrate's jurisdiction. In reconvention J. claimed £10 18s. 3d. as damages for injury done to machinery and 17s. 6d. as a set off for two days' work not done by the plaintiff. The Magistrate gave judgment in convention for £20 and in reconvention for £11 15s. 9d., which he set off against the full sum of £38 1s., which he considered to be due to the plaintiff.</p> <p>Held on appeal, that the Magistrate had rightly given judgment in convention for £20: but had erred (1) in setting off any claim for damages on either side. (2) In setting off the sum awarded to defendant against the full sum of £38 1s. instead of against the reduced claim of £20.</p> <p>Watson v. Jensen ... 260</p> <p>Sheep lease—Dominium—Possession—Spoliation—Interdict.</p> <p>Van der Meulen v. Greeff ... 1090</p>

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Ship—Attachment—Bodily fear.	
<i>The Court refused to order the attachment of a certain ship, ad fundandam jurisdictionem, at the suit of a fireman on board, who claimed a balance of wages due and cancellation of his contract of service on the ground that he went in bodily fear of certain members of the crew.</i>	
Gaupoulos v. Harris and Dickson ... ..	635
Society—Change of constitution— <i>Ultra vires.</i>	
<i>The Grand Council of a Society, whose Constitution had been obtained from a Society in England "under the banner of Surrey," having had a disagreement with the Mother Society, resolved to constitute itself a Society "under the banner of South Africa," although nominally respecting the authority of the Mother Society. The Grand Council had no power under its Constitution to pass such a resolution. A delegate from a branch at S. had attended the meeting, but there was no evidence that he had any authority from the branch to agree to the resolution. Subsequently a meeting of 6 members out of 30 constituting the branch passed a resolution at S., without previous notice to all the members at S., in favour of the change of banner, but at the next meeting, which was attended by a larger number of members, this resolution was not confirmed. Thereupon, by direction of the Grand Council, the branch at S. was declared defunct and its regalia and other property were taken possession of.</i>	
<i>Held, that the property thus taken must be restored to the S. branch.</i>	
Weight and another v. Kelly, N.O. and others ... ..	1074

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Special licence, <i>see</i> Marriage ...	170
Summons—Amount of claim—Exception.	
<i>It is a good objection to a summons in an action for defamation that it claims damages without stating the amount claimed.</i>	
Abdurahman v. Argus Printing Co. ... ..	245
Spoliation—Title to property—Sale under conditions—Passing of dominium.	
<i>One L. had received from the German Government 41 oxen and two wagons, having subscribed the following undertaking: "I am prepared to buy from the Government 40 oxen and two wagons to ride transport with the same for the Government. I am prepared to pay the purchase price to the Government. This purchase price, which is to be exactly computed by the Controller of the Depot at K., I bind myself to pay within two years in this way, that each time one-half at least of the transport I earn shall be retained from me in liquidation." With the consent of the German authorities, L. crossed the border on the road to Uppington to ride transport from thence to a certain place in German territory. He carried with him a letter addressed to certain agents of the German Government, stating, inter alia, that the wagons, &amp;c., were coming back with loads and still remained the property of that Government. When he had crossed into the Colony and was on his way to U., he met plaintiff, to whom he showed this letter, but who, nevertheless, purchased the oxen, &amp;c., from L. at about half their real value, in spite of the warnings of others. The cattle were afterwards seized by the defendants,</i>	

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Held in an action for spoliation against them, <i>that the contract between the German Government and L. not having been a completed contract of sale and no property in the oxen, &amp;c., having passed to L., he could not pass property in them to plaintiff, more especially as the latter did not appear to have been a bona fide purchaser.</i>	
Hirschhorn v. Schroder and another ... ..	1010
Spoliation—Warranty of horse.	
O'Connor & Co. v. Knight...	1066
Spoor evidence, <i>see</i> Magistrate's finding on facts ... ..	714
Statutory powers, <i>see</i> Municipality	740
Stock theft, <i>see</i> Magistrate ...	817
Stock theft—Act 35 of 1893, Sections 22, 28 and 30.	
Rex v. Van der Venter ...	1100
Statement material to issue, <i>see</i> Perjury ... ..	307
Subdivision of estate, refusal to sanction, <i>see</i> Municipality ...	338
Sub-tenant, <i>see</i> Lessor and lessee	824
Summons — Exception — Use of two languages.	
<i>A summons in a Magistrate's Court for slander set out the words actually used in the Dutch language and contained an innuendo as to the meaning of the words, although not a literal translation.</i>	
Held on appeal, <i>that the Magistrate had erred in allowing an exception to the summons, on the ground that it was partly in English and partly in Dutch.</i>	
Fortuin v. Steve ... ..	672
Summons, <i>see</i> Magistrate's Court	418

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Surety—Married woman—Renunciation of benefits—Signature on back of a promissory note.	
<i>Mrs. M. had signed her name on the back of a promissory note made by her husband without having renounced benefits.</i>	
Held, <i>that as by Sec. 20 of Act 19 of 1893, a married woman who becomes surety for her husband need not renounce benefits, she must be held liable as a surety.</i>	
Priest v. Stegmann (15 C.T.R., 407) distinguished. Kloppe v. Van Straten (4 C.T.R., 101) followed.	
Mare v. Michau and Hofmeyr	264
Surety—Pledge of cargo—Freight and landing charges — <i>Res inter alios acta.</i>	
<i>W. &amp; Co. had applied to defendant for accommodation, and P. bound himself to plaintiffs as W.'s surety in solidum and co-principal debtor for £10,000. This transaction was in respect of a certain cargo of timber of which W. &amp; Co. wished to obtain delivery and which they had pledged to defendant as security. On the arrival of the cargo, W. &amp; Co. could neither meet the bill which had been drawn upon them for the same nor pay the freight. The bills of lading, &amp;c., had been handed over to plaintiffs, who claimed the right to sell the cargo for the benefit of all concerned, and the creditors of W. &amp; Co. acquiesced. Thereafter the firm of W. &amp; Co. was sequestrated, and the trustee abandoned the cargo to plaintiffs, who sold it. Defendant alleged that, owing to plaintiffs' negligence, the cargo had become depreciated in value, and he now claimed compensation for this depreciation in the value of his security and claimed that, on paying the £10,000,</i>	

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<p>he was entitled to receive the full value of the cargo apart from freight and charges which he contended the plaintiffs ought to pay in virtue of his agreement with W. &amp; Co., and that their payment of freight, &amp;c., was really a loan made by plaintiffs to W. &amp; Co.</p> <p>Held, that as no agreement between defendant and W. &amp; Co. could bind plaintiffs, and as the evidence showed that plaintiffs had acted in the best interests of the creditors, and did not show that the payment of freight, &amp;c., was in the nature of a loan to W. &amp; Co., judgment must be given for plaintiffs as prayed, with costs.</p> <p>National Bank v. Peel ... 588</p> <p>Table Bay Harbour Board—Dock regulations—Breach of contract.</p> <p>The plaintiffs, being the owners of ship C., which required to be painted, entered into a contract, by which the defendant Board undertook to take her into the Graving Dock, but no specific day for doing so was agreed upon. Before the date of this contract the owners of the ship M. had engaged room in the Dock for a certain day, but owing to a detention on the Coast she did not arrive on the day agreed upon, whereupon the Board allowed her to enter when she arrived, two days later, charging her with dock fees from the day agreed upon. The result was that the ship C. could not enter the Dock until about 14 days after the date on which the contract for dry docking her was entered into. The Board is a statutory body, having power to make regulations for the management of the Docks, and one of the regulations so made was to the effect that 'on failure to place a vessel in the Dock on the day appointed for that purpose, such vessel should, if the Dock</p>	<p>be required, lose her turn on the list, and the owner shall be liable to pay to the Board the expenses which may have been incurred in preparing the Dock for her reception."</p> <p>Held, that the regulation did not make it obligatory on the Board to let the M. lose her turn, and that, as under the circumstances disclosed in the evidence, it was not unreasonable to allow the M. to enter when she did, the defendant Board was not liable in damages for the detention of the ship C.</p> <p>Stag Line, Ltd. v. Table Bay Harbour Board ... 615</p> <p>Tacking, see Insolvency ... 85</p> <p>Tainted evidence, see Magistrate 219</p> <p>Taxation of costs, see Attorney and client ... 814</p> <p>Taxation of costs, see Magistrate's Court ... 784</p> <p>Tembuland, see Magistrate's jurisdiction ... 261</p> <p>Theft — Magistrate's inference from facts overruled.</p> <p>Rex v. Harris ... 308</p> <p>Time, see Despatch of urgent order ... 819</p> <p>Title to property, see Spoliation 1010</p> <p>Totalisator — S.A. Turf Club — Acts 20 of 1882, 9 of 1886 and 36 of 1902—<i>Ultra vires</i> — Gaming — Betting — Game of chance.</p> <p>It is ultra vires of the S.A. Turf Club under Acts 20 of 1882 and 9 of 1886, to provide a totalisator on the grounds of the Kenilworth Racecourse, granted to them for other specific purposes by such Acts. The totalisator, as carried on by the Club, besides being a</p>



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means of betting, is a means of gaming, and is, therefore, illegal under the 2nd part of Act 36 of 1902.	power to enter into the agreement and that the approval of the Governor in Council could not render it valid.
Held, therefore, that the plaintiff, as a member of the Club, was entitled to an order declaring this system of gaming to be ultra vires and illegal, and to an interdict restraining the committee of the Club from continuing its use.	The agreement contained a separate provision that the Council should supply the Board with all water required by it, and that the Board should pay the same price as should from time to time be paid by householders: and for several years the Board enjoyed the benefit of this provision. For several years also the Board paid the annual contribution of £2,500 in addition to the rates payable by it.
Brady v. S.A. Turf Club ... 603	Held, that although the Board was entitled to be relieved from further payments of the contribution, it was not entitled to recover back contributions already paid under the agreement.
Town Council—Harbour Board—Invalid agreement— <i>Restitutio in integrum</i> —Crown property rates (Act 36 of 1891).	Cape Town Town Council v. Table Bay Harbour Board 970
The Government having promised the plaintiff Council that it would introduce into Parliament a Bill to provide for the taxation of Crown property within Municipal limits, the defendant Board, whose property was regarded as Crown property, proposed to the Council certain exemptions from its rating powers. To these proposals the Council agreed and "in consideration of the Council having the exemption introduced into the Bill, the Board covenanted to pay to the Council the sum of £2,500 upon the promulgation of the Act, and thereafter the like sum annually, so long as the property of the Government is liable to be rated." The exemptions were in substance introduced into the Bill which was passed, but the Bill made no mention of the sum to be paid annually by the Board in addition to the rates which would become payable by the Board under the Act. After the passing of the Act, the Governor in Council, on the recommendation of his Ministers, approved of the agreement substituting special provisions for the taxation of Board property in lieu of the provisions of the Act.	Town Council regulations, <i>see</i> New street ... .. 557
Held, that the Board had no	Trade mark—Colourable imitation. Spencer & Co., Ltd. v. Policansky Bros. ... .. 580
	Trading Company, <i>see</i> Libel ... 40
	Trading with "enemy," <i>see</i> Horse 730
	Transfer of land, <i>see</i> Divisional Council ... .. 704
	Transfer of property, <i>see</i> Lease...1113
	Transfer dues—Date of purchase—Reclaimed and reclaimable land—Act 5 of 1884, Sec. 2. The Colonial Government had agreed with C. & Co. to allow them to reclaim certain land near the shore of Table Bay, on condition that such land should become the property of C. & Co., if reclaimed within 10 years. Some 6 years before

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the conclusion of this agreement, C. & Co. had entered into an agreement with another company, whereby they sold some 70,000 square feet of ground "lately reclaimed from the sea," and other certain land thereunto adjoining and covered by the sea, which the vendors had a right to reclaim. Further sales of the property took place, until finally the rights of C. & Co. vested in the applicants. These sales were all made with the consent of the Government. Finally, in June, 1905, the Government granted to C. & Co. the original land reclaimed by them, together with a portion which had been reclaimed by their original successors in title, but refused to make a separate grant to the applicants of the land not reclaimed by them, on the ground that they had consented to the applicants taking over all rights from their predecessors in title. The applicants now desired to obtain transfer of all the reclaimed ground, but in order to do so, it was necessary to pay transfer dues, which the Civil Commissioner could not accept without the customary declarations of purchaser and seller. Applicants asked to have a special date, as the date of sale to them, fixed by the Court for transfer purposes. Under Act 5 of 1884, Sec. 2, transfer duty is payable only upon freehold and quitrent property.

Held, that as applicants had purchased a right to obtain freehold property from the Government within a certain time, of which property the sellers were not at the time of sale in a position to give transfer, it was not competent for the Court to fix a date of sale for transfer purposes.

*Ex parte The Imperial Cold Storage and Supply Co., Ltd....* ... 276

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Transkei — Magistrate's jurisdiction—Courts of appeal—Acts 21 of 1876, 38 of 1877, Sec. 2, 43 of 1885.

*The civil jurisdiction of Resident Magistrates in the Transkei as to amount and in respect of claims founded on liquid documents was regulated by Act 21 of 1876; and Act 43 of 1885 does not apply. By Act 38 of 1877, Sec. 2 (see also Act 29 of 1897, Sec. 1), the Governor is empowered to legislate for the Transkei by proclamation, and by such proclamation he subsequently conferred upon the Resident Magistrates of that Territory unlimited jurisdiction as to amount in illiquid civil cases, and the Magistrate has no power to remove such cases.*

*But non constat that the effect of this proclamation was to extend the jurisdiction under Sec. 3 of Act 21 of 1876.*

*Semble, the only Superior Court having appellate jurisdiction in native cases in the Transkei is that of the Chief Magistrate: but in cases in which a European is concerned an appeal lies either to the Supreme Court, the Eastern Districts Court, or a Circuit Court within the District.*

*Roodt v. Lake and others ...* 826

Transkeian Magistrates — Jurisdiction.

*Under the Transkeian Regulations the Magistrates in those territories "have jurisdiction in all civil suits and proceedings for and against persons residing within their respective districts."*

*Held, that a claim for the restoration of cattle and failing restoration thereof for the payment of £100 falls within such jurisdiction.*

*Erasmus v. Nxonye ...* ...1085

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Trespass—Cutting down trees— Measure of damages.	
<i>Where, in an action for trespass, it is proved that trees which enhance the value of the property have been cut down, the measure of damages is not the actual value of the trees, but the damage done to the property by deteriorating its value.</i>	
Arend v. Rix... ..	364

**Trespass—Right of road—Mistake in laying out a road—Road of necessity.**

*In an action for trespass in breaking a fence on the plaintiff's land, the defendant, whose land adjoined the plaintiff's, pleaded that he had broken the fence at a point where it crossed a roadway made by him to give him access to a main road recently constructed by the Government on the boundary of his land. The evidence, however, shewed that although the Government had intended to make the main road on his boundary, the main road, as actually constructed, was well within the plaintiff's land, and that the alleged trespass had been committed where the defendant's roadway crossed the plaintiff's land.*

*Held, that so long as the main road remains in its present position, the plaintiff is entitled to an interdict restraining the defendant from trespassing for the purpose of reaching the main road by a roadway on the plaintiff's land to which the defendant had no right from necessity or otherwise.*

Schmidt v. Scott ... ..	153
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**Trust estate—Liability of trustee—Loan—Security—Fire insurance policy.**

*G., acting as trustee in the estate of the late S., advanced to C. a loan of £1,500, taking as security (inter alia) a fire*

*insurance policy on certain of C.'s property for £1,500. Subsequently the policy was taken out in G.'s name, but C. continued to pay the premiums. Thereafter a fire broke out on the premises insured, and arbitrators assessed the damage done at £207 odd. C. wished to restore the premises, but to that G. objected and accepted a tender from an architect to restore the premises for a sum less than the £207: C. now claimed the balance.*

*Held, that as it had not been proved that the premises were properly restored, and as G. was liable to the heirs in the estate (among whom there were certain minors) for the condition of the buildings, absolution from the instance must be granted with costs.*

Cohen v. Executors Estate Stanford ... ..	460
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Trustees, see Will... ..	700
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**Turf Club—Meeting of members—Due notice of meeting.**

*The applicant, being a member of the S.A. Turf Club, moved to have all the proceedings at a meeting of members set aside, on the ground that notice of the meeting had been published in the papers six days before the day of meeting instead of ten days as required by the bye-laws of the Club.*

*Held, that in the absence of any proof that any member had been ignorant of the meeting who, if he had been present, would not have voted with the majority, the Court should not interfere.*

Brady v. S.A. Turf Club ...	237
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<i>Ultra vires, see Benefit society ...</i>	37
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„ see Liquor licence ...	1149
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<i>Ultra vires</i> , see Harbour Board ...	792
„ see New street ...	557
„ see Totalizator ...	603
„ see Society ...	1074

**Vagrancy—Ejectment.**

*Certain natives who had for some time resided on a Mission Station had misconducted themselves, and at the instigation of the missionary were charged and convicted under the Vagrancy Act.*

*Held, that the Act did not apply and that the missionary should sue for ejectment. Conviction quashed.*

*Rex v. Claassen and others...* 862

**Variance between Declaration and Replication, see Exception ...**1094

**Villages, see Act 47 of 1899 ...**1037

**Vindication—Sale by bailee—*Mobilia non habent sequelam.***

*It is not an unqualified rule of law that if any one to whom a thing has been lent or otherwise entrusted, alienates it without authority, the owner has no action against the person who has obtained it by a just title and in good faith.*

*If, however, the thing has been so entrusted under circumstances which might reasonably lead others to believe that the ostensible owner was the true owner, or had authority from the true owner to dispose of it, the owner cannot claim it from a person, who has acquired it in such belief and for value, without tendering to repay such value.*

*A., being the driver of a post-cart owned by the plaintiff, who was a post contractor, left one of the plaintiff's horses, which became disabled on the road, in the charge of B., and borrowed a mule from B. to prosecute the journey. B. sold*

*and delivered the horse to the defendant.*

*Held on appeal, that in the absence of proof of such circumstances as just stated, the Magistrate erred in granting absolution from the instance.*

*Adams v. Mocke ...* 652

**Wages, see Master and servant ...** 757

**Warranty of horse, see Spoliation ...** 1066

**Warranty of title, see Contract of sale, &c. ...** 379

**Water—Public perennial stream—Furrow—Right of entry on land of upper riparian proprietor for the purpose of repairing furrow.**

*Mulder and another v. Olivier and others ...* 639

**Water—Perennial stream—Boundary—Prescription—*Aqua erumpens in suo*—Servitude.**

*Plaintiff was the proprietor of a farm situate on the Ongars River. Defendant was the proprietor of a farm situate higher up the river. It had been held by a Circuit Court that at a certain upper part of its course the river was a public perennial stream. but it was shown that as far as the portion in dispute was concerned, the "river" consisted merely of certain pools fed by springs which originated on various private properties, the water of which the owners of such properties had used as their own beyond the term of prescription. There was no continuous flow in the river save after heavy rains, and then only for a few days.*

*Held, that the portion of the Ongars River in question was not a public perennial stream.*

*Held further, that the evidence did not disclose that the plaintiff had any servitude or pre-*

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<i>scriptive right in virtue of which he could claim any portion of the water of the river.</i>	
Kock v. Theron ...	173
Water Court—Jurisdiction—Appeal—Act 40 of 1899.	
<i>A Water Court established under Act 40 of 1899 has jurisdiction to decide a question of damages alleged to have been sustained by a party to a dispute concerning the diversion of water from a stream alleged by him to be a public perennial stream, and if the Water Court decides that the stream is not perennial, there is an appeal to the Supreme Court under the 15th section of the Act.</i>	
Saaiman and others v. Vander Merwe and others ...	599
Way bill, <i>see</i> Carrier ...	253
Whipping—Juvenile offender.	
<i>A Magistrate has no power to sentence a juvenile offender over the age of 14 to whipping for a first offence.</i>	
Rex v. Taljaard, alias Fourie	1
Will, joint — Fidei-commissum residui—Interpretation.	
<i>P. G. and his wife G. G. executed a mutual will, whereby they bequeathed to one H. G., married in community to one W. F. M. the sum of £400 and to the child of H. G. £350. H. G. had more than one child when the will was made, and the name of the child was left blank. The survivor was appointed sole heir, with the proviso that he or she should have power on the death of the first dying to sell the estate by public auction. It was directed that on the death of the survivor the entire estate should be sold by public auction and that the proceeds should be divided into two equal portions, whereof the one should go to the brothers and sisters of the testator and</i>	

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<i>the other to the brothers and sisters of the testatrix, with right of succession to their descendants. On the death of P. G., G. G. adiated and sold a bond with secured value of £750 to one H. M. for £100. The plaintiff now sued for (a) a refund of the said £750 (less £100), or (b) of half that amount (less £50), being a portion of P. G.'s estate.</i>	
<i>Held, that as the terms of the will did not contemplate any diminution of the joint estate during the life time of the survivor, it was not the intention of the testators to constitute a fidei-commissum residui, and that judgment must be given in terms of prayer (b).</i>	
<i>Held further, that the bequest to the child of H. M. was null and void on the ground of uncertainty, and that parol evidence of the testators' intentions was not admissible.</i>	
Estate Gouws v. Estate Marais and others ...	65
Will—Assumption of executor—Appointment as co-executor—Letters of administration—Procedure.	
<i>A.S., the widow of G.S. (with whom she had made a joint will under which she was appointed executrix), after the death of G.S. took out letters of administration and assumed F. as co-executor, who, however, omitted to take out his appointment in that capacity. A.S. thereafter revoked the deed of assumption. On the death of A.S., F. claimed to be executor of the joint estate, and the heirs now demanded that he should be ordered to return the notarial deed under which he claimed to act.</i>	
<i>Held, that the heirs should have called upon the Master to call a meeting of next of kin to A.S. to appoint an executor. The Court directed the Master</i>	



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<i>to call such meeting with authority to appoint an executor dative.</i>		Winding-up, <i>see</i> Company	1048, 1069
Scheepers v. Foster ... ..	540	Withdrawal of case—Costs.	
Will—Construction—"Heirs."		<i>The plaintiff having instituted an action against the defendant for a debt, discovered that it had been paid; and, according to his own statement, which the defendant denied, informed the defendant that the action would be withdrawn. Two days afterwards, the defendant called on the plaintiff's attorney, who knew nothing about the withdrawal of the case, and thereupon the defendant gave instructions to his own attorney for the defence of the case: Subsequently notice of withdrawal was given.</i>	
<i>Ex parte</i> Estate Ralani ... ..	533	Held, that the plaintiff should pay the defendant's costs incurred before receipt of such notice.	
Will—Trustee—Administrator— <i>Fidei commissum.</i>		Parker v. Feder ... ..	938
<i>M., married out of community, bequeathed all his property to his wife with fidei commissum in the event of her death or re-marriage to his trustee or executor for the behoof of his children living at the time of his death. One L. was appointed executor testamentary, and now claimed as against the widow (the plaintiff), who had not re-married, the right to administer the estate; or in the alternative that the plaintiff should be ordered to give security for due administration.</i>		Working railway, <i>see</i> Railway Company ... ..	202
Held, that L. having completed his duties as executor, was now functus officio, until the plaintiff should either re-marry or die.		Writ of arrest—Removal from the Colony.	
Held further, that the plaintiff, as being the mother of the fidei commissory heirs, could not be called upon to give security, and was entitled to the administration of the estate until her re-marriage.		<i>Writ of arrest confirmed, although the defendant alleged that he did not intend to leave the Colony unless he could first settle with all his creditors: it being clear that he had made all the necessary preparations for removing from the Colony.</i>	
Mackenzie v. Estate Mackenzie ... ..	700	Maccallum and others v. Stevens ... ..	31
Will, mutual, <i>see</i> Husband and wife ... ..	688	Wrongful seizure, <i>see</i> Execution debtor ... ..	222
Winding-up order, <i>see</i> Partnership	698		



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